

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 8, 2011

v

ROBERT LEON BEANE, JR., a/k/a
ROBERT LEAN BEAN, JR.,

No. 298956
Muskegon Circuit Court
LC No. 09-058082-FC

Defendant-Appellant.

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for armed robbery, MCL 750.529, and bank robbery, MCL 750.531. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 24 to 45 years' imprisonment for his armed robbery conviction and to 10 to 20 years' imprisonment for his bank robbery conviction. We affirm.

Defendant's convictions stem from his robbery of a Fifth Third Bank. The evidence revealed that defendant entered the bank and yelled that he had a bomb. Defendant jumped over the bank teller counter and took money from an unlocked teller's drawer.

I. SELF-REPRESENTATION

On appeal, defendant argues that the trial court erred in denying his request for self-representation. We review the entire record de novo to determine whether the defendant waived his right to counsel. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). The trial court's factual findings regarding a knowing, intelligent, and voluntary waiver are reviewed for clear error. *Id.*

Criminal defendants have a right to self-representation upon the waiver of the Sixth Amendment right to counsel. *Id.* at 641. However, there is no absolute right to proceed without counsel. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). Further, "courts *must* indulge every reasonable presumption against the waiver of the right to counsel." *People v Russell*, 471 Mich 182, 193; 684 NW2d 745 (2004) (emphasis in original). Four requirements must be satisfied before a defendant's request to proceed without counsel may be granted. First, the waiver must be unequivocal. *Williams*, 470 Mich at 642. Second, the waiver must be knowing, intelligent and voluntary. *Id.* The trial court must inform the defendant regarding the

risks involved in self-representation. *Id.* 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.” *Id.* Lastly, the trial court must comply with MCR 6.005(D)(1), which requires the trial court to advise the defendant of the charge, the maximum sentence if convicted, any mandatory minimum sentence, and the risks involved in self-representation and to offer the defendant an opportunity to consult with a lawyer. *Russell*, 471 Mich at 190-191.

In this case, defendant requested to represent himself, and after a hearing on the matter, the trial court denied defendant’s request. During the hearing, defendant stated that he wanted to represent himself but that he also wanted to preserve a claim of ineffective assistance of counsel for appeal. Defendant also stated that he had not anticipated representing himself, and that representing himself would be “crazy.” The trial court found that defendant’s waiver was equivocal and that defendant would be disruptive if permitted to represent himself. This latter finding was based on defendant’s behavior throughout the pendency of the case and during the trial of his codefendant. An appellate court is “not free to simply substitute its view for that of the trial court, but must be careful to respect the trial court’s role in determining factual issues and issues of credibility.” *Williams*, 470 Mich at 641. On the record before us, we find that the trial court’s findings that defendant’s waiver was equivocal and that defendant would be disruptive are supported by the record. Accordingly, the trial court did not err in denying defendant’s request to represent himself.

II. DEFENDANT’S STANDARD 4 BRIEF

Defendant argues that he was denied his right to due process as a result of prosecutorial misconduct. He claims that the prosecution failed to disclose all the bank surveillance video footage from the day of the robbery. This alleged error was not objected to at trial; therefore, it is reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The record does not support defendant’s assertion that the prosecution withheld some of the video footage. Defense counsel specifically stated on the record in a pretrial hearing that he had received a copy of the surveillance tape. The tape was admitted as evidence at trial without objection, and the entire tape was played for the jury. There is nothing in the record to suggest that the entire surveillance tape was not turned over to the defense. Accordingly, defendant has not shown plain error affecting substantial rights.

Defendant next argues that there was insufficient evidence to sustain his armed robbery conviction. We review a challenge to the sufficiency of the evidence *de novo*. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

“The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim’s presence or person (3) while the defendant is armed with a weapon.” *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). An oral representation that a defendant is in

possession of a dangerous weapon is sufficient to satisfy the third element. MCL 750.529; *People v Chambers*, 277 Mich App 1, 6; 742 NW2d 610 (2007).

Defendant specifically challenges the evidence supporting the element that he was armed. He claims that he did not orally represent that he had a bomb, and that he, in fact, did not have a bomb or any other weapon. Defendant does not deny that he said the word “bomb,” but argues that the reason he said the word “bomb” was because he was talking to himself and reminding himself that he should avoid a “bomb pack.” However, when the sufficiency of the evidence is challenged, the evidence is viewed in the light most favorable to the prosecution. *Nowack*, 462 Mich at 399-400. When the evidence is viewed in the light most favorable to the prosecution, there was sufficient evidence to prove that defendant claimed he had a bomb. Several witnesses testified to hearing defendant yell that he had a bomb. Thus, there is sufficient evidence to support defendant’s armed robbery conviction.

Defendant also argues that he was denied the effective assistance of counsel. In order to prevail on an ineffective assistance claim, the defendant must demonstrate that defense counsel’s performance fell below an objective standard of reasonableness and that the deficiency so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). Because no *Ginther*¹ hearing has been held on defendant’s claims, our review is limited to errors apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendant first argues that defense counsel was ineffective because counsel failed to adequately present a defense to the charge of armed robbery. Specifically, defendant claims that counsel should have explained to the jury that when defendant was talking about a “bomb” he was talking to himself about avoiding a “bomb pack” and was not claiming to have a weapon. However, this Court has held that “[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel’s decision not to emphasize the fact that defendant was talking about a “bomb” in any context was a legitimate trial strategy. Thus, defendant has not overcome the strong presumption of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, we note that defense counsel allowed defendant to testify as to his claim that he used the word “bomb” when talking aloud to remind himself to avoid a “bomb pack.”

Defendant also argues that defense counsel was ineffective because counsel failed to move for a directed verdict on the armed robbery charge. Defendant argues that because there was insufficient evidence, the trial court would have granted a directed verdict if counsel had asked for one. In *People v Riley*, 468 Mich 135, 141-142; 659 NW2d 611 (2003), the Supreme Court explained that “[b]ecause the prosecution submitted sufficient evidence . . . defense

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel was not ineffective for failing to make a motion for a directed verdict.” Here, as discussed, *supra*, the prosecution submitted sufficient evidence to support defendant’s armed robbery conviction. Thus, defense counsel was not ineffective for failing to move for a directed verdict. Counsel had no obligation to bring a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant further argues that defense counsel was ineffective because counsel failed to effectively cross examine the witnesses regarding exactly what defendant said while he was in the bank. However, defendant has not shown that counsel’s decisions regarding how to cross examine the witnesses constituted anything other than reasonable trial strategy. *Horn*, 279 Mich App at 39.

Defendant also argues that defense counsel was ineffective for failing to obtain the complete video footage contained on the bank’s surveillance cameras from the day of the robbery. However, defendant has failed to establish that counsel actually failed to obtain the video footage. As discussed, *supra*, the record indicates that counsel possessed all the bank surveillance video footage. Accordingly, defendant has failed to establish the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant next argues that defense counsel was ineffective because of how he handled the jury fair cross-section challenge. On the first day of trial, defense counsel moved to challenge the jury array. The trial court denied the motion, explaining that there was no proof of systematic exclusion because there was no evidence regarding the jury pool selection process. Defendant argues that defense counsel did not adequately challenge the jury cross-section because counsel failed to research the law before filing his motion. Specifically defendant argues that counsel should have investigated *Berghuis v Smith*, ___ US ___; 130 S Ct 1382; 176 L Ed 2d 249 (2010), before arguing the motion. However, defense counsel did address *Berghuis* in his argument, which competently addressed the relevant law regarding cross-section challenges. To the extent defendant is arguing that counsel should have produced evidence of the systematic exclusion of African-Americans, defendant has failed to establish a factual predicate for his claim. *Hoag*, 460 Mich at 6. Specifically, the record does not support that such evidence exists. Thus, defense counsel was not ineffective based on his motion challenging the cross-section of the jury pool.

Finally, defendant argues that the cumulative effect of all the errors denied him a fair trial. This Court reviews a claim of cumulative error to determine whether the combination of errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). However, “[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal.” *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Because defendant has failed to establish any error, his claim of cumulative error must be rejected.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens