

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK HERMAN FISHER,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 237819
Cheboygan Circuit Court
LC No. 00-002336-FH

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant was convicted of assault with a dangerous weapon, MCL 750.82; felon in possession of a firearm, MCL 750.224f; felony firearm, MCL 750.227b; obstructing and resisting a peace officer, MCL 750.479; hunting without a license, MCL 324.43509(2); operating a motor vehicle on a suspended license, MCL 257.904(3)(a); and operating an off-road vehicle (ORV) in violation of MCL 324.81133(r). Defendant was sentenced as a habitual offender, MCL 769.10, to a minimum of thirty months to sixty months' imprisonment for the assault with a dangerous weapon conviction to be served concurrently with a term of twenty-four to ninety months' imprisonment for the felon in possession of a firearm conviction. The above convictions are to be served consecutively to a term of twenty-four months imprisonment for the felony-firearm conviction. Defendant was also sentenced to a term of forty-two days each for the hunting, driving with a suspended license and operating an ORV convictions and was given a credit of forty-two days for each of the three convictions. Defendant appeals as of right. We affirm.

I. Facts

Michael Feagan, a conservation officer at the Department of Natural Resources (DNR), was driving through state land near Stoney Creek Road in Cheboygan County when he noticed a set of ORV tracks heading into the woods. The tracks did not follow a trail, indicating that the ORV driver was in violation of DNR rules. Feagan parked his vehicle on the road and followed the tracks on foot until he discovered an unoccupied hunting blind that was constructed illegally from live pine bows instead of dead material from the ground of the woods. Feagan returned to the area the next morning and found the blind occupied. Feagan announced to the person inside the blind that he was a conservation officer. Defendant exited the blind.

Feagan testified that defendant told him that he was unaware that he illegally drove the ORV into the woods or that he illegally constructed the blind. The sticker on the ORV had also expired. Defendant failed to produce a hunting license for inspection. Feagan asked defendant to point the rifle away from Feagan's direction and unload it. However, defendant pointed the rifle at Feagan and said, "[n]o, I don't think I can do that." Feagan was shocked. He put his hands up and tried to distance himself from defendant. Feagan repeatedly told defendant that "[t]his isn't worth it." Feagan testified that defendant said that he did not want to shoot Feagan but that he had no choice because he could not allow Feagan to do what he was "going to do that day." Feagan told defendant that the violations were not serious but similar to that of a parking ticket. He asked defendant to allow him to leave and he promised not to pursue defendant. Finally, he told defendant that he did not want to die but wanted to go home to his family. Defendant responded that he also would like to go home to his family and he told Feagan to put his hands down and leave. Feagan returned to his vehicle, drove away and radioed the DNR dispatch with a description of defendant. A number of leads pointed the DNR and the police to defendant as the perpetrator. Feagan positively identified defendant several days later, after defendant turned himself into the authorities.

II. Analysis

A. Defendant's Motion for a Mistrial

Defendant argues that the trial court abused its discretion in denying his motion for a mistrial. We find no error requiring reversal.

The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *Id.*

On the morning of the third day of the four-day trial, the trial court summoned counsel for both parties and informed them that juror David Charboneau had earlier "stuck his head in," presumably, the court's chambers and "said something unusual." The record does not indicate if anything further was discussed between the court and Charboneau. The court summoned Charboneau for questioning in the presence of counsel. Charboneau said that his car keys were removed from his vehicle the previous night. He related that he told the jurors about the incident and asked them whether anything unusual had happened to them. He said that he did not inform the jurors that his house had been frequently vandalized by his neighbor. He also said he did not believe that the incident was related to the trial and he regretted that he had mentioned the incident to the jurors.

