

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY DAVID STUCKEY,

Defendant-Appellant.

UNPUBLISHED

April 10, 2008

No. 274235

Shiawassee Circuit Court

LC No. 06-003593-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and carrying a concealed weapon, MCL 750.227. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 15 to 45 years for the robbery conviction, and 5 to 25 years for the CCW conviction. He appeals as of right. We affirm defendant's convictions, vacate the portion of the judgment ordering defendant to pay \$1,700 in attorney fees, and remand for consideration of defendant's ability to pay attorney fees.

I. Basic Facts

The complainant, an attorney who operates a law office out of his home, testified that he and defendant became friends in 2003, and were romantically involved in the summer of 2005. In October 2005, defendant asked to move in with the complainant, and the complainant explained that they needed to wait until the completion of his new office. The complainant did not see defendant again until November 22, 2005. On that day, at about 9:00 p.m., defendant rang the doorbell and the complainant let him inside for a visit. Shortly after coming into the house and cordially chatting, defendant pulled out a pistol, pointed it at the complainant, and demanded the money in the complainant's safe. The complainant responded that he had no money in the house, gave defendant a lockbox, and defendant removed \$5 of the \$6 that was inside. Defendant then demanded the money in the complainant's wallet, and the complainant gave defendant about \$50. Defendant then briefly searched the house. After the complainant refused defendant's request for a cigarette, defendant fled. The complainant indicated that throughout the incident, defendant threatened to shoot or hurt him. The complainant contacted the police and defendant was subsequently arrested.

The complainant indicated that, after defendant's arrest, defendant called him and told him to expect a letter of explanation. In December 2005, the complainant received a letter from

defendant. In the letter, defendant expressed his feelings for the complainant, claimed that his actions were foolish, explained that he was high on crack cocaine and made bad decisions, and sought the complainant's forgiveness and assistance in avoiding conviction. Defendant also claimed that the pistol was not real, but a Chinese trinket lighter that he had purchased at a restaurant. The complainant testified that he subsequently went to the restaurant and saw the trinket lighters there, but defendant's pistol was completely dissimilar and was real. The police viewed and obtained a picture of the trinket lighter, which was inconsistent with the complainant's description of the object that defendant used during the robbery.

The defense admitted that defendant went to the complainant's house and requested money, but asserted that defendant was under duress at the time and that the pistol was not real. Defendant's roommate testified that defendant owed money to a man, and that he had observed the man put a gun to defendant's head and demand payment. The man allegedly punched defendant in the face, said that he "know[s] where [defendant's] daughter lives," and gave defendant a "couple of days" to produce the money. The witness was unsure of the date of this incident, but estimated that it occurred within a week of the robbery.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his conviction for CCW. Despite framing this as a sufficiency of the evidence claim, defendant substantively argues that it was inconsistent for the jury to convict him of CCW, while convicting him of armed robbery under the theory that he was armed with an article fashioned as a dangerous weapon, and acquitting him of additional charges of felony-firearm, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f.¹

Our Supreme Court has held that juries may return inconsistent verdicts. *People v Lewis*, 415 Mich 443, 448; 453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). "A jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original). Inconsistent verdicts may require reversal when there is evidence, beyond the inconsistent verdict itself, "that the jury was confused, did not understand the instructions, or did not know what it was doing." *People v McKinley*, 168 Mich

¹ We note that, viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational jury to conclude that defendant was carrying a concealed weapon. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In order to establish the offense of carrying a concealed weapon, the prosecution must prove that: (1) the defendant carried a gun and (2) the gun was concealed on or about his person. MCL 750.227; *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979). The complainant testified that defendant entered his house and subsequently pointed a silver pistol at him. Despite the defense's claim that the gun was a toy or a lighter, the complainant testified that he was certain that the object was a "real gun." On cross-examination, the complainant explained that he believed the gun was real because of its appearance and defendant's handling of the gun. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

App 496, 510; 425 NW2d 460 (1988). See also *Lewis, supra* at 450 n 9. Conversely, when a jury chooses not to convict because it has chosen to be lenient, the defendant “has no cause for complaint.” *Lewis, supra* at 453. In this case, defendant has failed to show that jury confusion created his inconsistent verdict.

During deliberations, the jury sent a note that stated:

We are confused as to the definition of a concealed weapon. The notes refer to a pistol, the charges refer to a weapon.

After an in-chambers conference, the trial court stated that the jury appeared to be confused regarding the terminology used in the CCW charge, proposed to ask the jury if that was the confusion, and, if so, to reread the CCW count contained in the information. The parties agreed, and defense counsel indicated that he had no other requests or a different interpretation of the note.

After the jury was present, the trial court queried the jury foreperson to verify the question being posed. As a result, and at the request of the jury foreperson, the trial court twice read to the jury from the Information, Count III, pertaining to the charge of carrying a concealed weapon. The jury acknowledged that the trial court answered the question. In addition, the trial court’s answer was lucid, consistent with the jury instructions, and agreed on by defendant. The court also invited the jury to ask additional questions if necessary. On this record, the alleged inconsistency does not require reversal.

III. Adjournment

Defendant further argues that the trial court abused its discretion when it denied his request for an adjournment of trial after he was “surprised” by the prosecutor’s “tactic” of requesting to impeach his notice of alibi. We disagree.

A. Background

Approximately three weeks before trial, defendant filed a notice of alibi, claiming that he was elsewhere at the time of the robbery. On the third day of trial, after the close of the prosecution’s case, defendant requested an instruction on the defense of duress. The prosecutor objected, arguing that the request was untimely, and that although defendant had filed an untimely notice of alibi, the prosecution waived objection and agreed to proceed on that defense. He further argued that the theory of defense had evolved throughout trial from “it’s not a gun” to a defense of duress, with a defense witness planning to testify that defendant had been threatened. The prosecutor also argued that a threat of future injury is insufficient to support a defense of duress. After a lengthy discussion, the trial court noted that defendant was representing himself and allowed the defense of duress. Defendant then requested “another continuance,” noting that he had not had much sleep because he was preparing for trial. The trial court denied the request, noting that it had “bent over backwards” to convenience defendant, and that the request was “unreasonable” “considering the continuances that the Court has already granted.”

Thereafter, the prosecutor requested to impeach defendant with his alibi notice. Relying on *People v McCray*, 245 Mich App 631, 634-637; 630 NW2d 633 (2001), the court granted the prosecutor's request. Defendant then requested a recess, which the trial court granted. Following the recess, standby counsel advised the court that defendant had indicated that he "is just unprepared to proceed." Standby counsel indicated that he had explained to defendant that if he were acting as defense counsel, he would advise him not to testify and, in closing argument, rely on his reasons for committing the crime that are contained in the letter, which had already been admitted in evidence. Defendant then reiterated to the court that he was unprepared, was unsure how to proceed, and needed "some time to think now." Defendant noted that he was not expecting to be impeached with his alibi notice. In denying defendant's motion for an adjournment, the court noted that, throughout the proceedings, it had impressed upon defendant the seriousness of the charges, advised him that he is entitled to be represented by counsel, and asked if he wanted standby counsel to represent him. Defendant responded that he would like standby counsel to represent him, but he did not believe that counsel was ready to proceed. The court noted that it was "not going to get involved in any further gamesmanship," and directed defendant to make a decision about representation. At defendant's father's request, the court allowed defendant and his father to confer. Defendant then indicated that he wanted counsel to represent him, and subsequently stated that he was choosing not to testify. Defense counsel then called and questioned the defense witness and, after a recess, gave closing argument.

B. Standard of Review

"No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown" MCL 768.2. A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider*, *supra* at 421-422.

C. Analysis

We find no abuse of discretion. Defendant claimed that he needed more time to address the prosecutor's unexpected request to impeach him with his notice of alibi. However, when defendant, who was representing himself, completely altered his defense at trial to a claim that he robbed the complainant while under duress, he should have recognized that it was contrary to his own alibi statement made only three weeks before trial. It was unreasonable to expect that such a deviation would not be raised during trial. While defendant noted that he was representing himself, the record shows that the trial court apprised defendant of the dangers and disadvantages of self-representation, that defendant had access to preparation materials for trial, and defendant had the opportunity to consult with standby counsel. Defendant must accept the consequences of representing himself. *People v Kevorkian*, 248 Mich App 373, 422, 425; 639 NW2d 291 (2001).

Although defendant opined that standby counsel was not prepared to proceed, counsel did not indicate that he was unprepared. Counsel stated that he had been present throughout the

proceedings and, thus, was fully aware of the facts of the case, which were not overly complex. Further, counsel suggested a viable strategy, stating that he had advised defendant that he should not testify to avoid being impeached, and that the defense could rely on defendant's letter because it had already been admitted and contained defendant's reasons for committing the crime, which supported the defense of duress. After counsel took over defendant's representation, he questioned the defense witness and argued the defense of duress in closing argument. Defendant has not indicated what counsel would have done differently had an adjournment been granted.

In sum, apart from making a general statement that he needed more time, defendant has not explained on appeal how further preparation would have aided his case and he makes no attempt to explain how he was prejudiced by the denial of his request. Even if defendant had been afforded the opportunity to confer with standby counsel overnight, the notice of alibi would have still been admissible. *McCray, supra* at 634-637. Thus, defendant was left with the option of testifying and being impeached or invoking his right not to testify. Standby counsel noted on the record how he had advised defendant, and defendant does not explain on appeal what he would have done differently had an adjournment been granted. Under these circumstances, the trial court did not abuse its discretion by denying defendant's request for an adjournment.

IV. Sentence Credit

Defendant also argues that, pursuant to MCL 769.11b, the trial court erred by failing to award him credit against his new minimum sentence for the 324 days he served in jail before his sentence for the instant crime, which he committed while on parole. We disagree. Whether a defendant is entitled to credit for time served is a question of law that this Court reviews de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2). [*People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004) (citations omitted).]

See also *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006) ("a parole detainee convicted of a new offense is entitled to have jail credit applied *exclusively* to the sentence from which parole was granted") (emphasis added).

On February 20, 2004, defendant was sentenced to 19 months to four years for a prior larceny in a building conviction. On May 5, 2005, defendant was granted a two-year parole term. Defendant was on parole when he committed the present offense on November 22, 2005. Defendant was convicted in the instant case on August 24, 2006, and sentenced on October 13, 2006. At the sentencing hearing, defendant acknowledged that he was on parole at the time he committed the current offenses. Accordingly, when serving the 324 days in jail before his

sentence for the instant crime, defendant was continuing to serve the remaining portion of his sentence for the prior offense. Consequently, defendant is not entitled to credit against his new minimum sentence.

Although defendant acknowledges that existing authority holds that credit may not be awarded for time served for an offense committed while on parole, he argues that the credit he seeks is constitutionally required as a matter of due process, equal protection, and his double jeopardy right not to be subjected to more punishment than the Legislature intended. US Const, Ams V, XIV; Const 1963, art 1, §§ 2, 15, and 17. Because defendant did not raise this constitutional issue below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

In *People v Stewart*, 203 Mich App 432, 433-434; 513 NW2d 147 (1994), this Court stated that, under MCL 791.238, the fact that parolees are precluded from receiving credit for time served while held on parole detainer and, therefore, are treated differently than persons in jail awaiting trial, is not unconstitutionally discriminatory. The Court held that the statute does not violate rights of equal protection and due process, US Const, Am XIV, § 1; Const 1963, art 1, §§ 2, 17, or amount to cruel or unusual punishment, US Const, Am VIII; Const 1963, art 1, § 16. *Stewart*, *supra* at 434.

Defendant's double jeopardy argument is based on the inaccurate understanding that because he had already served the minimum portion of his prior sentence for the paroled offense, there is no sentence against which to credit the 324 days that he served in jail awaiting trial for the new offense. Even though defendant had served the *minimum* portion of his prior sentence, he was still liable to serve out the unexpired portion of his *maximum* sentence for the paroled offense. *Seiders*, *supra* at 706. It is against that sentence that defendant receives credit for his time served. *Id.*

Consequently, defendant has not demonstrated a plain constitutional error.

V. Attorney Fees

Defendant last's argument is that that the trial court erroneously ordered him to pay \$1,700 in attorney fees without inquiring into his current or future ability to pay. Because defendant failed to challenge the imposition of attorney fees below, we review this unpreserved claim for plain error affecting substantial rights. *Carines*, *supra* at 752-753, 763-764.

In *People v Dunbar*, 264 Mich App 240, 251-252; 690 NW2d 476 (2004), the defendant complained that the trial court failed to consider his ability to pay his attorney fees before entering the order imposing those costs. The *Dunbar* Court explained:

The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, the court does need to provide some indication of consideration, such as noting that it reviewed

the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id.* at 254-255 (internal citations omitted; emphasis in original).]

Because defendant failed to challenge the imposition of attorney fees, the sentencing court was not required to make formal findings of fact regarding defendant's financial situation. However, the sentencing court failed to indicate whether it considered defendant's ability to pay. At the sentencing hearing, the court did not refer to the employment and financial sections of defendant's presentence investigation report and made no mention of defendant's potential future ability to pay. Rather, the trial court merely imposed the fees without any discussion. We therefore vacate the portion of the judgment of sentence ordering defendant to pay \$1,700 in attorney fees and remand for consideration of defendant's present and future financial circumstances. *Id.* at 255-256. The sentencing court has the discretion to base its decision to award attorney fees on record evidence only and need not conduct a formal evidentiary hearing. *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto