

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 27, 2011

v

RUBEN CHE ESPINOZA,
Defendant-Appellant.

No. 297574
Ingham Circuit Court
LC No. 09-000731-FC

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of two counts of kidnapping, MCL 750.349, two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to concurrent prison terms of 168 to 360 months for kidnapping, 24 months to 72 months for felonious assault, 24 to 90 months for felon in possession, and a consecutive sentence of 2 years' imprisonment for felony-firearm. We affirm.

Defendant first argues that the trial court erred in allowing him to waive his right to counsel and to represent himself at trial. The trial court's factual findings with regard to whether a defendant has effectuated a knowing and intelligent waiver of the right to counsel are reviewed for clear error. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

As the Supreme Court held in *Williams*, there are three necessary findings that a trial court must make prior to granting a waiver of counsel:

[f]irst, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Williams*, 470 Mich at 642.]

Before granting a defendant the right to represent himself, the trial court must provide advice to defendant as outlined in MCR 6.005(D), which states in pertinent part:

[t]he court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The trial court complied with the above requirements as it engaged defendant in a coherent dialogue about the charges and potential penalties associated with the crimes, defendant's wishes and the risks inherent in self-representation. See *People v Anderson*, 398 Mich 361, 369; 247 NW2d 857 (1976). At the conclusion, defendant continued to assert his right to self-representation, albeit with the assistance of shadow counsel, which was provided.

Defendant asserts, however, that he has psychological disorders that precluded his ability to represent himself. This is not borne out by the record. In fact, the results of defendant's examination by the Center for Forensic Psychology (CFP) indicate the opposite.¹ We note that defendant was given the MMPI-2-RF² as part of his evaluation, and the results did not indicate any mental illness. Nor did anything pre-trial alert the trial court to any possible concerns, and at trial defendant was articulate, made appropriate objections, and had a relatively clear strategy

¹ We find the following from the CFP report instructive:

At the time of the evaluation, Mr. Espinoza presented as a man of average intelligence, who was in good overall behavioral and emotional control and was able to communicate relevantly. Although he was cooperative and pleasant throughout the evaluation, it was apparent that he harbors significant rage, about which he feels justified; particularly in terms of the actions he associates with it. The clinical evaluation suggested that Mr. Espinoza has the capacity for rational thought, and is capable of reasonably engaging in meaningful and logical discourse.

. . . Mr. Espinoza provided a coherent, logical and self-protective response when asked about the alleged offense. He was able to rationally answer all questions asked of him about his case. He participated in a lengthy forensic evaluation during which he maintained his attention, sustained a high level of cooperation, maintained a polite and interactive style, and conveyed good comprehension of the material discussed.

² Minnesota Multiphasic Personality Inventory, Second Edition, Restructured Form.

even if he was not allowed to pursue it to the degree he wanted. Accordingly, the court did not err in granting defendant's request to represent himself at trial.

Defendant next raises several matters he asserts are examples of prosecutorial misconduct that reversibly tainted his trial. After reviewing each in context, *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010), we conclude that defendant was not denied a fair trial by prosecutorial misconduct.

First, defendant challenges the accuracy of certain portions of the testimony of the police officer who took his custodial statement, arguing that the prosecutor erred in permitting the perjurious statements. See *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998) ("Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath."). To begin, defendant notes that during direct examination the police officer misrepresented what defendant said regarding plans to take action against the judge who presided at custody hearings involving defendant and his former girlfriend, a victim in this case. However, the error was raised by advisory counsel and corrected on cross-examination by defendant. Defendant also argues that, contrary to the officer's testimony, he never admitted to intentionally boxing his former girlfriend's car in her driveway. The officer did testify on cross-examination that defendant told the officer that he "had boxed her car in," but the officer did not testify to defendant's state of mind. And, in any event, the issue was addressed through examination of the witness, and there is nothing to suggest perjury was involved in any of this testimony.³

Second, defendant argues that the prosecutor improperly used the officer's testimony to establish elements of the charged crimes that the witnesses and victims had expressly denied. This assertion of error is built on a legal error. While a prosecutor is charged with the duty to seek justice, not merely convict, *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007), he also has the duty to prove his case, and he may do so by "argu[ing] the evidence and all reasonable inferences from the evidence as it relates to his theory of the case." *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).⁴

We also see no merit in defendant's assertion that the prosecutor improperly shifted the burden of proof. Although the prosecutor did elicit testimony from the officer about what

³ Defendant also asserts that the prosecutor should have raised an objection to defendant's testifying during his cross-examination of the officer. But defendant does not show how he was prejudiced by the prosecutor's failure to object to defendant's own actions. See *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

⁴ Defendant also asserts that the prosecutor erred by asserting in closing argument that defendant must have intended to use his former girlfriend as a shield or a hostage. However, defendant has taken the cited commentary out of context as the prosecutor was acknowledging that the evidence did not show that defendant used the victim as a shield.

defendant revealed about his plans regarding the charged offenses, providing testimony about defendant's own inculpatory statement does not shift the burden of proof. We also presume that the jury heeded the court's instructions on the burden of proof. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also raises a cumulative error argument. To the extent the argument is based upon the trial court allowing defendant to represent himself, we have already held that the court did not err in this regard. Likewise, the trial court did not err in allowing defendant to wear his jail jumpsuit throughout the trial, as the trial court not only offered to provide defendant with different clothes, but warned defendant about how jail clothing might influence a jury. After the warning, defendant still declined the opportunity to change.

Defendant also alleges error in the court's failure to assert itself into jury voir dire by sua sponte questioning potential jurors about whether they would be biased against defendant because he had chosen to represent himself. However, the court had no need to raise the issue since defendant inquired whether the potential jurors had "a problem" with the situation, and the one person who spoke up was struck from the jury. Further, the jury was specifically instructed not to let defendant's self-representation impact their "decision in any way." Again, we see nothing in the record to indicate the jury did not adhere to this clear admonition. See *Graves*, 458 Mich at 486.

Next, defendant argues it was error not to allow the jury to see the complete videotape of his statement to the police under the best evidence rule. See MRE 106. This Court has held that the best evidence rule can be satisfied even when the court does not play the relevant portions of a statement when the defendant has an opportunity to explain his statement. *People v Herndon*, 246 Mich App 371, 409; 633 NW2d 376 (2001). Here, defendant was able to cross-examine the officer who took the statement about the remaining portions of his statement, i.e., what defendant stated as his motivation for acting as he did. Further, defendant made his own statement regarding his motive when he was on the witness stand. Consequently, because no error was shown, defendant's cumulative error argument necessarily fails.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray