STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY J. MCCALL,

Defendant-Appellant.

UNPUBLISHED
April 21, 2000

No. 203203
Oakland Circuit Court
LC No. 96-147839 FH

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was sentenced to two days in jail and eighteen months' probation. We affirm.

Defendant first argues that he is entitled to a new trial because a substitute judge received the jury's verdict, with no indication in the record that the original judge was dead, ill, or disabled. Defendant alleges prejudice because the substitute judge did not certify that he was familiar with the record, and because his presence had a prejudicial effect on the jury. Defendant claims that the jurors, when polled, may have been reluctant to voice objections to the verdict because the substitution gave the appearance that the proceedings were unimportant and were conducted as a mere formality.

"As a rule, a judge cannot finish the performance of a duty already entered upon by his predecessor where that duty involves the exercise of judgment and the application of legal knowledge to, and judicial deliberation of, facts known only to the predecessor." *People v McCline*, 442 Mich 127, 133; 499 NW2d 341 (1993), quoting *State v Johnson*, 55 Wash 2d 594, 596; 349 P2d 227 (1960). A judge may be substituted for another judge in the case of death, sickness, or other disability. MCR 6.440(A); *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). For substitution in a jury trial, the court rule requires certification that the substitute judge has familiarized himself with the record in the case. MCR 6.440(A); *Bell, supra,* at 275. However, a defendant is not entitled to automatic reversal of his conviction upon a showing that a judge was substituted without familiarity with the case. *Bell, supra*, at 275, citing *McCline, supra*, at 134 n 10, rather, prejudice must be shown. *Bell, supra*, at 275. Defendant has failed to establish prejudice, thus any error was harmless.

The substitute judge's participation in this case was minimal. The original judge presided from the beginning of the trial through the charging of the jury. The substitute judge presided only over the delivery of the jury's verdict and the polling of the jury. These duties did not require the judge to exercise judgment or apply legal knowledge to, or deliberate about, facts known only to the original judge. *McCline*, *supra*, at 133. The substitute judge reserved consideration of the prosecution's motion to revoke bond for the original judge. Defendant's claim that the substitution of judges may have caused jurors to refrain from voicing objection to the verdict when polled is unsubstantiated.

Defendant also argues that the court abused its discretion by refusing to allow the late endorsement of his brother as a witness. A trial court has discretion to permit the late endorsement of witnesses. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998).

Defendant was first tried on March 6, 1997. At the first trial, the prosecutor directed the jury's attention to the fact that defendant had failed to call his brother to testify in support of defendant's claim that his brother used the gun for target practice, and had presumably left it in the car when he used the car, as he frequently did. The trial resulted in a hung jury and a mistrial. The retrial was scheduled for March 21. Defendant provided no notice to the prosecution, pursuant to MCR 6.201(A)(1), that he intended to call his brother to testify at the second trial. However, on the afternoon before trial, defense counsel filed a motion to withdraw due to defendant's inability to pay her, and a motion to adjourn, based on counsel's need to withdraw and defendant's inability to secure the transcript of the first trial, due to indigence, and defendant's predicament of needing to call his brother as a witness in light of the prosecution's argument at the first trial, and his brother being unavailable March 21 because scheduled for admission screening at the VA hospital. The following morning, the case was called as scheduled. The court explained that it had a civil trial that was concluding, and that trial of the instant case would commence as soon as the civil jury was instructed. Defense counsel presented her request for an adjournment. The court recognized defendant's indigence, appointed retained counsel as appointed counsel, and stated that the transcript would be available at public expense by the afternoon, before trial commenced. The prosecution objected to defendant's adding his brother as a witness, arguing that he had just received notice the afternoon before. The court determined that defendant had had ample time to give notice of the witness, but that under the circumstances that trial would not begin until the afternoon, and the prosecutor knew about the brother's alleged involvement from the first trial, defendant would be permitted to call the witness provided the witness was produced by one o'clock, and that the prosecutor would have an opportunity to interview him. At ten minutes to two, when the case was recalled, defense counsel informed the court that according to defendant's wife, defendant's brother was on his way to court. The court stated that the witness would not be permitted to testify, and commenced jury selection.

We find no abuse of discretion. The court imposed reasonable conditions on the late endorsement of the witness. Defendant failed to comply. Defendant knew of the potential relevance of his brother's testimony well in advance of the second trial, and had ample opportunity to secure the witness' presence at trial. We find no error in the court's preclusion of the witness.

Defendant next claims that the court improperly admitted photographs of defendant's vehicle that did not accurately depict the tint of the rear window. We disagree. After a proper foundation is

laid, "[p]hotographs are admissible if they are substantially necessary or instructive to show material facts or conditions." *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995); *People v Johnson*, 113 Mich App 575, 580-581; 317 NW2d 689 (1982). The pictures were taken in the presence of defense counsel at the same time of day as defendant's arrest. The police officer at the scene testified that the pictures accurately depicted his view of defendant's rear window. We conclude that the court did not abuse its discretion in admitting the photographs.

Defendant's final argument is that the prosecution's comment to the jury regarding defendant's failure to produce his brother at trial was improper because it was the prosecution's objection to the witness that precluded his testimony. We disagree.

We first observe that the prosecutor was rather circumspect in his argument regarding defendant's brother. In the first trial, the prosecutor referred directly to defendant's failure to produce witnesses at trial to support his defense.[1] In the second trial, the prosecutor recasted the argument to focus on defendant's failure to mention his brother until trial, and the brother's failure to come forward. The prosecutor did not directly refer to the brother's failure to testify at trial.[2]

Further, it is not improper for the prosecution to comment on a defendant's failure to call a corroborating witness. *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996*); People v Spencer*, 130 Mich App 527, 533; 343 NW2d 607 (1983). Defendant had ample opportunity to add his brother to the witness list. Defendant knew of the potential relevance of his brother's testimony since the first trial in this matter. On the day of trial, the court overruled the prosecution's objection and permitted defendant additional time to produce the witness. The court ultimately denied defendant's request to amend his witness list because defendant failed to comply with the court's instructions, and not because of the prosecution's objection. Thus, we find no error.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard Allen Griffin

[1] The prosecutor argued:

> Did the defendant bring in anybody to say, yeah, I was one of the many drivers in the house? Did he bring in any proof that he owned any other cars? Did he bring in his brother to claim - - the brother that may or may not have known about the gun? No . . .

[2] The prosecutor argued:

> The Defendant never mentions his brother to the police, not once. He doesn't mention him on the side of the road, in the patrol car, back at the station. The Defendant's

> brother never steps up, which would be a natural thing to do in that situation, and say, oh, I left the gun in the car.

And, in summation, the prosecutor added:

> His brother did not come forward to say that he committed the crime.