

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL HAROLD CATALDO,

Defendant-Appellant.

UNPUBLISHED

November 17, 2000

No. 219216

Osceola Circuit Court

LC No. 97-002749-FH

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of forging a personal check, MCL 750.248; MSA 28.445. The trial court sentenced defendant to fifteen to forty years' imprisonment as a fourth habitual felony offender, MCL 769.12; MSA 28.1084, after initially sentencing him to seven to fourteen years on the forgery count, a sentence which was subsumed into the habitual offender sentence. Defendant now appeals as of right. We affirm.

At trial, evidence was presented that a longtime customer of defendant, an elderly stroke victim, had defendant fill in the amounts on checks he used to pay defendant for gasoline he purchased at his service station. One day, while making a gas purchase, the customer happened to mention to defendant that he had over \$1,200 in his checking account. Defendant, rather than inserting the authorized amount of \$25.40, the amount of the purchase, on the check, filled in the amount as \$1,225.40. The check created an overdraft in customer's account. In his testimony, defendant denied that this was what happened, insisting that the customer had owed him this amount for a transmission repair. The prosecution, however, both in cross-examining defendant and through the testimony of investigating witnesses, pointed out numerous inconsistencies in defendant's story. On the evidence presented, a reasonable trier of fact could have concluded that the invoice defendant presented for the alleged transmission job was itself a forgery and that no such repair was ever performed.

Defendant first contends that the trial court erred by not removing his attorney from the case before trial, alleging that she was not prepared to try the case. However, the record shows that the lack of preparation was not the attorney's fault, but that of defendant, who had failed to meet with his attorney to prepare for trial despite her repeated and persistent efforts to get him to do so. Moreover, at the hearing on the attorney's motion to withdraw, defendant himself asked that her motion be denied and that she continue to represent him. By doing so, he waived any

objection to having her serve as his attorney, and his waiver precludes him from raising this issue on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant also contends that the prosecutor committed misconduct by aggressively cross-examining him, first as to whether he had “dummied up” the transmission repair invoice and second as to why he had closed his service station. Defendant also alleges misconduct in the prosecutor's closing argument comment regarding the failure of the defense to present corroborating witnesses it had previously indicated would testify.

We initially note that the defense objected only to the cross-examination concerning the reason the service station closed, thereby failing to preserve the other instances of alleged prosecutorial misconduct. Reversal based on these unpreserved instances is accordingly warranted only if defendant is actually innocent or if error seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because there was ample evidence from which the jury could have concluded that defendant is guilty, we cannot say that he is actually innocent. Nor can we say that the prosecutor's conduct seriously affected the fairness, integrity or public reputation of the trial. Indeed, we believe his conduct was not improper. The aggressive questions about “dummying up” the invoice were not unfair, given the many anomalies with the invoice that raised questions about its authenticity. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Comments on the failure of a defendant who testifies on his own behalf to produce corroborating witnesses are permitted. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993).

Where the issue of prosecutorial misconduct is preserved by timely objection, the standard is whether the misconduct deprived defendant of a fair and impartial trial. *People v Rice*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). Viewed by this standard, there was no error when the trial judge allowed the prosecutor to cross-examine defendant as to whether he had sold his service station to raise funds to repay his brother his bond money. Defendant himself had raised the subject by testifying that he had closed the service station due to police harassment in the form of a number of visits by officers investigating this case. His credibility and the credibility of the prosecution's case were at issue, given that his testimony as to the number of visits to the station by officers was seriously at odds with the testimony of prosecution witnesses. The prosecutor was entitled to try to resolve the credibility issue by exploring whether the testimony was truthful. We cannot say that this questioning denied defendant a fair trial.

Defendant next alleges ineffective assistance of counsel, because his attorney did not object to the alleged instances of prosecutorial misconduct (except for that regarding the service station sale) set out above. Because the prosecutor's comments were not improper, it follows that defense counsel was not ineffective in failing to object to them. Defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant, in his brief in propria persona, raises other areas where he believes his trial counsel was ineffective, claiming she failed to subpoena endorsed witnesses or object to prosecutorial intimidation of a potential witness. For two reasons, these objections must fail. First, defendant points to nothing in the record substantiating the incidents he claims occurred,

relying instead on unsubstantiated statements in his brief. Where no motion for a new trial is made or evidentiary hearing conducted in the trial court on an ineffective assistance of counsel claim, this Court is limited to a review of the existing record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Moreover, at least as far as the failure to subpoena witnesses is concerned, the record makes clear that any deficiency resulted from defendant's failure to cooperate with his attorney, not from his attorney's inaction.

Defendant also alleges additional instances of prosecutorial misconduct, claiming the prosecutor intimidated a key witness. The record, however, is devoid of any evidence supporting this claim. This Court cannot consider a claim of error based on alleged facts outside the record. *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989).

Defendant next asserts he was denied counsel at critical stages of the proceedings. The record shows, however, not that he was denied counsel, but that the court's appointment of counsel was temporarily revoked when the trial court determined defendant to be ineligible for appointed counsel. The court again appointed counsel before plea negotiations reached a critical stage, and long before trial. There is nothing in the record to indicate the trial court was mistaken in its finding of fact as to defendant's financial ineligibility for appointed counsel, nor is there anything in the record to indicate defendant lacked counsel at any critical stage of proceedings.

Defendant also claims the prosecutor failed to honor a written plea agreement. The record actually shows that the exact opposite occurred. The prosecutor offered defendant a plea agreement. Defendant chose not to accept.

Finally, defendant claims that he lacked effective assistance of counsel at sentencing and that his sentence was excessive. This claim lacks merit. The trial court carefully considered the accuracy of the presentence report and objections to it at the sentencing hearing, took into account a correction as to defendant's prior criminal record, and took pains to ensure that the correct number of convictions had been ascertained before sentencing defendant as an habitual offender. Imposing sentence, the court found that defendant had an extensive record, that he was a poor prospect for rehabilitation based on his history, and that defendant's crime amounted to fraud on an elderly and susceptible victim who placed confidence in him. Accordingly, defendant's sentence was not disproportionate. See *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

As for assistance of counsel, we have noted that earlier difficulties in the attorney-client relationship were defendant's fault, not his attorney's. The record indicates that defendant continued his uncooperative attitude toward counsel through the sentencing stage of proceedings. Nevertheless, his attorney did an effective job of representation, pointing out an error in the pre-sentencing report, and asking the court to exercise leniency toward defendant because of his family support and his prospects for rehabilitation.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin