

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARCO WARREN,

Defendant-Appellant.

UNPUBLISHED

December 18, 2001

No. 223542

Wayne Circuit Court

LC No. 99-002360

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm, MCL 750.84, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

First, defendant argues on appeal that the trial court erroneously instructed the jury on the specific intent element of armed robbery, constituting plain error requiring reversal. We disagree. Jury instructions are reviewed on appeal for plain error unless the issue has been preserved by an objection. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Defendant did not object to the jury instructions as given; rather, defendant stated on the record that he was satisfied with the jury instructions. Under *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000), because defendant expressed satisfaction with how the jury was instructed, defendant has waived this issue on appeal and may not seek appellate review.¹ Further, the armed robbery jury instruction, read as a whole, adequately informed the jury that defendant must have intended to permanently deprive the owner of property and, thus, sufficiently protected defendant's rights. See *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant next argues that the trial court erred in permitting witness testimony to be read back to the jury and by failing to record the reading back of the testimony to the jury. We disagree. Because defendant failed to object or raise these issues in the trial court, the issues are

¹ Failure to object qualifies as a forfeiture and is reviewed for plain error, while affirmatively approving the instructions constitutes a waiver and operates to extinguish any error. *Carter*, *supra* at 215-216.

forfeited unless plain error is established. See *Carter, supra* at 215-216; *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). To establish plain error, the error must have occurred, been plain, and affected the defendant's substantial rights, i.e., was prejudicial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). However, even if the requirements are met, reversal is only warranted when the plain error resulted in the conviction of an innocent defendant or when such error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763.

Whether to allow a jury to rehear testimony rests within the sound discretion of the trial court. MCR 6.414(H); *Carter, supra* at 218. "[T]he court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." MCR 6.414(H). In this case, the record demonstrates that the trial court did not abuse its discretion by honoring the reasonable request of the jury, after first having a discussion with trial counsel and questioning the jury regarding the specific testimony requested and the reason for the request. Therefore, the issue is forfeited.

Further, defendant fails to demonstrate how the failure to record the reading back of testimony was plain error requiring reversal. Defendant fails to cite apposite legal authority for his argument that the trial court was required to record the reading back of testimony and we will not search for such authority. See *People v Jensen (On Remand)*, 231 Mich App 439, 457; 586 NW2d 748 (1998). Moreover, defendant has failed to show that he was prejudiced by the court's alleged error. In fact, defendant was present during the reading back of the testimony and did not object to any improprieties or inaccuracies. Accordingly, defendant forfeited the claim of error. See *Carines, supra* at 772.

Next, defendant argues that he was denied a fair trial because the prosecutor improperly vouched for the credibility of a witness and testified to matters of personal knowledge during closing argument. We disagree. Defendant did not object to the remarks in the trial court; therefore, appellate review is precluded unless a timely objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

When reviewing allegations of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Furthermore, prosecutors may not make statements of fact to the jury that are not supported by the evidence. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). However, prosecutors are free to argue the evidence and all reasonable inferences as they relate to the theory of the case. *Bahoda, supra* at 282.

After examining the prosecutor's remarks in context, the allegedly improper comments were based on evidence produced at trial and were in rebuttal to defendant's theory that his prosecution was the result of a police conspiracy. The record is replete with suggestions and implications by defendant that he was arrested and forced to confess as part of a police conspiracy. Consequently, the contested remarks were an attempt to illustrate how incredible

defendant's conspiracy theory was in light of the evidence against him. See *Bahoda, supra* at 286-287. Furthermore, the prosecutor did not improperly vouch for a witness' credibility or convey that he had some personal knowledge of the investigation. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In sum, appellate review is precluded. See *Aldrich, supra*.

Finally, defendant argues that he was denied the effective assistance of counsel because of his counsel's failure to object to: (1) the specific intent instruction, (2) the trial court's failure to record the reading back of the witness' testimony, and (3) the prosecutor's alleged improper comments. Defendant also alleges ineffective assistance because his counsel failed to make an opening statement to assert a self-defense theory and failed to request a self-defense jury instruction. Because a *Ginther*² hearing was not conducted, this Court's review is limited to errors apparent on the record. See *Lee, supra* at 183.

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *Stanaway, supra* at 687-688. The defendant has to overcome the presumption that the challenged actions might be considered sound trial strategy. *People v Charles Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

As discussed above, the specific intent instruction sufficiently protected defendant's rights, the trial court properly responded to the jury's request for a read back of witness testimony, and the prosecutor did not commit misconduct; therefore, defendant's ineffective assistance of counsel claim premised on these arguments fails. Further, defendant's claim that his counsel was ineffective for failing to make an opening statement is without merit because whether to make an opening statement is a matter of trial strategy which this Court will not second-guess. See *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983). Similarly, defendant's claim that his counsel was ineffective for failing to request a self-defense instruction is unfounded because his counsel did request such instruction but was denied by the trial court as unsupported by the evidence. In sum, defendant has failed to demonstrate that his counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. See *Pickens, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).