

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

J-VON D. BYNUM,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 248095

Wayne Circuit Court

LC No. 02-014334-01

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 110a(2), unlawfully driving away a motor vehicle, MCL 750.413, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

The prosecutor's theory of the case was that defendant and two others forced their way into an elderly man's home in Detroit, that defendant took money from the victim's wallet then struck him on the head with a gun, and that the three then ransacked the house, taking several items, then drove away in the victim's car. The offenders ended up in a serious accident with the victim's car, resulting in a fatality. In the hospital after the accident, defendant implicated himself in the home invasion in a statement to a police officer, and further admitted that a gun was involved.

Appellate counsel argues that the trial court abused its discretion in denying defendant's motion for appointment of substitute defense counsel, and in denying a motion for a mistrial. Defendant, in his brief in propria persona, adds the assertion that trial counsel was constitutionally ineffective.

II. SUBSTITUTION OF COUNSEL

A. Standard of Review

A trial court's decision on a motion to substitute defense counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Substitution 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). "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.*

B. Analysis

Appellate counsel states that trial counsel's laxity in obtaining hospital records constituted a legitimate difference of opinion regarding a fundamental trial tactic, and argues that those records would have better allowed both the court and the jury to understand the conditions under which defendant made his statement to the police officer.

This argument does not bring to light a disagreement, however. Trial counsel reported that he had subpoenaed the records in question, but that the hospital had "some sort of breakdown" and could not produce them. Defendant does not dispute this account, and trial counsel did indeed cross-examine the police witness who took defendant's statement over defendant's condition at the time. Appellate counsel fails to show any difference of opinion on a fundamental trial tactic and as a result, appellate counsel fails to show that the court abused its discretion in declining to order substitution of trial counsel on the morning of trial.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Concerning the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Defendant did not move for a new trial or a *Ginther*¹ hearing below; thus, this Court's review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

B. Analysis

Defendant continues the argument that defense counsel performed deficiently for failure to obtain his hospital records. However, defendant offers no reason to suppose that the court or prosecutor would have had better success in causing the hospital to find lost records than defense counsel had with his own subpoena. Defendant's speculation in this regard does not support a claim of ineffective assistance. Defendant fails to show that defense counsel erred in the matter, or that the proceedings were fundamentally unfair. *Messenger, supra.*

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant also contends that defense counsel had failed to consult with him. Defendant cites authority for the proposition that failure to investigate and present favorable witnesses can constitute ineffective assistance, then argues that counsel's failure to obtain and introduce a photograph of the deceased denied him a fair trial. Defendant implies that production of a photograph of the deceased would have encouraged the jury to consider that the deceased, not defendant, participated in the home invasion. However, that similarity in weight and height was attested to and described at trial. Defendant's plain statement to the police putting himself among the perpetrators of the home invasion shows this argument to be a strained one. Defendant has failed to show attorney error that caused him prejudice. *Messenger, supra*.

IV. MISTRIAL

A. Standard of Review

Trial counsel moved for a mistrial after many of the details of the fatal car accident had come to the jury's attention. This Court reviews a lower court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted).

B. Analysis

Before trial, the understanding of the trial court and the parties was that few of the details of the accident would be brought out. The trial court acknowledged, however, that things might change as trial progressed. Then, on the first day of trial, the complainant testified that the police called him to report, "we found your car . . . one dead, two in the hospital." The court promptly advised the witness not to volunteer information. On the second day, the prosecutor, recalling that one of the charges was unlawfully driving away, stated an intention to bring out some of the circumstances of the accident. The trial court allowed her to do so, but stated that this should not include mention that someone died in the accident.

An officer with the Detroit Police described "a vehicle flipped over on 96 and 'Fullerton,' with four males in the car, and identified defendant as the driver. A fire fighter described finding defendant in a burning vehicle. Defense counsel himself finally elicited that someone had died in the accident.

That defendant was found situated as the driver of the car that was stolen on the occasion in question obviously bore directly on the question of defendant's participation in the crimes charged, especially unlawfully driving away. That the accident involved a fatality was part of the overall context, and thus evidence to that effect was not a prejudicial irregularity. A jury is entitled to learn the complete story of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Moreover, as the trial court pointed out, the dramatic and tragic details of the accident had the potential to evoke sympathy from the jury, which could have worked to defendant's advantage. For these reasons, defendant fails to show that the trial court abused its discretion in denying the motion for a mistrial.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette