

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL ANTHONY PARKER,

Defendant-Appellant.

UNPUBLISHED

June 22, 2004

No. 244118

Washtenaw Circuit Court

LC No. 01-000984-FC

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of fifteen to forty years. He appeals as of right. We affirm.

Defendant was convicted of robbing the Cross Street Tanning Salon in Ypsilanti, Michigan, on March 2, 2001. On that date, a man poked his head into the salon and inquired whether “Lori” was working. The salon’s clerk, Nicole Zielinski, informed the man that he should check another salon located further down the street. Zielinski thought the man was looking for a friend. She observed that the man was African-American and was wearing a dark knit hat, thick sunglasses and a dark purple, parka-like winter jacket. Sometime later, between forty-five minutes and 1-1/2 hours after his first visit, the man returned. He entered the salon, walked toward the back hallway, looked into the back, and then asked Zielinski about the salon’s address. The man subsequently stepped behind a customer who was standing at the front counter. Zielinski observed the man unzip his jacket and pull out a pipe. The man put the pipe against the customer’s back and requested that Zielinski give him all of the money. Zielinski was nervous and scared. She complied with the man’s request by removing the cash drawer from the computer and setting it on the front counter. The man removed the cash from the drawer. Both Zielinski and the customer described the robber as wearing a dark knit cap, sunglasses, a dark-colored winter jacket, which Zielinski described as purple, and gloves. Zielinski testified that the man had a mustache, no sideburns, and unusually arched eyebrows. She estimated that he was six feet, one inch tall. At trial, Zielinski identified defendant as the robber.

On March 3, 2001, the Ann Arbor police were dispatched to a Gags and Gifts store after receiving a report about a suspicious, large male with a maroon jacket, knit cap, sunglasses and gloves. A large knife was sticking out the individual’s pocket, and he was smoking a cigar in the

store. Ann Arbor police officers responding to the call were unaware of the Cross Street Tanning Salon robbery that occurred the previous evening in Ypsilanti. Officers Elizabeth Patten and Aimee Metzger, who were in full uniform, arrived at Gags and Gifts first. They entered the store, observed defendant, and walked up behind him. Metzger observed that defendant was wearing a purple coat, black knit hat, and sunglasses. Patten grabbed a fourteen-inch knife¹ out of defendant's coat pocket and passed it back to Metzger, who held it down behind her leg. Patten then put her hand on defendant's shoulder to turn him toward her. Defendant faced the officers and made eye contact with Patten. Patten tried to engage him in conversation, but he forcibly pushed Metzger over and ran for the front door. He knocked merchandise and displays into the aisle way to hinder Patten's attempt to follow him. Before defendant could leave the store, Officer Rodney Whitehead, who had arrived to provide assistance, tackled him. Whitehead repeatedly punched defendant to try and gain control over him. Defendant struggled and resisted. It took four officers to finally handcuff and subdue defendant. During a post-arrest patdown, a long, dark gray pipe was recovered from defendant's coat

Defendant denied robbing the Cross Street Tanning Salon and presented evidence that he was in Jackson, Michigan, until 5:30 p.m. He claimed that he went directly to Detroit after leaving Jackson. The tanning salon reported the robbery at 6:56 p.m.² Defendant also claimed that he was framed by the police, specifically, that the pipe was planted on him in Ann Arbor. And, he attacked Zielinski's identification of him as the robber.

I

Defendant first argues that that he was deprived of several constitutional rights because the jury may have considered extraneous information when deliberating. During the course of trial, one juror indicated that she could overhear a bench conference during which some of defendant's past offenses were mentioned. This issue is not preserved however, because, while defendant raised this issue in a motion for a new trial, he failed to object at trial, failed to request that the juror be removed or move for a hearing to determine if the jury was tainted, and failed to move for a mistrial. A contemporaneous objection provides the trial court with "an opportunity to correct the error, which could thereby obviate the need for further legal proceedings and would be the best time to address a defendant's constitutional and nonconstitutional rights." *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). We review unpreserved issues, constitutional and nonconstitutional, to determine if the defendant has demonstrated a plain error that affected his substantial rights, i.e., affected the outcome of the lower court proceedings. *Id.* at 763-764. If the defendant demonstrates the existence of prejudicial plain error, this Court must exercise its discretion in deciding whether to reverse. *Id.*

Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously

¹ The blade and handle together were fourteen inches.

² There was testimony that, if defendant left Jackson at 5:30 p.m., he could have been in Ypsilanti forty-five minutes before the robbery. Thus, the time line did not exclude defendant as a perpetrator.

affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence" [*Id.* (citation omitted).]

In this case, at the beginning of a bench conference, defendant's prior armed robbery and "CCW" convictions were mentioned. The prosecutor did not want to admit those convictions or question defendant about them, but wanted to question defendant about a prior larceny conviction. During the ensuing discussion, Juror 14 interrupted and indicated that, if the comments were not meant to be heard, the participants to the conversation should be quieter. The jurors were not all seated at the time the comment was made, and Juror 14 was standing. According to the trial court, Juror 14 was the closest juror to the bench when the bench conference took place. After the bench conference concluded, defendant was questioned in front of the jury about his prior larceny conviction. Juror 14 did not ultimately deliberate in the case. She was randomly chosen as an alternate juror before deliberations.

In *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997), the Court recognized that, where a jury considers extraneous facts, the defendant is deprived of his rights of confrontation, cross-examination, and assistance of counsel as embodied in the Sixth Amendment.

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.³ [*Id.* at 88-89 (citations omitted).]

In this case, defendant cannot demonstrate that the jury was exposed to extraneous influences. First, it is unclear what portion of the conversation Juror 14 actually heard. If she only heard the portion related to the larceny conviction, which was later disclosed to the jury, she heard no extraneous information. Second, even if she heard the entire conversation, the record does not indicate that she informed any of the other jurors about what she heard. All of the jurors were instructed at the beginning of trial that they must not discuss the case with anyone, including the other jurors, until deliberations. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Third, nothing in the record indicates that any other juror heard portions of the bench conference. Juror 14 was standing closest to the bench when the comments were made. Finally, and most importantly, Juror 14 was not part of the jury when it deliberated. Under these circumstances, defendant has not demonstrated the existence of a plain error requiring reversal. *Carines, supra*.

³ The *Budzyn* Court additionally stated that, if a defendant carries his initial burden, the prosecution must establish that the error was harmless beyond a reasonable doubt. *Id.* at 89, citing *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). Unlike this case, however, in *Budzyn* the issue of extraneous influences over the jury was preserved. *Id.* at 87.

Defendant also argues, however, that he is entitled to an evidentiary hearing on the matter of whether the jury was exposed to extrinsic influences. The trial court disagreed. A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987). We find no abuse of discretion. Where there is evidence to suggest that the verdict was affected by external influences, juror testimony may be admitted to impeach the verdict. *People v Fletcher*, ___ Mich App ___; ___ NW2d ___ (2004) (Docket No. 229092, issued February 10, 2004), slip op at 4. "[I]nvasions into the deliberative process should be limited to situations where there is evidence that influences external to the trial proceedings affected the verdict." *Id.* at slip op p. 5. As previously discussed, the record does not suggest that the verdict was affected by extraneous influences. Defendant's request for an evidentiary hearing is based only on his unsupported speculation that other jurors may have heard the contents of the bench conference or that Juror 14 may have ignored her instructions and told other jurors what she heard. Because the request for an evidentiary hearing was based solely on unsupported speculation, the trial court did not abuse its discretion in denying the request.

We note that, even if there was evidence that the jury was exposed to extraneous information, reversal would not be required. Assuming that other jurors heard or were informed about defendant's prior convictions, defendant has not shown that his substantial rights were affected. Contrary to defendant's argument on appeal, this case was not a credibility contest solely between the police and defendant. In addition to the strong circumstantial evidence, Zielinski identified defendant in court as the man who committed the armed robbery. Further, reversal is not warranted under the plain error standard unless the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines, supra*. In this case, defendant has not shown that this unpreserved issue warrants appellate relief.

