STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2003
v	No. 244518 Wayne Circuit Court
KEVIN GRIMES, Defendant-Appellant.	LC No. 01-008789

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his October 16, 2001, jury trial conviction for armed robbery, MCL 750.529. On November 13, 2001, defendant was sentenced to 7½ to 20 years' imprisonment. We reverse and remand. Defendant first argues that he was entitled to the requested jury instructions on the necessarily lesser included offenses of robbery not armed, MCL 750.530, and larceny from a person, MCL 750.357. We agree.

There are two types of lesser included offenses, necessarily included lesser offenses and cognate lesser offenses. *People v Mendoza*, 468 Mich 527, 532; 664 NW2d 685 (2003). A necessarily included lesser offense is one where it is impossible to commit the greater offense without first having committed the lesser. *Id*., n 3, citing *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). A trial judge need only instruct the jury on a necessarily included lesser offense if there is a disputed factual element in the greater offense that is not included in the lesser offense and a rational view of the evidence would support it. *Id*., 357.

Unarmed robbery is a necessarily included lesser offense of armed robbery. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). Unarmed robbery differs from armed robbery in that the charged offense requires the robber to be "armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." *Id*., 447, n 10; MCL 750.529.

In this case, it is disputed whether a codefendant was armed. The victim's testimony and police testimony regarding the victim's statement, indicate that the codefendant was armed with a gun. Some evidence, however, suggests that the codefendant was not armed. Defendant testified that he saw no gun, and that the money he received from the victim was a drug debt owed to him, which he gained without force and then left. There was a factual discrepancy as to whether there

was a weapon; therefore, defendant should have received the requested instruction for unarmed robbery. Accordingly, the trial court erred in failing to allow an instruction on unarmed robbery because it was supported by a rational view of the evidence. *Reese, supra,* 466 Mich 446; *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002).

Because larceny from a person is also a necessarily included lesser offense of armed robbery, it is error not to give the requested instruction if a rational view of the evidence would support it. *Cornell, supra*, 466 Mich 357. The element separating larceny from a person from armed robbery is the element of a weapon, or an article used as a weapon, violence or intimidation. *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975) overruled in part on other grounds *Cornell, supra*, 466 Mich 357-358. The Supreme Court stated, "Robbery is committed only when there is larceny from the person," and "every armed robbery would necessarily include unarmed robbery and larceny from the person as lesser included offenses." *Chamblis, supra*, 395 Mich 425.

Here, the evidence varied regarding whether violence or intimidation was used. Defendant testified several times that no one threatened Sims. Only Sims testified that he was threatened. Because there is evidence to support the theory of larceny from a person, the trial court also erred in omitting the requested jury instruction on a lesser offense where a factual dispute exists. *Cornell, supra,* 466 Mich 355-356.

Harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *Cornell, supra*, 466 Mich 361. Defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included instruction undermined the reliability of the verdict. *Id.,* 364, citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), and *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Pursuant to MCL 769.26, the "entire cause" must be reviewed to determine whether the error undermined the reliability of the verdict. *Cornell, supra,* 466 Mich 364 n 18. *Cornell* is to be given limited retroactive effect, so it applies to those cases pending on appeal in which the issue has been raised and preserved. *Id*., 367.

Defendant bears the burden of proof in showing that after reviewing the case in its entirety, the error resulted in a miscarriage of justice such that it was outcome determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). An error was outcome determinative if it undermined the reliability of the verdict, centering on the nature of the error in light of the weight and strength of the untainted evidence. *Id.* at 474. Where a requested necessarily included lesser offense instruction is not given, though the instruction was supported by substantial evidence when considering the entire cause, the reliability of the verdict is undermined resulting in an error requiring reversal. *Cornell, supra*, 460 Mich 365.

In reviewing the entire cause, substantial evidence supported both the instruction for unarmed robbery and larceny from the person. Accordingly, the reliability of the verdict was undermined. Further, codefendant Courtney Grimes, the only defendant charged with felony-firearm, was acquitted of that charge. His acquittal did not require the jury to find him not guilty of armed robbery in order to have a consistent verdict because while felony-firearm, MCL 750.227, requires "possession of a firearm," armed robbery, MCL 750.529, only requires defendant to be "armed with a dangerous weapon, or any article used or fashioned in a manner to

lead the person so assaulted to reasonably believe it was a dangerous weapon." This Court allows juries to return inconsistent verdicts. *People v Garcia*, 448 Mich 442, 466; 531 NW2d 683 (1995). But, viewing the felony-firearm acquittal in conjunction with the factual discrepancy regarding the gun and the lack of intimidation, it is more probable than not that the outcome was affected by the failure to give the instructions of armed robbery and larceny from the person. Further, this Court has previously found that failure to give these instructions was reversible error in the case of codefendant, Courtney Grimes. *People v Grimes,* unpublished opinion of the Court of Appeals, entered August 21, 2003 (Docket No. 240010).

Therefore, defendant satisfied his burden of showing that it was more probable than not that the failure to provide the requested instruction undermined the reliability of the verdict and that the error in this case requires reversal and a new trial. Because the arguments defendant raised on appeal may arise again, we will address the remaining arguments except the sentencing issue.

Defendant next argues that the trial court violated his statutory right to ten peremptory challenges when it refused to permit his sixth challenge, resulting in plain error. We disagree.

Defendant argues that the trial court denied him the opportunity to exercise his peremptory challenges in accordance with the court rules. Before discussing the merits of the issue, the standard of review must be established. Defendant contends that the issue was preserved regardless of a failure to object below. In this case, the court raised the issue sua sponte in a side bar that was off the record. When defendant later attempted to use a peremptory challenge, the court disallowed it:

> *THE COURT*: Okay. Now, what about you, Ms. George?
>
> *MS. GEORGE*: Defense would like to thank and excuse the Juror in seat No. 4, Mr. Tamminga.
>
> *THE COURT*: Hold on a minute. The Court will not permit that challenge.
>
> Anything further?
>
> *MS. GEORGE*: Defense is satisfied.

The court later explained the reasons for its actions:

> *THE COURT*: All right. The Court will state, for the record, that I disallowed her challenge because I had advised Counsel that jurors cannot be disqualified for racial reasons.
>
> And it became obvious to the Court during the – after all, the Court excused I don't know how many jurors; 20 or so – that jurors are being excused because of their – because they're white. And I sensed it, I advised Counsel.
>
> And also, since I didn't have a conference with the defendant, I also told them that the defendant doesn't have a right, also.

> So, the Court detected that that was continuing. I disallowed the challenge because the juror was white, and that was obvious to the Court that that was the reason.
>
> So, whatever anyone else wishes to think of it, that was the Court's ruling, and that's why I permitted the juror to stay. . . .

A party's claim that the jury selection procedure was flawed is not usually deemed preserved if defendant failed to use all available peremptory challenges. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998), citing *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). A challenge is also preserved if the party refuses to express satisfaction with the jury. *Schmitz, supra*. In this case, when the trial court denied the peremptory challenge, the defendant was asked if there was "anything further?" Counsel for defendant expressed immediate satisfaction with the panel stating, "[d]efense is satisfied." By expressing satisfaction, this issue has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Moreover, even if the issue is only unpreserved, defendant has not demonstrated that plain error affected his substantial rights. *Carines, supra*, 460 Mich 774. Defendant has produced no evidence that the juror who was not stricken was biased in any way or that allowing the juror to remain in any way affected the fairness of his trial. Defendant did not attempt to challenge the juror for cause, which was his right if he thought the juror biased or having a state of mind that would in prevent him from rendering an impartial verdict. MCR 2.511(D). Defendant's only argument was that he did not "receive" all of his peremptory challenges. Defendant did not argue or show in any way that losing the peremptory challenge affected the fairness, integrity, or public reputation of the judicial proceeding. Therefore, there is no plain error that affected his substantial rights. *Carines, supra*, 460 Mich 763.

