

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ZACHARY ALLAN MORGAN,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 242136

Genesee Circuit Court

LC No. 02-009366-FC

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, fleeing and eluding a police officer, MCL 750.479(A)(3), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutive to concurrent prison terms of twenty-four to forty-eight months for the felonious assault conviction, twenty-four to sixty months for the CCW and fleeing and eluding convictions, and 180 to 360 months for the assault with intent to commit murder conviction. He appeals as of right. We affirm.

Defendant first argues that reversal is required because there were references to the fact that he was arrested for an unrelated matter. Because defendant failed to object to the challenged testimony at trial, this issue is unpreserved. Therefore, we review the issue under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999):

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

Defendant's reliance on *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973), is misplaced because that case is limited to certain circumstances where evidence of a prior arrest is used for the purpose of impeaching a witness' credibility. *People v Layher*, 464 Mich 756, 766-768; 631 NW2d 281 (2001). Here, the references were not intended to impeach either a witness' or defendant's credibility. Rather, they were made to explain the circumstances under which the police obtained the gun that was used in the charged incident.

To the extent the evidence could be considered plain error under MRE 404(b), because evidence that the gun was obtained under circumstances involving an arrest on an unrelated matter was not itself material and, therefore, not relevant, MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994), we are satisfied that defendant's substantial rights were not affected. First, the nature of the matter for which defendant was arrested was not disclosed to the jury, thereby minimizing any prejudice. Second, the trial court gave a cautionary instruction whereby the jury was instructed that it could not consider the evidence of defendant's unrelated arrest for an improper purpose, i.e., that defendant was a bad person or was likely to commit crimes. The court's limiting instruction sufficiently protected defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

We also reject defendant's claim of ineffective assistance of counsel in connection with counsel's failure to object to the references to defendant's arrest. Counsel may have decided not to object in recognition that the matter for which defendant was arrested was not disclosed and as not to draw undue attention to the matter. Defendant has not overcome the presumption of sound strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Next, defendant argues that reversal is required because the trial court failed to appoint substitute counsel. We disagree. 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). Appointment of substitute counsel is warranted only on a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

Defendant made his request for new counsel on the third day of trial. Defendant asserts that, instead of considering whether there was good cause to appoint another attorney, the trial court erroneously based its ruling only on the fact that he did not have another attorney ready to immediately take over the case. We disagree.

The trial court gave defendant an opportunity to voice his complaints with defense counsel on the record. Defendant failed to identify a legitimate difference of opinion with counsel concerning a fundamental trial tactic, and the trial court commented that counsel had performed competently at trial and it saw no reason to appoint another attorney. Thus, the record reflects that the trial court did consider the issue of good cause for substitution, but concluded that good cause had not been shown. The trial court also inquired whether another attorney was immediately available, which was relevant in considering whether substitution would unreasonably disrupt the judicial process. As the trial court observed, where defendant's request for new counsel was made in midtrial, and where new counsel was not immediately available, a late substitution would have required the court to declare a mistrial and unreasonably disrupt the

judicial process. The trial court did not abuse its discretion in denying defendant's request for new counsel.

Affirmed.

/s/ David H. Sawyer

/s/ Richard Allen Griffin

/s/ Michael R. Smolenski