II

Defendant additionally raises numerous instances of ineffective assistance of counsel. Where, as here, a defendant chooses to represent himself, he loses his constitutional right to have an attorney. *People v Kevorkian*, 248 Mich App 373, 422; 639 NW2d 291 (2001); see also *People v Adkins (After Remand)*, 452 Mich 702, 721; 551 NW2d 108 (1996) (a defendant has a right to counsel or a right to proceed in propria persona, but not both). He also loses the right to complain that the quality of his defense amounted to the denial of the effective assistance of counsel. *Kevorkian, supra* at 419. And, he has no basis to claim that a standby attorney did not provide effective assistance of counsel. *Id.* at 424. "[A]bsent a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective." *Id.* at 425, citing *United States v Schmidt*, 105 F3d 82, 90 (CA 2, 1997). In this case, however, defendant's appointed counsel did not act merely as standby counsel. Rather, appointed counsel engaged in an expanded role wherein he shared trial responsibilities with defendant, who was acting in propria persona. There is no constitutional right to this type of "hybrid representation."⁴

⁴ "Hybrid representation" describes an arrangement whereby both the defendant and his attorney conduct portions of the trial and share joint representation of the defense, while the defendant retains ultimate control over the strategy. *People v Dennany*, 445 Mich 412, 440 n 17; 519 (continued...)

Kevorkian, supra at 420. Thus, defendant did not have a right to proceed in propria persona in conjunction with his court-appointed attorney. Nevertheless, it was within the trial court's discretion to allow this hybrid representation.

The appellate courts of this state have not definitively determined whether a defendant who participates in this form of hybrid representation may maintain a claim that his appointed attorney was ineffective. In *Kevorkian, supra* at 425-426, this Court, citing *Schmidt, supra*, with approval, suggested that, if the defendant's attorney had not acted as traditional standby counsel, but acted as the defendant's lawyer, it may have considered the claim of ineffective assistance of counsel. Therefore, where appointed counsel engages in an expanded role, it may be appropriate to review claims of ineffective assistance of counsel. We find it unnecessary to actually decide this issue, however, because, regardless of whether defendant may maintain claims for ineffective assistance of counsel, he has not demonstrated any colorable claims in this case.

Where this Court considers claims of ineffective assistance of counsel, review is limited to errors apparent on the record if, as here, no *Ginther*⁵ hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant first argues that counsel was ineffective for failing to move for an evidentiary hearing or mistrial after Juror 14 indicated that she could overhear the bench conference. Defendant fails to explain or rationalize his position and his cursory argument may be deemed abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). More importantly, he fails to argue or demonstrate that, but for defense counsel's failure to request an evidentiary hearing, there is a reasonable probability that the outcome of trial would have been different. *Stanaway, supra*. We note that the trial court denied defendant's post-trial motion for an evidentiary hearing on this same issue. We further note that, while he raises the issue, defendant has not demonstrated, or even argued, that a motion for mistrial would likely have been granted if one had been made. Counsel is not required to make frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998). Defendant has not met his burden of proving that counsel was ineffective with respect to the incident involving Juror 14.

Defendant next argues that counsel was ineffective for failing to move to suppress statements he made to a member of the Ann Arbor Police Department after being involved in the incident at Gags and Gifts. Again, defendant's argument may be deemed abandoned, because he fails to explain or rationalize his position that suppression of the statements was warranted because he was in the hospital at the time they were made and it was a police beating that led to his hospitalization. *Kelly, supra*. Nevertheless, we find that defendant cannot demonstrate that

(...continued)

NW2d 128 (1994).

⁵ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

counsel's performance fell below an objective standard of reasonableness because a motion to suppress would have been meritless. In *People v Wells*, 238 Mich App 383, 388; 605 NW2d 374 (1999), the defendant was beaten at the time of his arrest, and claimed that the beating induced his later statement to the police. This Court stated that “[i]f there is no causal connection between the events at the time of arrest and the giving of a subsequent statement, then a confession will be found to be voluntary if the other circumstances show that the defendant gave his confession freely and voluntarily.” *Id.* In this case, defendant has not demonstrated any causal connection between the beating that resulted in his arrest and his later statement made at the hospital. The beating did not continue after defendant's arrest, and the Ann Arbor police officer to whom defendant gave his statement was not involved in the beating or arrest. *Id.* Defendant does not otherwise argue that his statement was involuntary.

Defendant next argues that counsel was ineffective for failing to find and call defense witnesses. The decision whether to call a witness is presumed to be a matter of trial strategy. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). Here, defendant fails to identify any alleged witnesses or the relevance and substance of any testimony they might have offered. Thus, there is no basis in the record to conclude that defense counsel was ineffective for failing to call additional witnesses.

Defendant additionally argues that counsel was ineffective for failing to obtain defendant's complete medical records after his arrest. This argument is also abandoned, because defendant fails to explain or rationalize his position that counsel was ineffective in this regard. Specifically, defendant fails to explain why his medical records would have been relevant or admissible at his armed robbery trial. Moreover, he fails to cite any authority in support of his position that his medical records should have been secured for trial. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *Kelly, supra*.

Finally, defendant argues that counsel was ineffective for failing to obtain transcripts from his earlier trial on charges related to the incident that occurred at Gags and Gifts. Defendant argues that, in order to effectively impeach the police witnesses involved in the Gags and Gifts incident, he needed the transcripts from his earlier trial. We initially note that defendant, not appointed counsel, took responsibility for the cross-examinations of all of the Ann Arbor police witnesses. Defendant attempted to impeach them on cross-examination. Defendant's argument on appeal implicates a deficiency in his own performance with respect to these witnesses, a claim he is not permitted to make because he chose to represent himself in cross-examining and attempting to impeach these witnesses. *Kevorkian, supra*. Even if we were to agree that appointed counsel had the responsibility of obtaining transcripts from the earlier trial, defendant has not met his burden of demonstrating that, but for counsel's conduct in failing to obtain these transcripts, the outcome of trial would have been different. Defendant fails to specifically outline what impeachment would have been possible if the transcripts were available. Thus, defendant has failed to meet his burden with respect to his claim of ineffective assistance of counsel in connection with this issue. *Stanaway, supra*.

We also reject defendant's argument that he is entitled to a *Ginther* hearing with respect to his claims of ineffective assistance of counsel.⁶ We are not persuaded that defendant has shown that remand is warranted. When a defendant requests a remand to develop a factual record, he must support his request with affidavits or other offers of proof regarding the facts to be established at the hearing. MCR 7.211(1)(a)(ii). The purpose of a *Ginther* hearing is to allow a defendant to establish facts or evidence to assist in making his claims. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). With respect to counsel's failure to move to suppress defendant's statements made at the hospital, gather complete medical records and obtain transcripts from defendant's previous trial, the issues raised on appeal may be resolved without any further factual development. With respect to defense counsel's failure to call unidentified witnesses, the issue of counsel's effectiveness in this regard has been abandoned on appeal. Thus, further factual development is not necessary to resolve the issue. Indeed, defendant has not identified the names of the alleged witnesses, much less made an offer of proof regarding their proposed testimony. Similarly, with respect to counsel's failure to move for an evidentiary hearing or mistrial, defendant has not provided any affidavits or made an offer of proof with respect to what facts could be established at a hearing. We therefore decline to remand for a *Ginther* hearing.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette

⁶ This Court previously denied defendant's motion to remand for an evidentiary hearing on his claims of ineffective assistance of counsel. *People v Parker*, unpublished order of the Court of Appeals, entered January 23, 2004 (Docket No. 244118).