

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO JBRONE BAK,

Defendant-Appellant.

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UNPUBLISHED

August 16, 2002

No. 232387

Oakland Circuit Court

LC No. 2000-171424-FH

Before: Murray, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of seven to twenty years. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial and the right to the effective assistance of counsel when defense counsel confirmed outside the presence of the jury that a defense witness had given false testimony. Specifically, defendant first asserts that the off-the-record discussion outside defendant’s presence regarding the truthfulness of the witness’ statement that she had talked to defense counsel before the day of trial and the appropriate remedial measure to be taken to correct the false statement violated his right to be present at trial. See MCL 768.3. We disagree.

An in-chambers conference to discuss matters of procedure or law attended by his counsel to which the defendant raises no objections does not violate the defendant’s right to be present during his trial and does not constitute reversible error. *People v Baskin*, 145 Mich App 526, 544-545; 378 NW2d 535 (1985). Here, the off-the-record discussion was tantamount to an in-chambers conference. Defendant raised no objection to being removed from the courtroom, and defendant’s substantial rights were not affected by the discussion regarding the appropriate remedial measure to be taken to inform the jury of the false testimony.

With respect to the off-the-record discussion, defendant also argues that defense counsel’s acknowledgement to the court that the witness’ testimony that she talked to defense counsel before the day of trial was false and the subsequent instruction to the jury that the witness’ testimony in this regard was untrue denied him the effective assistance of counsel and the right to confront witnesses against him. We disagree. Both the witness and defense counsel acknowledged that the witness did not in fact talk to defense counsel about the facts of the case

before the day of trial. Thus, defense counsel had an obligation to take remedial measures to correct false testimony that he knew to be false. MRPC 3.3. The instruction given by the court explained that Welch's testimony that she had previously spoken to defense counsel regarding what she testified to at trial was either the result of confusion or of "not being truthful." Defendant has not established that the instruction to the jury, which was supported by undisputed facts, constituted plain error affecting defendant's substantial rights.

Defendant next contends that the trial court erred by finding a prosecution witness unavailable under MRE 804 and allowing the witness' preliminary examination testimony to be read to the jury. Although defendant objected to the use of the witness' preliminary examination testimony, defendant did not offer a specific objection. A defendant must challenge the admission of evidence on the same ground specified at trial, *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987) and, therefore, this issue is unpreserved.

Our Supreme Court has stated that, to avoid forfeiture of an issue under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear and obvious, and 3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the proceedings, and it is the defendant who bears the burden of persuasion with respect to prejudice. *Id.* Moreover, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or where an error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" independent of the defendant's innocence. *Id.* Therefore, this Court must first review the record to determine whether any error occurred.

Under MRE 804(b)(1), the prosecution may present at trial the transcribed testimony of a witness at the preliminary examination if the witness is unavailable pursuant to MRE 804(a)(5), which provides:

"Unavailability as a witness" includes situations in which the declarant –

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is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

Whether due diligence is demonstrated depends on the facts and circumstances of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Due diligence requires the prosecutor to make good faith efforts to locate witnesses and secure their testimony, regardless of whether greater efforts would have been successful. *Id.* at 684. When the declarant is unavailable and due diligence has been shown, the declarant's former testimony is admissible if the adverse party had a similar motive or opportunity to cross-examine or otherwise develop the declarant's former testimony. MRE 804(b)(1).

Here, the prosecution noted at the beginning of trial that the trial would last less than a day and that one of its three witnesses had telephoned the court indicating that her car was stuck

in the snow and she was having difficulty getting to court because of the severe snowstorm. The prosecutor sent a detective to the witness' house, but by the time the detective arrived the witness had apparently attempted to get to court through other means. The prosecutor noted that the witness was subpoenaed and was in court for jury selection on a previous day. The trial court concluded that the witness was unavailable for the one-day trial and that the witness' prior recorded testimony could be admitted. Under the circumstances presented, we find no abuse of discretion in the trial court's finding that the witness was unavailable to testify. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Defendant also contends that he was denied a fair trial by the improper prosecutorial comments. Defendant did not object to the allegedly improper comments. Unpreserved issues are reviewed for plain error that affected substantial rights. *People v Rodriguez*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 208445, rel'd 4/26/02), slip op p 10. We have reviewed the allegedly improper comments and conclude that the comments were either not improper or could have been cured by a timely objection. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Thus, we find no plain error affecting substantial rights.

Last, defendant argues that the cumulative effect of the errors alleged previously denied him a fair trial. Having found no error of consequence, we disagree. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Christopher M. Murray  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell