

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERECK M. BONASSE,

Defendant-Appellant.

UNPUBLISHED

August 6, 2002

No. 231997

Wayne Circuit Court

LC No. 00-003263

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to eleven to twenty-five years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that his felony-firearm conviction is void because the jury returned a verdict which found defendant "guilty of the *use* of a firearm during the commission of a robbery armed" versus a finding of guilt for the crime for which he was charged, as stated in the information that "defendant did carry or have in his/her *possession* a firearm."¹ We find that defendant's expressed satisfaction with the verdict form before its submission to the jury forecloses appellate review of this issue. See *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), citing *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000).

With respect to defendant's argument that the evidence was insufficient to sustain his felony-firearm conviction, again we disagree. To convict defendant of felony-firearm, the prosecution had to establish that defendant knowingly possessed or carried a firearm during the commission of his armed robbery of the complaining witness. The elements of armed robbery include: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Rodgers*, 248

¹ We note that defendant presented this issue as a sufficiency of the evidence issue. However, if defendant is challenging the form of the verdict based on the language of the verdict form, this issue is waived because defendant approved the verdict form before its submission to the jury, which contains the very language that defendant argues on appeal constitutes error.

Mich App 702, 707; 645 NW2d 294 (2001), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995).

Here, the complaining witness testified that defendant approached him from behind and pointed the chrome revolver at his head. The complaining witness also indicated that he feared he would be shot, and thus, he had a reasonable belief that defendant was armed with a dangerous weapon. Lastly, the complaining witness testified that he gave defendant \$80 from his pocket or person after defendant demanded money. Accordingly, a rational trier of fact could conclude beyond a reasonable doubt that defendant knowingly carried or possessed a firearm when he pointed the chrome revolver at the complaining witness' head before he received the \$80. When viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction for felony-firearm. See *People v Prather*, 121 Mich App 324, 332; 328 NW2d 556 (1982).

Defendant next argues that the prosecutor, in his closing argument, improperly shifted the burden of proof to defendant by indicating that defense counsel failed to dispute the prosecution's evidence. We disagree. Defendant failed to timely and specifically object to preserve this claim of prosecutorial misconduct for appeal. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Accordingly, to avoid forfeiture under the plain error rule, defendant must show that the error was plain and affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra*. It is impermissible for the prosecutor to shift the burden of proof. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra* at 720-721.

Here, the prosecution, in its rebuttal argument, stated:

You're going to get an instruction from the judge with regard to identification. One of the things is very key and I did not hear defense counsel do is [sic] defense counsel make the case of identification for me. Because he never denied the fact that this is somebody that the man has seen next door at his neighbor's house before. Never denied that.

When the prosecution's closing argument is reviewed in its entirety, no error occurred because the prosecution was responding to arguments raised in defense counsel's closing argument. Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, in *Fields*, *supra* at 115, our Supreme Court held:

[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, [a] comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [See *Reid*, *supra* at 479.]

Here, defense counsel explicitly advanced his theory during his closing argument:

How many of you, how many people, not you, how many people do you think would be robbed by someone that they knew and wouldn't go straight and tell the police, "I just got robbed and I know who did it. It wasn't a stranger that I've never seen before, that I'll never see again. I know the guy that robbed me." But he says nothing. Does that create any doubt in your mind whether or not he was even robbed?

Because defense counsel attacked the victim's credibility, the prosecution properly rebutted defendant's theory because, if the jury had accepted defendant's theory, defendant could have been exonerated. Therefore, the prosecution was free to argue the reliability of the victim's identification of defendant on the basis that the victim had seen defendant on several occasions before the robbery. See *id.*

Further, absent an objection, a judge's instruction that arguments of attorneys are not evidence dispels any prejudice. *Bahoda*, *supra* at 282. Here, the trial court gave detailed instructions to the jury regarding the consideration of evidence in its deliberations. First, the jury was given instructions immediately after closing arguments where the court stated, "[t]he lawyer's statements and arguments are not evidence." Further, the trial court reminded the jurors that "[e]very Defendant has the absolute right not to testify. When you decide the case, you must not consider the fact that he did not testify. It must not affect your verdict in any way." Consequently, defendant may not avoid forfeiture of this issue. See *Carines*, *supra* at 763.

Defendant argues that the trial court failed to properly instruct the jury. We disagree. Jury instructions must be objected to at trial in order to preserve the issue on appeal. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Additionally, a verdict may not be set aside on the basis that the court failed to instruct on a point of law unless the defendant requested the instruction. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Here, defendant affirmatively waived this issue when he expressed satisfaction with the trial court's instructions. Accordingly, appellate review is precluded because there are no errors to review. See *Ortiz*, *supra*.

Defendant next argues that the trial court erred when it failed to compel witnesses to testify because they may have provided information regarding the robbery. We disagree. A trial court's decision whether to issue compulsory process to a witness and elicit testimony is reviewed for an abuse of discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996). Defendant failed to properly preserve this issue because it was not raised before and addressed by the trial court. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Accordingly, to avoid forfeiture under the plain error rule, the defendant must show that the error was plain and affected the defendant's substantial rights. *Carines*, *supra* at 764-765.

A defendant in a criminal action has the right to compulsory process of witnesses in his favor. See *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988). However, this right is not absolute. *Id.* After a review of the record, defendant never made a showing to establish how the witnesses' testimony would have been material or non-cumulative. Accordingly, the trial court did not abuse its discretion in failing to issue an order compelling the testimony. See *Yeoman*, *supra*. Further, we note defendant's affirmative decision not to call the witnesses to testify on his behalf when he had the opportunity to do so. A defendant may not claim error regarding an issue on appeal where his lawyer deemed the action proper at trial or otherwise acquiesced. See *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Therefore, defendant may not avoid forfeiture of this issue. See *Carines*, *supra* at 763-764.

Lastly, defendant raises ineffective assistance of counsel claims on the basis of defense counsel's failure to object to (1) the "void" felony-firearm conviction, (2) the prosecution's closing argument, and (3) the trial court's instructions to the jury on identification. Because defendant did not request a *Ginther*² hearing below, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient representation prejudiced the defense so as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable and this Court will not assess counsel's competence with the benefit of hindsight. *Id.*; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

With respect to trial counsel's failure to object to the void felony-firearm verdict, defendant has not established a reasonable probability that, but for counsel's failure to object to the verdict form, the trial outcome would have been different, in light of (1) the impossibility of a conviction for a lesser included offense, (2) the victim's testimony that defendant pointed the chrome revolver to his head when he demanded money, (3) the trial court's instructions regarding the elements of felony-firearm, (4) the jury was informed that defendant was charged with having possessed a firearm, and (5) the felony information charged defendant with possession of a firearm. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

As discussed previously, defendant's failure to establish error regarding the prosecution's closing argument forecloses appellate relief because trial counsel was not required to advocate a meritless position. See *Snider, supra* at 425. Further, defendant has not established error apparent on the record regarding the trial court's instructions. A review of the instructions establishes that the trial court addressed key points of defendant's defense, including credibility and the circumstances surrounding the complaining witness' identification of defendant. Accordingly, we are satisfied that the jury was adequately informed of the issues to be tried. Consequently, defendant has failed to overcome the presumption that he received effective assistance of counsel.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder