

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME D. SIMPSON,

Defendant-Appellant.

---

UNPUBLISHED

January 22, 2002

No. 226142

Wayne Circuit Court

LC No. 99-002528

Before: K.F. Kelly, P.J., Hood and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of delivering less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), and one count of possession with intent to deliver less than fifty grams of heroin MCL 333.7401(2)(a)(iv). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 1-1/2 years to 20 years' imprisonment on each count. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred when it required police officers, who testified as prosecution witnesses, to locate Rodney Phillips, a corroborating defense witness.<sup>1</sup> Respecting that a trial judge enjoys wide discretion with regard to trial conduct, we thus review its decisions for an abuse of discretion. See *People v Sharbnaw*, 174 Mich App 94, 99; 435 NW2d 772 (1989) (quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988)).

Upon review of the record, we find that defendant's claim lacks merit. The trial court, on its own initiative, offered to appoint an investigator for defendant when his counsel expressed difficulty in locating defense witnesses. The trial court issued an order to appoint an investigator to assist defendant. More than thirty days before trial, the prosecution provided defendant with a list of all witnesses who might be called by the prosecution. This list also included the names of defendant's eventual defense witnesses. In response to defendant's request for assistance in procuring Phillips' attendance at trial, the trial court relied upon the express provisions of MCL 767.34, which provides that:

---

<sup>1</sup> Defendant cites no authority for this proposition. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for the claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

[a]ny circuit court or any court of record shall have the power to issue capiases, in the first instance, for any witness or witnesses in criminal cases, when it shall satisfactorily appear that such witness or witnesses are material and that there will be danger of the loss of their testimony.

In order to effectively respond to defendant's request to secure Phillips, the trial court had to act promptly because the prosecution, with two remaining witnesses, was near the end of its case-in-chief. By not responding quickly, defendant would have risked the definite loss of Phillips' testimony if the trial concluded.

The record further reflects the prosecution's compliance with the applicable provisions of the res gestae statute, MCL 767.40a, which provides in pertinent part that:

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. (See also *People v Burwick*, 450 Mich 281, 287-288; 537 NW2d 813 (1995).

In light of the court's express authority to issue capiases, the time limitations of the trial proceedings, the failure of defendant to provide authority for his position and the prosecution's compliance with the res gestae witness statute, we find no abuse of discretion.

Next, defendant contends that the trial court did not adequately inquire into Phillips' claim of police intimidation. The Sixth Amendment of the United States Constitution, as well as the Michigan Constitution, provide an accused the right to call witnesses in his defense. US Const, Am VI; Const 1963, art 1, § 20. This constitutional right mandates that witnesses for the defense must be called without intimidation. *People v Pena*, 383 Mich 402, 406; 175 NW2d 767 (1970). Any attempts by the prosecution to intimidate witnesses from testifying, if successful, may constitute a denial of a defendant's right to due process of law. *People v Hooper*, 157 Mich App 669, 675; 403 NW2d 605 (1987). Threats from law enforcement officers may be attributed to the prosecution. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). Considering the gravity of witness intimidation and potential constitutional implications, incumbent upon the trial court is to "immediately conduct an inquiry into the truthfulness of the allegation." *People v Johnson*, 46 Mich App 212, 224; 207 NW2d 914 (1973).

A review of the record reveals that the trial court conducted an inquiry, even though brief, into Phillips' allegation outside the presence of the jury. Furthermore, the record reflects that the trial court's questions were non-threatening. Moreover, Phillips had the benefit of appointed counsel. Although Phillips did not specifically assure the trial court that he was not intimidated, the trial court was nevertheless free to assess Phillips' credibility relative to his allegation of intimidation with regard to the circumstances surrounding his arrest for possession of narcotics and established record of a parole violation. Respecting the trial court's superior ability to assess the credibility and demeanor of witnesses brought before it, this Court affords the trial court due deference as regards those matters. See *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Defendant further contends that not only was Phillips intimidated from coming forward and accepting service of process to testify, but the court's examination coupled with Phillips' court appointed attorney's advice, intimidated Phillips thus prompting him to invoke his Fifth Amendment privilege against self-incrimination. We do not agree.

The Fifth Amendment states, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. A witness may invoke this exception to the government's power to compel testimony in a criminal, civil, administrative or legislative proceeding and elect to remain silent. *People v Cheatham*, 453 Mich 1, 10 n 12; 551 NW2d 355 (1996). In the instant case, Phillips had legitimate Fifth Amendment concerns. Indeed, if Phillips took the stand and testified, he may very well have divulged details regarding his parole violation. Accordingly, there is nothing to suggest that Phillips' decision made in consultation with his court appointed attorney to invoke the privilege against compelled self incrimination was anything more than a legitimate exercise of that right. *Id.*

Finally, defendant contends that his right to an impartial jury was compromised when a juror observed a conversation transpire between an unidentified police officer and an attorney as the police officer left the stand. We do not agree.

Generally, to preserve an issue for appellate review, a defendant must object to the offending incident or procedure at trial. *People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994). Indeed, "[t]he purpose of the appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate prejudice, or at least create a record of the error and its prejudice." *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

In the case at bar, defendant failed to place an objection to this conduct on the record. Accordingly, defendant failed to properly preserve this issue for appellate review. *Rollins, supra* at 468. However, this Court will review an unpreserved claim in accord with the "plain error" rule. See *People v Carines*, 460 Mich 750, 761-763, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, the defendant must show that: "(1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights." *Id.* at 763. To demonstrate that the error "affected substantial rights," the defendant must establish prejudice affecting the outcome of the proceedings in the lower court. *Id.*

It is axiomatic that during deliberations, jurors may only consider the evidence presented in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). To establish that an extrinsic influence constituted error requiring reversal, the defendant must prove that the jury was exposed to extraneous influences and that the extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. *Id.* at 88-89.

Because Juror No. 8's observation of the conversation between the police officer and one of the attorneys occurred outside of the adversarial process, it may be characterized as an extraneous influence. *Budzyn, supra* at 88. However, defendant must also establish that this extraneous influence was "substantially related to a material aspect of the case," and it "created a real and substantial possibility that the jury's verdict was affected." *Id.* at 89. To prove the second component, the defendant may "demonstrate a direct connection between the extrinsic material and the adverse verdict." *Id.*

The relevant section of Juror No. 8's note stated, "[I] would like to know what the first officer said to the attorney." Evident from the juror's note is that the juror was not privy to the content of the discussion that transpired between the officer and the attorney. Consequently, defendant cannot establish that this alleged extraneous influence was "substantially related to a material aspect of the case" thus creating "a real and substantial possibility that the jury's verdict was affected." *Id.* Defendant did not come forth with a scintilla of evidence demonstrating a direct connection between the conversation that Juror No. 8 *observed*, a material aspect of defendant's case, and the adverse verdict.<sup>2</sup> *Id.* Accordingly, we decline to discern error in this regard.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Harold Hood  
/s/ Martin M. Doctoroff

---

<sup>2</sup> Defendant submits that other jurors may have heard, observed or spoke with Juror No. 8 regarding the conversation between the police officer and attorney. However, the mere possibility of prejudice is insufficient. MCL 768.10; See also *People v Hayes*, 126 Mich App 721, 729; 337 NW2d 905 (1983). Error requiring reversal only occurs where actual prejudice may be established. *Id.*