STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2002
v	No. 230874 St. Joseph Circuit Court
MARANZ LAMONT DAVIS, Defendant-Appellant.	LC No. 00-010037-FC

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, assault with intent to do great bodily harm, MCL 750.84, and assault with a dangerous weapon, MCL 750.82. Defendant was subsequently sentenced as a second habitual offender, MCL 769.10, to serve a term of 30 to 80 years' imprisonment for his armed robbery conviction, 95 months to 15 years' for his conviction of assault with intent to do great bodily harm, and 3 to 6 years for his conviction of assault with a dangerous weapon. Defendant appeals as of right. We affirm.

I

During voir dire, the prosecutor requested to talk to three jurors in the hallway outside the courtroom regarding "items mentioned on their questionnaire." The record indicates that the trial court, prosecutor, and defense counsel briefly spoke with each juror in the hallway. Defendant, however, was not present during these conversations. On appeal, defendant claims that his absence during those portions of the jury voir dire was constitutional error requiring reversal of his convictions. We disagree.

It is well-established that a defendant has the right to be present at all stages of trial, including voir dire and selection of the jury. See *People v Kvam*, 160 Mich App 189, 197; 408 NW2d 71 (1987). However, a defendant's exclusion from a portion of trial does not require reversal unless there exists a reasonable possibility that the defendant's absence was prejudicial. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977).[1]

[1] Defendant relies on *People v Medcoff*, 344 Mich 108; 73 NW2d 537 (1955) and *People v Harris*, 43 Mich App 746; 204 NW2d 734 (1972), for the proposition that prejudice should be conclusively presumed from his absence at any portion of trial. However, in *Morgan*, *supra*, our Supreme Court overruled the automatic reversal rule established in *Medcoff* and relied on by the panel in *Harris*.

With respect to the first two jurors questioned outside defendant's presence, we note that the prosecutor by way of peremptory challenge ultimately removed the two from the panel. Inasmuch as defendant does not allege that the prosecutor's use of these challenges was based on improper criteria, see, e.g, *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986), and was otherwise powerless to retain those jurors in the face of such challenges, it is impossible to demonstrate any prejudice flowing from his absence during their questioning outside the courtroom.

Regarding the remaining juror, defendant asserts that had he been present during the hallway conference he may himself have exercised a peremptory challenge to remove that juror despite his trial counsel's apparent acquiescence to the juror's remaining on the panel. Defendant further argues that, inasmuch as no record of the conversation had with this juror was made, prejudice as a result of his being deprived the right to exercise such challenge must be presumed as it is impossible for him to show such harm in the absence of an official record.[2] However, because the lack of any record for review of this issue is directly attributable to defense counsel's explicit decline of the trial court's offer to create a record of the conversations had with this juror, the issue of prejudice is waived. See *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). In any event, even were we to consider the issue, given the testimony of defendant's former friends, Trentice Hardy and Nicholas Page, that defendant had admitted to committing the robbery and in doing so provided them with details of the crime consistent with the testimony of events provided by the victims, no reasonable possibility of prejudice requiring reversal exists. *Morgan*, *supra*.

II

Defendant next argues that the trial court erred in not promptly denying the prosecutor's pretrial request that, should defendant choose to testify, the victims be permitted to listen to defendant's testimony for purposes of making a voice identification. Again, we disagree.

Rather than deciding the matter outright, the trial court indicated that if defendant in fact chose to testify it would permit the victims to listen to defendant's testimony and that, should the prosecution still wish to pursue the voice identification issue after doing so, it could raise the motion again. In doing so, however, the trial court noted its doubts as to whether the prosecution would be able to satisfy the foundational requirements for admission of voice identification testimony established in *People v Bozzi*, 36 Mich App 15; 193 NW2d 373 (1971). Defendant asserts that because the trial court clearly recognized that the witnesses' voice identifications would have been inadmissible under *Bozzi*, the trial court abused its discretion in failing to deny the prosecutor's request outright, and that this error chilled defendant's right to testify. However, even assuming that the trial court erred in failing to issue a final ruling on the prosecution's request, no reversal is warranted.

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[2] Although the prosecutor avers that the questioning of this juror simply concerned an "arrest or conviction" noted on the juror's questionnaire, this Court's review is limited to the record on appeal, *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992), and, as noted, the substance of the conversation at issue was not preserved in the lower court record. See also MCR 7.210(A).

While defendant contends that the court's failure to issue a final ruling on this matter affected his decision whether to testify, no intent to testify was ever indicated at trial and there is nothing on this record to suggest that defendant decided not to testify out of fear of an affirmative voice identification. See, generally, *People v Finley*, 431 Mich 506, 512-513; 431 NW2d 19 (1988). Indeed, the trial court had previously ruled that if defendant chose to testify, he could be impeached with evidence of a prior burglary conviction. As argued by the prosecutor, it is just as likely that defendant chose not to testify for fear of impeachment with this prior criminal record. Moreover, because defendant failed to set forth the substance of his testimony through an offer of proof, there is no evidence from which to conclude that allowing defendant's convictions to stand would be inconsistent with substantial justice. See MCR 2.613(A).

III

Defendant next argues that the prosecutor improperly elicited police testimony that Mike McQueen, a disgruntled employee of the restaurant, had been eliminated as a suspect following interviews with McQueen and several other persons. We disagree.

At trial, Detective Earl Stark testified on "redirect" examination that he had interviewed at least one witnesses who had confirmed McQueen's alibi and that, therefore, Stark disregarded McQueen as a suspect. Detective Michael Mohney similarly testified that he interviewed a number of witnesses during his investigation and that suspicions as to McQueen's involvement in the robbery ultimately did not "pan out." Defendant asserts that the testimony of these officers implicitly placed hearsay before the jury, in violation of defendant's right to confrontation.

Because defendant failed to object to the challenged testimony at trial, our review is limited to determining whether outcome-determinative plain error occurred. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find no such error on the record before us.

As argued by the prosecutor, having told the jury during opening argument that McQueen was a more likely suspect, whom the police only marginally investigated before focusing their attention on defendant, counsel for defendant opened the door to the prosecutor's elicitation of the details and resulting conclusions of the investigation into McQueen's involvement in the robbery. The admission of otherwise admissible hearsay is not error requiring reversal where the complaining party has opened the door to its use. See, e.g., *People v Verburg*, 170 Mich App 490, 498; 430 NW2d 775 (1988); *People v Hunt*, 120 Mich App 736, 740-741; 327 NW2d 547 (1987).[3] Moreover, even assuming the challenged testimony to have been wrongly admitted, reversal of defendant's convictions is not required because defendant's substantial rights were not affected. *Carines*, *supra*. As previously noted, there was testimony at trial from two of defendant's former friends indicating that defendant had admitted to committing the robbery and

[3] The cases relied on by defendant to support his argument that admission of the challenged testimony was error requiring reversal, *People v Lucas*, 138 Mich App 212; 360 NW2d 162 (1984), *People v Smith*, 87 Mich App 584; 274 NW2d 844 (1978), and *People v Tanner*, 222 Mich App 626; 564 NW2d 197 (1997), do not involve circumstances wherein the opposing party "opened the door" to a line of questioning necessitating the use of such evidence. Accordingly, we do not find them persuasive on the issue before us.

that in doing so provided them with details of the crime consistent with the testimony of events provided by the victims. Given this evidence, it cannot be reasonably argued that the alleged error was outcome-determinative.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot