

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SCOTT CHEGWIDDEN,

Defendant-Appellant.

UNPUBLISHED

January 16, 1998

No. 189699

Houghton Circuit Court

LC No. 95-001348-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit first-degree home invasion, MCL 750.157a; MSA 28.354(1) and MCL 750.110a(2); MSA 28.305(a)(2), and unarmed robbery, MCL 750.530; MSA 28.798. For those respective convictions, defendant was sentenced as a second habitual offender¹ to eighteen to thirty years' imprisonment and fifteen to twenty-two and one-half years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first claims that the trial court abused its discretion in denying his motion for a change of venue because of the potential bias caused by pretrial media news coverage. We disagree. During voir dire, when an individual became a possible juror for the case, the trial judge and counsel met with him or her in chambers to ask about the effect, if any, of publicity on that person's ability to be impartial. All twelve of the seated jurors went through the process. From this record, we do not conclude that the trial court abused its discretion in denying defendant's motion. Although the record indicates that media coverage of these events was widespread, that is not enough. Defendant failed to carry his burden of showing that the jurors were biased. *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996).

Defendant also argues that the trial judge, "during individualized sequestered voir dire of the prospective jurors, utilized the type of questions recently disapproved of by the Michigan Supreme Court in *People v Tyburski*," 445 Mich 606; 518 NW2d 441 (1994). Although the questions challenged by defendant may be somewhat similar to the leading questions asked by the trial judge in *Tyburski*, the present case is otherwise distinguishable and therefore reversal is not required. First, the trial judge in *Tyburski* denied the request of defense counsel to sequester each potential juror for

individual voir dire. *Id.* at 611. In the present case, the judge and counsel met in chambers with the potential jurors. Second, the trial judge in *Tyburski* would not allow the attorneys to ask questions; the judge would allow only written follow-up questions submitted through him. *Id.* In this case, each attorney asked questions of potential jurors. Third, the trial judge in *Tyburski* questioned the jurors in open court and gave “subtle admonishment” to a juror who admitted to having a bias. *Id.* at 612-617. Here, there was no such admonishment. The questions complained of by defendant were the trial judge’s explanations to the individual jurors as to why he or she needed to meet in chambers with the judge and counsel. It appears that the trial court in the present case, by conducting individual voir dire of each juror along with the participation of counsel, strove zealously to impanel an unbiased jury. See *id.* at 618.

Defendant asserts that the trial court improperly denied his motion to dismiss the jury panel after a potential juror pointed in the direction of defendant and stated, “My son was assaulted by –” in front of the jury panel. We disagree. We have reviewed the lower court transcript and conclude that the trial court did not abuse its discretion in denying defendant’s motion. See *People v Benton*, 402 Mich 47, 56-57; 260 NW2d 77 (1977) (the trial court has discretion to discharge a jury). The potential juror was interrupted by the trial judge before he could finish his sentence and was immediately excused by the trial judge from the jury panel. According to the lower court record, the potential juror “sort of waived [sic] in the general direction of counsel table,” which consisted of four people, including Police Officer Destrampe who believed that the juror was motioning and referring to him. Considering the fact that the juror’s statement and gesture could have been made regarding any of the four people at the table and the fact that the trial court subsequently questioned all the jurors about their potential biases in the case, we conclude that defendant was not prejudiced.

Defendant next posits that there was insufficient evidence at trial identifying him as one of the robbers. Defendant, however, offers no authority to support his position that specific identification of him was required during the witnesses’ testimony. This issue is effectively abandoned. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Moreover, the record reflects that the witnesses knew defendant or knew it was of him they spoke. For example, the victim in this case said at trial that he could tell defendant was the man who robbed him because of the nature of defendant’s “body action.” The record adequately reflects the identity of defendant. *People v Weathersby*, 204 Mich App 98, 112-113; 514 NW2d 493 (1994).

Defendant claims the trial court erred in denying his motion for a directed verdict on the conspiracy count. We disagree. Proof of a formal agreement is not required to show conspiracy. *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986). The circumstances, acts, and conduct of the parties may establish an agreement in fact. *Id.* The conspiracy may be established by the use of circumstantial evidence and may be based on inference. *Id.* In the present case, the victim testified that when the two men came into his house, they announced that “we” want your money. One of the men then held him while the other searched his house. It is reasonable to infer that the two men agreed to do this before entering the victim’s house. Viewing the evidence in a light most favorable to the prosecution, a reasonable juror could have found that the essential elements of conspiracy were

proven beyond a reasonable doubt. *People v Turner*, 213 Mich App 558, 569-570; 540 NW2d 728 (1995); *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

Defendant moved to dismiss all charges because of the alleged misconduct of investigating police officers. Because alleged misconduct on the part of law enforcement officers is attributable to the prosecution, defendant's motion to dismiss essentially constitutes a claim of prosecutorial misconduct. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). Claims of prosecutorial misconduct are reviewed on a case-by-case basis in order to determine whether defendant received a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Defendant points to the testimony of five witnesses to support his position that the police intimidated witnesses. While the police may have spoken to each witness about potential prosecution, each witness denied being threatened. In deciding defendant's motion, the trial court first reviewed the cases offered in support thereof and found all to be distinguishable in that there was not clear misconduct on the part of police in the present case. Moreover, the trial judge also noted that the witnesses, "quite frankly all of whom could probably have been charged with being an accessory to the offense," were appropriately cautioned by police. Given that these witnesses either destroyed potential evidence or aided in the attempted flight of defendant, it may be said that they gave assistance to defendant "in an effort to hinder the felon's detection, arrest, trial, or punishment." *People v Perry*, 218 Mich App 520, 534; 554 NW2d 362 (1996). Defendant was not denied a fair trial, and the trial court properly denied defendant's motion.

Defendant next asserts that the court erred by having an in camera hearing regarding the identity of a confidential informant. However, this issue is waived for failure to argue this specific issue before the trial court. Furthermore, while appellate courts may consider claims of constitutional error argued for the first time on appeal if they could have been decisive of the outcome, *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *People v Johnson*, 215 Mich App 658, 669; 547 NW2d 65 (1996), there is no claim in this case, nor do we see how such a claim would have merit under the facts in this case, that the identity of the caller at issue would have changed the decision of the jury.

Defendant also argues that he was denied the effective assistance of counsel. The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Because an evidentiary hearing or a new trial was not requested below, our review is limited to the lower court record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant asserts that counsel was ineffective for failing to call certain alibi witnesses, for remarking during closing argument that another man was not responsible for the crime, and for failing to renew the motion to change venue at the conclusion of voir dire. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be a matter of trial strategy, and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. See *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In the present case, defendant's alibi defense was presented by other witnesses. There is no showing on this record that other witnesses could have enhanced the defense.

Similarly, defense counsel's closing argument must be considered trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). The fact that a strategy does not work does not constitute ineffective assistance of counsel. *Stewart, supra*. Finally, as to renewing the motion for a change of venue, the trial judge and counsel conducted a thorough voir dire. As indicated above, the jury exhibited no bias. Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Finally defendant asserts that his sentences are disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and that they violate the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Because defendant failed to offer any support for his assertions, the arguments are abandoned on appeal as being insufficiently briefed. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). However, after reviewing the record, we note that defendant's sentences are proportionate under *Milbourn* and that his sentences do not violate the *Tanner* rule.

We affirm.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Richard A. Bandstra

¹ MCL 769.10; MSA 28.1082.