# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 6, 2001 |
| V | No. 217453<br>Oakland Circuit Court |
| PIERRE Z. LASSETTI,<br><br>Defendant-Appellant. | LC No. 97-156491-FC |

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of bank robbery, MCL 750.531, felonious assault, MCL 750.82, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of fifteen to thirty years for the bank robbery conviction and four to six years for the felonious assault conviction, to be served consecutive to two concurrent two-year terms for the felony firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise from the October 27, 1997, armed robbery of the Citizens Bank on Nine Mile and Telegraph roads in Southfield. On appeal, defendant first argues that the police did not have the reasonable and articulable suspicion of wrongdoing needed to justify an investigative stop under *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and that, consequently, the trial court erred when it denied his motion to suppress all evidence obtained as a result of his arrest. We disagree. We review a trial court's factual findings on a motion to suppress for clear error. *People v Stevens (After Remand)*, 460 Mich 626, 630; 597 NW2d 53 (1999). However, to the extent the trial court's ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo. *Id.* at 631.

In support of his position that reversal is warranted on this issue, defendant relies in large part on our Supreme Court's holding in *People v Shabaz*, 424 Mich 42, 61-62; 378 NW2d 451 (1985), that the defendant's flight from an unmarked police vehicle did not justify a stop of the defendant, despite his having been observed leaving an apartment building at which the

observing officers had previously made a number of arrests for concealed-weapons violations and narcotics offenses.[1] We find, however, that this case is factually distinguishable from *Shabaz*. Here, unlike *Shabaz*, the police were investigating a recently committed crime, i.e., the armed robbery of a local bank. Moreover, defendant, who matched the general description of the robber, acted peculiarly when spotted by police while walking alone in a high traffic area near the bank just after the robbery. Also, although in *Shabaz* the defendant's flight was ambiguous under the circumstances, in this case defendant knew that he was being approached by a police officer, which made his evasive conduct (including an abrupt jaunt across eight lanes of heavy traffic) suspicious. The totality of the circumstances indicates that the police had a reasonable and articulable suspicion that criminal activity was afoot, so as to justify stopping defendant. *Terry*, *supra*. Accordingly, the trial court did not err in denying defendant's motion to suppress on that ground.

Defendant next argues that he was denied his right to a fair trial as a result of the trial court's conduct. Specifically, defendant asserts that the trial court improperly interfered with and interrupted his cross-examination of prosecution witnesses, and, through its questioning of defendant during his own testimony, generally projected an attitude that defendant was not worthy of belief. We disagree. Defendant's failure to preserve this issue with an appropriate objection at trial limits our review to plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A trial court has wide discretion and power in the matter of trial conduct, *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), including the power to "interrogate witnesses, whether called by itself or by a party." MRE 614(b). This discretion, however, is not unlimited. *Paquette*, *supra*. A trial court "pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id*. Here, however, review of the record indicates that the trial court was justified in questioning defendant during his testimony, because defendant was becoming difficult and argumentative, was avoiding direct answers to questions about his prior conviction, and was testifying in an incredible manner. Moreover, in relation to his earlier conviction, the court merely pointed out the usual procedure that the circuit courts are required to follow when taking a no contest plea. Viewed in context, the court did not act in a prejudicial, unfair, or partial manner in questioning defendant. See *id*. Similarly, inasmuch as defendant was asking inappropriate questions, had violated a rule of evidence, and was impermissibly testifying himself, the trial court had good reason to interrupt his pro se questioning of witnesses. Nothing in the court's questions or comments can be construed as calculated to arouse suspicion in the mind of the jury unjustifiably, or to influence the jury to the detriment of defendant's case in any

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[1] We disagree with the prosecution's claim that *Shabaz* has been overruled by *Illinois v Wardlow*, 528 US 119, 126-127; 120 S Ct 673; 145 L Ed 2d 570 (2000). Both decisions recognize that the "totality of the circumstances" must be examined in determining whether the police had a reasonable and particularized suspicion of possible wrongdoing to justify a police stop. *Shabaz*, *supra* at 55; *Wardlow*, *supra* at 126-127. Both decisions also indicate that although "flight" alone is not sufficient to establish wrongdoing, it is nonetheless a pertinent factor that may be considered under the totality of the circumstances. *Shabaz*, *supra* at 62; *Wardlaw*, *supra*.

other way. *Id*.; see also *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Accordingly, defendant is not entitled to relief on this claimed error.

Next, defendant argues that his constitutional right to counsel was violated when the trial court denied his request for substitution of counsel on the second day of trial. Again, we disagree. Substitution of counsel is "warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A court's decision regarding substitution of counsel will not be upset on appeal absent a showing of an abuse of discretion. *Id*. Here, apart from failing to demonstrate good cause to replace his second appointed attorney, defendant's request for substitution of counsel was made on the second day of trial, which would have unreasonably disrupted the judicial process. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's request for substitution of counsel.