Defendant's third argument is that the trial court denied him his right to substitute appointed counsel. We disagree.

A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Under both the United States and Michigan Constitutions, an indigent criminal defendant has a right to counsel. US Const Ams VI, XIV; Const 1963, Art 1, § 20. Although an indigent defendant is guaranteed the right to counsel, he is not entitled to replace his original appointed counsel merely by asking. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). The appointment of substitute counsel is warranted only upon a showing of good cause and provided substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *Mack, supra*, 190 Mich App 14. Good cause can be found where there is a legitimate difference of opinion between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Traylor, supra*, 245 Mich App 462; *Mack, supra*, 190 Mich App 14. The trial court is in the best position to determine whether facts exist which establish good cause to replace appointed counsel. *People v Russell* 254 Mich App 11, 14; 656 NW2d 817 (2002). Matters of general legal expertise and strategy fall within the sphere of the professional judgment of counsel. *Id.*

According to the information on the record, it cannot be determined if defendant's request was timely enough to not unreasonably disrupt the judicial process. The record shows that defendant sent letters bearing this request to another judge, but it does not reflect when the letters were sent. Regardless, the court did not abuse its discretion in denying defendant's motion for substituted appointed counsel because there was no showing of good cause. Defendant's reason for wanting new counsel was that she had never communicated with him, had not visited him, and would hang up on him when he called. Counsel responded by stating that she had communicated with defendant, had filed motions on his behalf, and that visiting him at the county jail would have accomplished nothing. Counsel also told the court that she was familiar with the facts of the case. The court denied defendant's motion for substitute counsel, stating that the bench had experience in the matter. There were facts on the record to show that counsel had adequately communicated with defendant; therefore, the court did not abuse its discretion in finding that no good cause for substitution of counsel existed.

Defendant next argues that the trial court violated his constitutional right to confront the witnesses against him by refusing to allow cross-examination of witnesses regarding their drug use on the day in question. We disagree.

Because defendant's argument implicates his Sixth Amendment right to confront his accuser, we review the issue de novo. *People v Beasley*, 239 Mich App 548, 553; 609 NW2d 581 (2000); *People v Smith*, 243 Mich App 657, 681; 625 NW2d 46 (2000). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Lukity*, *supra*, 460 Mich 488.

Defendant has a constitutional right to confront his accusers under the Sixth Amendment of the United States Constitution, and § 20 of article 1 of the Michigan Constitution of 1963. *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). However, "neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to cross-examine on any subject." *People v Cantor*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The court may deny cross-examination with respect to collateral matters bearing only on general credibility, or irrelevant issues. *Id.* The Sixth Amendment Confrontation Clause must be balanced against other "legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, safety of the witness, or interrogation that is repetitive or only marginally relevant." *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993). Notably, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985), and citing *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1896).

Defendant argues that the trial court violated his constitutional right to confront the witnesses against him by not allowing questioning regarding their drug use on the day of the incident. This line of questioning was relevant to the defense that Sims and Stoudemire were customers who bought drugs from defendant, and it was a drug debt that defendant was collecting on the day of the alleged robbery. This defense, however, was not raised until defendant testified on his own behalf, which was after Sims and Stoudemire were cross-examined. Therefore, before defendant testified, the drug use of Sims and Stoudemire was only

marginally relevant to their credibility. *Byrne*, *supra*, 199 Mich App 679. It was properly within the court's discretion to limit testimony during cross-examination regarding Sims and Stoudemire's drug use. *Cantor*, *supra*, 197 Mich App 564. Further, any error in not admitting the questions was harmless beyond a reasonable doubt because defendant's testimony sufficiently presented his own version of the facts. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

Defendant's final argument is that the court abused its discretion in sentencing him above the minimum guideline range where the evidence did not demonstrate that the crime was extraordinary. In light of our remand for a new trial, we decline to review the issue. But, we do note that the trial court failed to complete a guidelines departure form as required. See *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

We reverse and remand for a new trial with proper jury instructions. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter