

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID AZIEL SHEER,

Defendant-Appellant.

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UNPUBLISHED  
February 14, 2012

No. 302109  
Oakland Circuit Court  
LC No. 2010-230574-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Defendant David Sheer appeals as of right his jury trial conviction for armed robbery.<sup>1</sup> The trial court sentenced Sheer as an habitual offender, fourth offense,<sup>2</sup> to 18 to 40 years' imprisonment, to be served consecutive to a parole sentence. We affirm.

I. FACTS

At about 11:00 p.m. on November 10, 2009, a man entered and robbed an adult novelty store with a utility knife, taking \$588 and a number of DVDs. Sheer's former girlfriend, Misty Michelle Justice, testified at trial. Before Justice's testimony commenced, juror questions distracted the trial court, and the trial court inadvertently neglected to swear in Justice. Neither the prosecution nor Sheer objected to Justice's subsequent unsworn testimony. Justice testified that at about 10:00 p.m. on November 10, 2009, Sheer left the couple's trailer in Justice's vehicle, and then returned to the trailer at about 4:00 a.m. According to Justice, when Sheer returned, he had money and DVDs. On November 19, 2009, Justice gave the police her account of Sheer's behavior surrounding the time of the robbery. Thereafter, the police searched the trailer and found 38 DVDs that were stolen during the robbery. The police also searched Justice's vehicle and found a utility knife. Sheer now appeals.

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 769.12.

## II. FAILURE TO SWEAR IN WITNESS

### A. PRESERVATION OF ISSUE AND STANDARD OF REVIEW

Sheer argues that the trial court denied him his constitutional right to confront an adverse witness by allowing Justice's unsworn testimony. However, Sheer had an opportunity to object to Justice's unsworn testimony at trial but failed to do so. In cases involving similar claims related to admission of a witness's unsworn testimony, Michigan courts have acknowledged that a trial court is required to swear in witnesses, but also held that a defendant waives the argument by not objecting to the unsworn testimony at trial.<sup>3</sup> Although, we believe that defense counsel's failure to object is arguably more akin to forfeiture than waiver,<sup>4</sup> we need not decide whether the issue is actually waived as opposed to forfeited because we are compelled to review it given that Sheer raises an attendant claim that his counsel was ineffective for failing to object to the unsworn testimony. This Court reviews unpreserved constitutional issues for plain error affecting a defendant's substantial rights.<sup>5</sup>

### B. LEGAL STANDARDS

The Confrontation Clause clearly requires that a witness testify under oath: a criminal defendant's constitutional "right of confrontation insures that the witness *testifies under oath at trial*, is available for cross-examination, and allows the jury to observe the demeanor of the witness."<sup>6</sup> Likewise, "[t]he Revised Judicature Act of 1961 mandates that witnesses in court proceedings take an oath or make an affirmation that their testimony will be true."<sup>7</sup>

### C. APPLYING THE LEGAL STANDARDS

There can be no dispute that the trial court's failure to require Justice to swear under oath or make an affirmation was a plain error. Nevertheless, Sheer fails to show "that the error affected the outcome of the lower court proceedings."<sup>8</sup> The trial proceeded as if Justice's testimony was sworn, and the record does not indicate that Justice testified differently because she was not under oath. Moreover, the prosecution presented ample evidence of Sheer's guilt other than Justice's unsworn testimony. When the police searched Sheer's trailer, they found 38 DVDs that were stolen during the robbery. The police also found a utility knife in Justice's

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<sup>3</sup> See, e.g., *Mettetal v Hall*, 288 Mich 200, 207-208; 284 NW 698 (1939); *People v Kemmis*, 153 Mich 117, 118; 116 NW 554 (1908); *People v Knox*, 115 Mich App 508, 511; 321 NW2d 713 (1982).

<sup>4</sup> See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

<sup>5</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>6</sup> *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994) (Brickley, J.) (emphasis added).

<sup>7</sup> *Knox*, 115 Mich App at 511, citing MCL 600.1432, MCL 600.1434, and MRE 603.

<sup>8</sup> *Carines*, 460 Mich at 763.

vehicle, which the store's employee identified as the knife used by the robber. The employee also listened to a police voice line-up and identified Sheer's voice as that of the robber. In light of the foregoing evidence, Sheer fails to establish that the trial court's plain error affected the outcome of his trial.

### III. JURY INSTRUCTION

Sheer argues that the trial court denied him his constitutional right to a properly instructed jury by failing to instruct the jury that Justice's testimony was unsworn. However, we find that Sheer did waive this claim because he expressed satisfaction with the trial court's jury instructions.<sup>9</sup>

### IV. EFFECTIVENESS OF COUNSEL

#### A. STANDARD OF REVIEW

Sheer argues that he was denied his constitutional right to the effective assistance of counsel because defense counsel failed to object to Justice's unsworn testimony. This Court's review of Sheer's unpreserved claim is limited to plain errors apparent in the record.<sup>10</sup>

#### B. LEGAL STANDARDS

"The right to counsel guaranteed by the United States<sup>[11]</sup> and Michigan Constitutions<sup>[12]</sup> is the right to effective assistance of counsel."<sup>13</sup> "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise."<sup>14</sup> "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial."<sup>15</sup> To demonstrate prejudice, a "defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable."<sup>16</sup>

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<sup>9</sup> *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001) ("Defendant affirmatively waived any errors when he specifically indicated to the trial court that he had no objections to the instructions as given. Because any objections were waived, there are no errors to review.")

<sup>10</sup> *People v Snider*, 239 Mich App 393, 420, 423; 608 NW2d 502 (2000).

<sup>11</sup> US Const, Am VI.

<sup>12</sup> Const 1963, art 1, § 20.

<sup>13</sup> *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2001) (quotation omitted).

<sup>14</sup> *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

### C. APPLYING THE LEGAL STANDARDS

While we acknowledge that defense counsel possessed “wide discretion in matters of trial strategy[.]”<sup>17</sup> we find that there was no arguable trial strategy to justify allowing an adverse witness to testify outside the penalties of perjury.<sup>18</sup> Accordingly, we find that defense counsel’s performance fell below an objective standard of reasonableness where counsel failed to object to Justice’s unsworn testimony. However, to establish his claim of ineffective assistance of counsel, Sheer must also demonstrate that, but for counsel’s error, the outcome of trial would have been different and that the error rendered the proceedings “fundamentally unfair or unreliable.”<sup>19</sup> As discussed above, the trial proceeded as if Justice’s testimony was sworn, and the record does not indicate that Justice testified differently because she was not under oath. Moreover, the prosecution presented ample evidence of Sheer’s guilt other than Justice’s unsworn testimony. Thus, Sheer fails to establish that defense counsel’s failure to object to Justice’s unsworn testimony prejudiced Sheer by affecting the outcome of his trial.

We affirm.

/s/ Cynthia Diane Stephens  
/s/ William C. Whitbeck  
/s/ Jane M. Beckering

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<sup>17</sup> *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

<sup>18</sup> See *People v Ramos*, 430 Mich 544, 548; 424 NW2d 509 (1988) (noting that a sworn witness “promis[es], under threat of severe penalties for lying, to be truthful”).

<sup>19</sup> *Garza*, 246 Mich App at 255.