Nor do we believe that, as argued by defendant, the trial court abused its discretion when it granted defendant's request to represent himself. The record demonstrates that the trial court satisfied the requirements that must be met before allowing a defendant to proceed in propria persona. See MCR 6.005(D); *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Further, the record reflects that defendant understood what he was doing and chose to represent himself while fully aware of his alternatives. Cf. *People v Holcomb*, 395 Mich 326, 335; 235 NW2d 343 (1975). We will not permit defendant to '"indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal . . . ."' *People v Dennany*, 445 Mich App 412; 519 NW2d 128 (1994), quoting *People v Morton*, 175 Mich App 1, 8-9; 437 NW2d 284 (1989).

Next, we reject defendant's claim that resentencing is required because the trial court failed to recognize its discretion to deviate from the sentencing guidelines recommendation. A review of the record indicates that the trial court was aware of its discretionary authority with regard to sentencing and exercised that discretion. Moreover, while reference to the sentencing guidelines for purposes of appellate review of an habitual offender's sentence is inappropriate, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996), the mere fact that the trial court considered the guidelines when exercising its sentencing discretion does not invalidate defendant's sentences so long as the court did not abuse its discretion. Here, an abuse of discretion has not been shown. Although defendant does not have a significant criminal history, he is nonetheless an habitual offender. Moreover, in perpetrating the instant offense, he held a loaded firearm to a customer's head and threatened to kill her if bank employees did not cooperate with his demands. Given these facts, we find defendant's sentences to be proportionate to the seriousness of the circumstances surrounding both the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Next, we consider those issues raised in the supplemental brief filed by defendant pro se. Defendant first argues that the trial court erred in refusing to suppress his statements to police as involuntary on the ground that the statements were elicited in violation of his right to prompt arraignment without unnecessary delay, and because the police would not honor his request for

an attorney unless he first agreed to execute a written waiver of his *Miranda*[2] rights. Defendant further asserts that the statements were induced by promises that he would be released after speaking with police. However, after review of the record in this matter we do not believe that there is a basis for overturning the trial court's finding of voluntariness.

Initially, we note that defendant's failure to raise his claim of an unnecessary delay in arraignment before the trial court has resulted in this Court being left without a sufficient record for appellate review. Nonetheless, even assuming the claimed delay to have been unreasonable, any such delay in arraignment is but one factor to be considered in evaluating whether a defendant's statements should be suppressed as involuntary. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). As always, the question remains whether the statements were voluntary under the totality of the circumstances. See e.g., *People v Ray*, 431 Mich 260, 268; 430 NW2d 626 (1988); *People v Hicks*, 185 Mich App 107, 113-114; 460 NW2d 569 (1990).

When reviewing a trial court's determination as to voluntariness, this Court is required to examine the entire record and make an independent determination of the issue as a question of law. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). In doing so, however, deference is given to the trial court's findings, especially where resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence. See *People v Marshall*, 204 Mich App 584, 587-588; 517 NW2d 554 (1994). Giving such deference, we find no error in the trial court's conclusion that the challenged statements were voluntarily given. See *Mack*, *supra* at 17. At the hearing on defendant's motion, the trial court was presented with two wholly conflicting accounts of the circumstances surrounding the taking of defendant's statements. One supported the admissibility of those statements as voluntary, while the other supported a conclusion that the statements were improperly coerced. The issue was thus one of credibility, which the trial court decided in favor of the interrogating officer. Because of the trial court's superior opportunity to view the witnesses, we will not interfere with its determination in this regard. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). Accordingly, we conclude that the trial court did not err in denying defendant's motion to suppress his statements.

Defendant further claims that he was denied the effective assistance of counsel because his attorney failed to adequately prepare for trial, or to object to allegedly improper conduct by the prosecutor and trial court. Again, we disagree.

Reversal of a conviction based on ineffective assistance of counsel requires that a defendant show, at a minimum, (1) deficient performance by trial counsel and (2) a reasonable probability that, but for the unprofessional conduct, the result of the proceeding would have been different; in other words, the defendant must show some measure of prejudice resulting from the allegedly deficient performance. *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997).

Here, in challenging counsel's efforts to prepare for trial, defendant asserts that counsel's failure to sufficiently communicate with defendant, or otherwise investigate this matter, resulted

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

in an opening statement that incorrectly summarized defendant's version of the events that transpired on the day of the robbery. However, even were we to accept these alleged failures as constituting deficient performance on the part of trial counsel, we are not persuaded that the outcome of the proceedings would have been different in the absence of such claimed errors. Regardless of the remarks made by counsel during his opening statement, defendant was nonetheless permitted to present his claimed version of events to the jury during his testimony from the witness stand. The mere fact that this testimony was rejected by the jury is insufficient to establish the requisite probability that, absent the challenged remarks, the outcome of the proceeding would have been different. This is especially true where, as here, the jury was instructed by the trial court that the comments and arguments of the attorneys were not evidence. See, e.g., *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Consequently, we do not believe that defendant was denied the effective assistance of counsel as a result of the alleged deficiencies in preparing for trial.

We similarly do not believe that defendant was denied his right to the effective assistance of counsel on the basis of counsel's failure to object to improper conduct on the part of the prosecutor or the trial court. Defendant's assertions in this regard stem, in large part, from the prosecutor's attempt to elicit defendant's acknowledgement of a previous conviction for drawing a check over $200 without sufficient funds, MCL 750.131(3)(c). Because proof of such conviction was admissible to impeach defendant's trial testimony, see MRE 609, defendant's contention that counsel was ineffective in failing to object the prosecutor's attempts to admit the conviction as improper is without merit. A defense attorney's failure to raise a futile or meritless objection does not constitute ineffective assistance. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Moreover, although defendant's failure to request an evidentiary hearing on his claim of ineffective assistance of counsel limits this Court's review to errors apparent on the record, *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996), such failure does not relieve defendant of his burden to establish the factual basis supporting his claim. See *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). On the basis of the record currently before this Court there is nothing that would indicate that the comments of either the trial court or the prosecutor, with respect to defendant's previous conviction, were inaccurate or otherwise improper, and, accordingly, nothing on which to base a conclusion that defense counsel's failure to object to such comments was unreasonable. See *People v Hoag*, 460 Mich 1, 8; 594 NW2d 57 (1999). The record is similarly devoid of any evidence to show that the prosecutor lied when he stated that an umbrella carried by the robber had been recovered, or that that defense counsel was in league with the prosecutor and thus deliberately sabotaged defendant's case. Defendant has failed to sustain his burden of establishing ineffective assistance of counsel on this claim. *Id.*

Defendant next claims that he was denied a fair trial when the prosecutor (1) permitted Detective Christopher Helgert to offer false testimony, (2) exceeded the bounds of permissible argument in his closing statement, and (3) attempted to impeach defendant with evidence of his prior non-sufficient funds conviction. Defendant's failure to preserve this issue with an appropriate objection at trial limits our review to plain error that affected his substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines, supra*. We find no such error on this record. Although, as argued by defendant, there were in fact some inconsistencies between Helgert's testimony at the evidentiary hearing and at trial, defendant has

not demonstrated that Helgert's trial testimony involved perjury or deliberate lying, or that the prosecutor knew the trial testimony to be false, so as to require the prosecutor to correct the testimony or bring it to the attention of the trial court and jury. Cf. *People v Lester*, 232 Mich App 262, 277, 279-280; 591 NW2d 267 (1998). Similarly, plain error is not apparent from the statements made by the prosecutor during closing argument. The prosecutor is '"free to argue the evidence and all reasonable inferences arising from it as they relate to [his] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). The prosecutor is further permitted to comment on the testimony in "a case and argue that, upon the facts presented, a witness, including the defendant, is not worthy of belief . . . ." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, viewed in context, the challenged portions of the prosecutor's arguments fall within the boundaries of permissible argument. Moreover, as previously noted in our discussion of defendant's claims of ineffective assistance, defendant's prior conviction for passing a non-sufficient funds check was properly admissible under MRE 609. See also *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Accordingly, the prosecutor did not engage in misconduct by introducing this evidence.

Defendant next contends that the evidence was insufficient to support his convictions because none of the witnesses present at the bank during the robbery could positively identify him as the perpetrator, and the fingerprints found on the weapon were not his. However, the circumstantial evidence and reasonable inferences arising from the evidence, when viewed most favorably to the prosecution, were sufficient to enable the jury to find, as it did, that defendant was guilty of the charged crimes. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant next claims that he was denied his statutory and constitutional rights to be personally present at every critical stage of trial. See US Const, Am VI; Const 1963, art 1, § 20; MCL 768.3. We find this argument to be without merit. Defendant's presence was neither statutorily nor constitutionally required when the court merely read its decision on defendant's motion to suppress into the record. Nothing in the nature of evidence was taken at this proceeding. See *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). In any event, a defendant's absence from a part of trial only requires reversal if there is a reasonable possibility of prejudice resulting from the absence. *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). Given our previous conclusion as to the propriety of the trial court's decision on defendant's motion, we find no such prejudice. For this same reason, we similarly reject defendant's claim that by allowing substitute counsel to represent him at this hearing, the trial court essentially denied defendant his right to effective representation at a critical stage in the proceedings. See MCL 769.26 (the verdict should not be disturbed unless "it shall affirmatively appear" that the error was prejudicial).

Finally, we find no merit in defendant's claim that his sentence for bank robbery constitutes cruel or unusual punishment. A proportionate sentence is not cruel and unusual.

*People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). As discussed above, defendant's sentences are proportionate.

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens