

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. DILLARD,

Defendant-Appellant.

UNPUBLISHED
October 31, 2000

No. 215193
Wayne Circuit Court
LC No. 98-001604

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645. We affirm.

Defendant first argues that the court erred by giving a UDAA instruction because defendant was originally charged with armed robbery and the crime of UDAA is not a lesser included offense. We disagree.

Defendant contends that he had insufficient notice of the new charge and was denied the opportunity to defend against it. However, we have reviewed the entire record of the proceedings below and we conclude that defendant expressly acquiesced in the UDAA instruction on more than one occasion and has therefore waived the issue for review. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Defendant next argues that defense counsel was ineffective in three ways: by failing to object to the instruction on UDAA, by failing to move for a directed verdict on the armed robbery count, and by conceding in closing argument that defendant might have been guilty of UDAA. Defendant contends that the prejudice from this ineffective assistance is apparent because he was convicted of UDAA. We disagree.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443;

212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

Under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), in order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and also that the representation so prejudiced the defendant as to deprive him of a fair trial. *Id.* at 309. Prejudice exists where a court can conclude that there is a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695. To prevail, a defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Rice (On Rem)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

Defendant argues that the mere fact that he was found guilty of UDAA demonstrates that he was prejudiced by the amendment. He contends that without the new charge, he may have been acquitted. However, defendant can only speculate that he received a more severe penalty than he would have in the absence of the UDAA instruction because the jury could have found him guilty of armed robbery or of unarmed robbery. A similar argument was rejected in *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993), and we find that other than these conclusory assertions, defendant has made no showing that defense counsel's decision to acquiesce in the UDAA instruction so prejudiced him as to deprive him of a fair trial.

Defendant's argument that counsel was ineffective for failing to move for a directed verdict on the armed robbery charge is also without merit. We find that based on the evidence presented, such a motion would have been denied. In fact defendant's codefendant did make such a motion, and it was summarily denied by the trial court. Because the court had previously indicated its intention to treat such a motion brought by one defendant as applicable to both, we find no error in counsel's prudent decision not to needlessly waste the court's time.

Lastly, defendant argues that counsel was ineffective by making statements during closing argument that constituted a concession of defendant's guilt with regard to the offense of UDAA. Assuming that counsel's remarks were a "complete concession of guilt," defendant must still show prejudice by demonstrating that there is a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695.

We find no such prejudice. The evidence supporting the UDAA conviction was plentiful. The victim testified that defendant and a codefendant robbed him at gunpoint, stealing his keys and pager and then driving off in his truck without permission. Defendant's own statement established at the very least that he was present during the crime and that he and his codefendant got into the victim's vehicle and drove away immediately after he witnessed his codefendant assault the victim. There was also evidence that both defendants later jumped out of the moving truck and fled from the police. We cannot conclude that absent defense counsel's remarks, the jury would have had a reasonable doubt

respecting defendant's guilt. Accordingly, defendant was not so prejudiced that he was deprived of a fair trial.

Next, defendant argues that during jury selection, the court demonstrated partiality by reiterating the prosecution's theory of the case on aiding and abetting. Defendant contends that in so doing, the court tainted the jurors before the proofs commenced. We disagree.

Defendant failed to object to any of the court's remarks at trial; therefore, the issue is not preserved for appeal. Under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), in order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; (3) and that the plain error affected substantial rights. *Id.* This test applies to unpreserved allegations of both constitutional and nonconstitutional error. *Id.* at 764. Once an appellant has satisfied these three requirements, an appellate court must "exercise its discretion in deciding whether to reverse." *Id.* at 763. Reversal is warranted only when the plain, unpreserved error resulted in "the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764.

We have reviewed the challenged comments and conclude that they do not demonstrate any lack of impartiality on the part of the court. Examining the comments in context, it is clear that the court was doing nothing more than explaining the concept of aiding and abetting to the jury, thereby clarifying the charges in the information. The court carefully prefaced each remark with "it is the People's theory," or a phrase to the effect of "it is alleged," taking caution to emphasize that it was the prosecutor, not the court, advocating these assertions. Furthermore, the court instructed that jury at length that "[a]ny comments I've made about anything whatsoever" were not to be construed as evidence. Defendant has demonstrated no error affecting his substantial rights.

Defendant also argues that he was denied a fair trial because of a comment made by the prosecutor in her rebuttal closing argument. Defendant failed to object at trial, and thus our review is again limited to deciding whether plain error occurred affecting a substantial right. *Id.*

Viewed in context, it is clear that the challenged comment was made in response to a specific portion of defense counsel's closing argument. Remarks of the prosecutor which would be improper if standing alone do not amount to error mandating reversal when made primarily in response to matters previously discussed by defense counsel. See *People v Potra*, 191 Mich App 503, 513; 479 NW2d 707 (1991). We conclude that the prosecutor's comment was not improper, and that defendant has again failed to demonstrate plain error affecting his substantial rights.

Finally, defendant argues that the court erred by failing to ascertain on the record whether defendant intelligently and knowingly waived his right to testify. Because no such requirement exists, this claim is likewise without merit. See *People v Simmons*, 140 Mich App 681; 364 NW2d 783 (1985).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins