

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD DEAN STEIN,

Defendant-Appellant.

UNPUBLISHED

November 18, 2010

No. 293646

Calhoun Circuit Court

LC No. 2009-000876-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of armed robbery, MC 750.529, assault with a dangerous weapon, MCL 750.82, and unlawful imprisonment, MCL 750.349b. For the reasons set forth below, we affirm.

I. FACTS

Maureen Jenkins, who was 84 years old at the time of trial, testified that on February 1, 2009, defendant appeared at her front door. Ms. Jenkins knew defendant for approximately three years because he had performed various odd jobs around her house. Though she had not seen defendant in several months, she allowed defendant inside. After a brief conversation, defendant began to repeatedly ask Ms. Jenkins to loan him money. Ms. Jenkins testified that she had given defendant money in the past because he had refused to leave her house until she did so. On this occasion, Ms. Jenkins refused to give defendant money and told him that she knew he could not pay her back because he did not have a job. After Ms. Jenkins declined to give defendant money, defendant stood up and put on a pair of gloves, but did not leave the house.

Ms. Jenkins went to the kitchen to call her daughter so that she might persuade defendant to leave. However, defendant twice took the telephone receiver from Ms. Jenkins and hung it up. He then began to push her toward a hallway. When Ms. Jenkins held onto a doorway, defendant pried her loose and pushed her toward her bedroom. In the bedroom, defendant took Ms. Jenkins's new digital camera and put it in his pocket. He then opened one of her dresser drawers and attempted to open two file cabinet drawers, but they were locked. Defendant picked up a pair of scissors from the dresser and waved them at Ms. Jenkins, then picked up a paring knife and pointed it at her. While holding the knife, defendant pushed Ms. Jenkins onto the bed, leaned over her, and placed his arm against her throat. Defendant began to push harder and harder on his arm and then suddenly moved away and grabbed Ms. Jenkins's purse from the

floor. Defendant took approximately \$200 from the purse and then left the house. Ms. Jenkins locked her door and called 911 and defendant was later arrested by Battle Creek police officers.

II. ANALYSIS

A. Substitution of Counsel

Defendant contends that the trial court erred when it denied his request for new appointed counsel. “A trial court’s decision regarding substitution of counsel will not be disturbed absent an abuse of discretion.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). As this Court further explained in *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991):

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972).

Defendant initially asked the district court to appoint a new attorney on the day of his preliminary examination and the judge denied the request, finding nothing in the record to justify a change. On appeal, defendant complains that the district court erred when it denied the motion, but he fails to set forth a legal or factual argument to support his claim. Because defendant does not explain why, at that procedural juncture, there was good cause for substitution of counsel, and how he was prejudiced by the district court’s denial, defendant has waived this issue. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

On the day before trial in the circuit court, defendant again moved for the appointment of new counsel. Defendant fails to explain why he waited until the day before trial to bring the motion in the trial court. It is clear that he could have pursued the matter during the months between his preliminary examination and the date of trial, as evidence by his decision to independently file a claim against counsel with the attorney grievance commission—a claim that was rejected as without substance. Though defendant complained that he was not happy with defense counsel’s representation, he did not articulate his reasons for seeking new counsel and did not establish good cause for the court to appoint a new attorney to the case on the eve of trial.

We hold that the trial court did not abuse its discretion when it denied defendant’s motion. A substitution of defense attorneys the day before trial would have disrupted the judicial process and would have required an adjournment for new counsel to examine evidence, interview witnesses, and conduct other trial preparation. Further, defendant failed to establish that he and his attorney developed a legitimate difference of opinion “with regard to a fundamental trial tactic.” *Mack*, 190 Mich App at 14. Defendant also failed to explain how he and defense counsel were at odds over the manner in which his defense should be conducted.

Further, defendant failed to specify materials he allegedly failed to receive from defense counsel or in what manner his defense would be compromised by counsel's representation.¹ Moreover, defendant's failure to respond to his attorney's request for a list of potential witnesses did not justify a change of counsel. For these reasons, defendant is not entitled to relief on this issue.

B. Conduct of the Prosecutor

For the first time on appeal, defendant claims that he was prejudiced by the prosecutor's references to his poverty and lack of employment.² Our Supreme Court has held that "evidence of a defendant's financial condition, because it ordinarily has limited probative value and usually goes to a collateral issue, will often distract rather than aid the jury." *People v Henderson*, 408 Mich 56, 65; 289 NW2d 376 (1980). The Court further explained, "[e]vidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive." *Id.* at 66.

Were we to hold that the prosecutor improperly questioned defendant about his financial condition or that the prosecutor erroneously relied on this evidence during his closing argument,

¹ Defendant complained that he did not receive some discovery materials, but defense counsel later stated for the record that the only items defendant did not receive were the 911 tape, which defense counsel could not copy, and a DVD of photos of Ms. Jenkins's house which counsel also could not copy but, in counsel's opinion, defendant did not need it because he was familiar with Ms. Jenkins's house from doing work for her over the years. Defendant does not challenge this information on appeal.

² This Court reviews unpreserved claims of prosecutorial misconduct under the plain error rule. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). To establish plain error, a defendant must show that an error occurred, the error was plain, and the plain error affected the defendant's rights, i.e., caused prejudice that affected the outcome of the proceedings. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* As this Court further explained in *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005):

When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. [*Callon*, 256 Mich App at 330]. Further, the propriety of a prosecutor's remarks depends on the particular facts of each case. *Id.* Prosecutors are free to argue the evidence and any reasonable inferences arising from the evidence, *id.*, and "need not confine argument to the 'blandest of all possible terms'" *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

defendant is not entitled to relief on this issue where a cautionary instruction could have cured any potential prejudice. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Further, defendant cannot show that the prosecutor's conduct actually prejudiced him under the plain error rule. Before the prosecutor questioned defendant, evidence in the record already established that defendant lacked steady work and that he had no permanent residence. On the basis of that evidence, the jury could have easily concluded that defendant lacked financial stability without the prosecutor's additional questioning and argument. Moreover, the evidence establishing defendant's guilt was clear and consistent, and defendant cannot show that defendant would have been acquitted but for the prosecutor's reliance on evidence of his financial condition. For the same reason, defendant cannot show that the result of the proceedings would have been different if counsel made a timely objection.³ Accordingly, we reject defendant's request for a new trial on this basis.

C. Double Jeopardy

Defendant maintains that his convictions for both armed robbery and felonious assault violate the double jeopardy clause.⁴ A double jeopardy challenge generally presents a question of constitutional law that this Court reviews de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). This Court reviews unpreserved constitutional errors for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 774; 597 NW2d 130 (1999).

Defendant claims that his argument is supported by *People v Wilder*, 485 Mich 35; 780 NW2d 265 (2010). In *Wilder*, our Supreme Court explained the legal question in the case as follows:

We granted leave to appeal in this case to consider the limited issue of whether third-degree home invasion, MCL 750.110a(4), is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2). We hold that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion because all the elements required to convict defendant of third-degree home invasion under that subdivision are subsumed within the elements that would have been necessary to convict defendant of first-degree home invasion. [*Id.* at 37.]

³ To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

⁴ "Under the Double Jeopardy Clause of the Michigan Constitution and United States Constitution, an accused may not be put in jeopardy twice for the same offense. Const 1963, art 1, § 15; US Const, Am V." *People v Grace*, 258 Mich App 274, 278; 671 NW2d 554 (2003).

Thus, unlike the crimes of armed robbery and felonious assault, the Court in *Wilder* considered whether “degreed” offenses of a single crime, home invasion, may be considered separate crimes for purposes of double jeopardy. *Id.* Because this case involves separate, distinct crimes and each requires proof of an element that the other does not, *Wilder* has no bearing on this case. As the prosecutor points out, this Court specifically ruled in *People v Chambers*, 277 Mich App 1, 9; 742 NW2d 610 (2007) that convictions for both armed robbery and felonious assault do not violate double jeopardy protections. Accordingly, defendant’s argument is without merit.

D. Standard 4 Brief

We also reject defendant’s assertion that the prosecutor improperly referred to defendant’s prior conviction and described him in disapproving terms to the jury.⁵ The record reflects that the prosecutor argued the facts placed in evidence and urged the jury to convict defendant based on those facts. It is well-settled that prosecutors are allowed to argue all reasonable inferences that arise from the evidence and need not confine the argument to “the ‘blandest of all possible terms.’” *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Moreover, the prosecutor did not appeal to the jury’s sense of civic duty, but merely asserted that, based on the evidence, defendant was the person who robbed Ms. Jenkins and he should be convicted of the charges against him.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

⁵ Defendant’s claim is for prosecutorial misconduct. As noted, we review unpreserved claims of prosecutorial misconduct for plain error that affected the defendant’s substantial rights. *Ackerman*, 257 Mich App 448; *Callon*, 256 Mich App at 329.