

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN ANTHONY HAYES,

Defendant-Appellant.

UNPUBLISHED

May 22, 1998

No. 192405

Kalamazoo Circuit Court

LC No. 95-000831 FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of twenty to thirty years for both the armed robbery and conspiracy convictions, to be served consecutive to a two-year term for the felony-firearm conviction. We affirm.

The victim was accosted by two men wearing masks as she was leaving St. Mary's church in Kalamazoo. While brandishing a gun, one of the perpetrators commanded the victim to drop her purse and to lie face down on the ground, and threatened to shoot her. The perpetrators then absconded with the purse and other items. At trial, Nicole Thompson (defendant's former girlfriend), Charles Olinger, Charles Lewis, and Steven Harper testified that defendant had boasted to them that he and a man named Bo had robbed a woman at the same church at gunpoint while wearing masks. Thompson also testified that defendant had brought back to the house a dark purse containing credit cards and other items immediately following the armed robbery.

Defendant first asserts that the trial court erred by impaneling an "anonymous" jury. Defendant's argument is based solely on the fact that the jurors were referred to by badge numbers. Defendant has not supplied this Court with any evidence that the jury selected in this case was actually "anonymous." No evidence has been presented indicating that defendant and defense counsel lacked access to the juror's names and/or questionnaires. Indeed, the examination of the prospective jurors by

trial counsel suggests that both counsel possessed knowledge of the jurors' background information. Thus, this issue as presented is without merit.

Defendant also claims that the trial court abused its discretion by admitting a double hearsay statement of an alleged informant who never testified at trial. However, any error in the admission of the evidence was harmless in light of the overwhelming testimony of the victim as well as the four witnesses who testified that defendant admitted to them that he had robbed a woman at gunpoint at St. Mary's church. *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997).

Defendant next argues that the prosecution engaged in misconduct in eliciting testimony that a gun belonging to defendant had been used in an unrelated matter. The record reveals, however, that the prosecution did not attempt to elicit evidence from the witness with regard to the unrelated event involving defendant and that the witness' statement was made in a non-responsive fashion. Hence, the prosecutor is not responsible for the introduction of the evidence. *People v Bryan*, 92 Mich App 208, 220; 284 NW2d 765 (1979).

Defendant finally claims that he was denied the effective assistance of counsel at trial. Defendant did not move for a new trial or a *Ginther*¹ hearing below. Therefore, our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). This Court will find ineffective assistance of counsel only where a defendant demonstrates that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

First, defense counsel's elicitation that defendant had been incarcerated before his arrest on the present charges was not prejudicial in light of the fact that the prosecution had already presented evidence that would have clearly suggested to the jury that defendant had been incarcerated on a separate, unrelated matter at the time of an interview regarding the present case. Second, defendant has failed to show how counsel's failure to object to a police officer's testimony that there were three warrants for defendant's arrest caused him prejudice. Third, with regard to defendant's claim that counsel improperly elicited testimony that defendant had allegedly permitted his brother to beat up a neighbor and break that person's television set, we note that defendant has mischaracterized the record developed at trial. This evidence was not, in fact, purposefully elicited but was instead volunteered by the witness in a non-responsive manner. Defense counsel immediately stated on the record that the testimony had not been in response to her question, but did not request the trial court to strike the statement or instruct the jury that it should disregard the comment. However, such an omission may be considered sound trial strategy. Indeed, the damaging testimony had already been inadvertently uttered before the jury. Lodging an objection may have attracted additional, unwarranted attention to the introduction of the non-responsive testimony. Fourth, defendant's claim that defense counsel improperly elicited testimony that defendant had allegedly made indirect threats against him again mischaracterizes the record. On direct examination by the prosecutor, a witness testified threats had been made against himself and his family as a result of his cooperation with the authorities in the present case. The witness did not identify the source of those threats, but the testimony suggested that the threats were made by defendant. The record suggests that defense counsel cross-examined the witness

to clarify the alleged source of the threats. The witness then stated that defendant had *indirectly* threatened him. If defense counsel had not diligently probed into the witness's past statement under direct examination, the jury could have been left with the impression that defendant had *directly* threatened the witness. Hence, we find no prejudice to defendant as a result of the questioning.

Finally, defendant relies on materials outside of the record to support his argument that trial counsel failed to produce witnesses who have offered exculpatory evidence and, therefore, this argument is not properly before this Court.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, jr.
/s/ Mark J. Cavanagh

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).