After Charboneau was questioned by both the trial court and counsel, he returned to the jury room with instructions not to discuss the matter with the jurors. Defendant's counsel consulted with defendant and then moved for a mistrial on the ground that Charboneau's comments to the jury on the incident caused the jury to suspect that defendant was attempting to intimidate the jurors particularly when the jury was aware from the parties' stipulation at trial that defendant had a prior felony conviction and nine jurors on the panel had been exposed to pretrial media information with respect to inadmissible evidence pertaining to defendant's prior conviction.

In response to defendant's motion for a mistrial, the trial court conducted an in-chambers inquiry to determine whether the jury was influenced by Charboneau's comments on the incident of the missing keys. The trial court again summoned Charboneau into chambers. The court and counsel learned that, upon returning to the jury room, Charboneau told the jurors that the court was concerned about the influence his comments had on the jury and he informed the jurors about the problems he had with his neighbor. Each juror was summoned to chambers individually and was questioned by the court and counsel. At the conclusion of the inquiry, the court determined that the jurors were not unduly influenced by the incident. The court offered to excuse Charboneau from serving as a juror upon defendant's request. After consulting with defendant, counsel requested that Charboneau remain as a juror.

A defendant tried by jury has a right to a fair and impartial jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The guarantee of the right to a fair trial means that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion . . . or other circumstances not adduced as proof at trial." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978).

Here, the jurors were questioned individually. The trial court explained the purpose of the inquiry, questioned each juror about Charboneau's incident and inquired into whether the incident affected them. The prosecutor and defendant's counsel were present and they were allowed to ask additional questions. The court promptly addressed the concern of several jurors who had mistakenly believed that the parties had access to the jurors' home addresses from the jury-duty forms. All except for one juror stated that Charboneau's incident with the missing keys was unrelated to the trial and that Charboneau must have merely misplaced his keys. The single juror who believed that the trial and Charboneau's incident were related immediately changed her mind when the court informed her that the parties did not have access to the jurors' home addresses. All jurors stated that they could be fair and impartial. Following the inquiry and upon the prosecutor's request, the court informed the jury that the parties did not have access to the jurors' home addresses. Accordingly, there is nothing to establish that Charboneau's incident affirmatively prejudiced defendant's right to a trial before a fair and impartial jury. Thus, the trial court did not abuse its discretion in denying the motion for a mistrial.

B. Defendant's Right to Be Present at a Critical Stage of Trial

Defendant next argues that the trial court committed error requiring reversal by conducting, outside of his presence, the inquiry into possible undue influence by Charboneau on the jury. Defendant asserts that the inquiry was a critical stage of trial and that he was denied his statutory and constitutional rights to be personally present at the inquiry. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.3.

Defendant failed to preserve this issue for appellate review because neither he nor his counsel requested defendant's presence at the inquiry. Thus, our review is limited to plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). This Court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

A hearing on the issue of undue influence of a juror is a critical stage of the trial at which a defendant has a right to be present. *People v Hayes*, 126 Mich App 721, 730; 337 NW2d 905 (1983). Because it is possible that the defendant's absence made no difference in the outcome of the proceeding, the standard by which to determine whether error requiring reversal occurred is whether there is "any reasonable possibility of prejudice." *Hayes, supra* at 731, quoting *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977).

In support of his burden to establish the possibility of prejudice, defendant reiterates the same argument as discussed in the first issue on this appeal and states that he could have offered some assistance to his counsel to combat the suspicion on the part of the jury that he may have been attempting to intimidate the jury. This argument is based wholly on speculation. Defendant presents nothing to show how he may have been of assistance to his counsel. There is nothing in this record to establish the possibility of any prejudice.

Defendant invites this Court to turn its back on precedent established in *Morgan, supra*, and adopt the dissenting opinion in that decision. We decline to entertain defendant's cursory suggestion because we are bound by our Supreme Court precedents. *People v Reese*, 242 Mich App 626, 634; 619 NW2d 708 (2000), *aff'd* 466 Mich 440, 647 NW2d 498 (2002).

C. Suppression of the Evidence

Defendant argues that he was denied a fair trial and due process of law when the trial court failed to rule on his motion in limine to exclude photographs of the clothes he was allegedly wearing at the time of his encounter with Feagan.¹ The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

One week before the trial, defendant withdrew his motion in limine to exclude the photographs. However, at a hearing on other motions on the day before the trial, defendant revived the motion to exclude the photographs when he objected to the photographs as being highly prejudicial. The trial court decided to defer its ruling until the photographs were offered into evidence at trial. At trial, defendant's counsel questioned Feagan on one photograph and stated that he had no objection to the admission of the photographs into evidence. Defendant and his counsel were aware that they could have objected but they chose not to object. Defendant may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Moreover, we conclude that the photographs were merely cumulative. They were introduced to prove that Feagan's initial description of defendant was accurate. However, when

¹ It cannot be discerned from defendant's brief on appeal whether he argues that the trial court failed to rule on his motion to suppress the clothes that he was allegedly wearing on the day he encountered Feagan or his motion in limine to exclude photographs of the clothes. The court declined to rule on the motion to suppress the clothes because the prosecutor did not know whether the items would be offered into evidence. Because the prosecutor offered into evidence the photographs and not the clothes, we address only the issue of the motion in limine to exclude the photographs.

defendant turned himself into the authorities, Feagan affirmatively identified him as the perpetrator. Defendant does not argue that Feagan's identification of him was suspect.

Defendant next argues that the trial court abused its discretion in allowing a rifle similar to the rifle defendant allegedly pointed at Feagan to be displayed in the courtroom as demonstrative evidence. We find no abuse of discretion with respect to the court's ruling. As noted in *Lopez v General Motors Corp*, 224 Mich App 618, 627-628; 569 NW2d 861 (1997), quoting *Smith v Grange Mutual Fire Ins Co of Michigan*, 234 Mich 119, 126; 208 NW 145 (1926), "demonstrative evidence is admissible if it bears 'substantial similarity' to an issue of fact involved in a trial." Feagan testified that the firearm looked like the rifle defendant pointed at him on the day in question. The record shows that Feagan was required to use the rifle to demonstrate how defendant pointed the rifle at him.

D. Motion to Disqualify the Trial Court

Defendant asserts that he was denied a fair trial and due process of the law because the trial court failed to rule on his motion to disqualify the judge. Defendant does not brief his argument on appeal nor does he explain the reasons why the trial court should have been disqualified. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Thus, we deem this argument abandoned. *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002).

E. Ex-Parte Communication with a Juror

In his Standard 11 brief on appeal, defendant asserts that the trial court failed to disclose the content of its ex-parte communication with juror Charboneau and accordingly, denied defendant of his right to a fair trial and due process of the law.

Defendant's Standard 11 brief is unclear. It appears that defendant raises this argument in support of the first two issues on this appeal. As previously discussed in this opinion, the record is devoid of anything that points to the possibility of prejudice in this case. Defendant also asserts that the effect of Charboneau's comments coerced the jury to reach a verdict. From our review of the portions of the record that defendant points out on appeal, we conclude that there is no evidence of jury coercion to reach a verdict. Instead, those portions from the record reflect the statements by several jurors that they did not believe that the incident warranted so much time and effort on the part of the trial court.

F. Evidence of Defendant's Prior Conviction

Defendant asserts in his Standard 11 brief on appeal that evidence of his prior conviction should have been excluded under MRE 404(b) as improper evidence of his character or propensity to commit the charged offense and under MRE 609 as improper evidence for impeachment purposes.

Contrary to defendant's contention on appeal, the stipulation on defendant's prior conviction was not admitted as evidence of his character or propensity to commit the charged offense or for impeachment purposes. Defendant was charged, among other offenses, with felon

in possession of a firearm, MCL 750.224f. Proof of a prior conviction is an element of that offense. Defendant stipulated to the prior felony to avoid exposing the jury to the nature of the prior conviction.

In the body of his argument in the Standard 11 brief, defendant asserts that the trial court improperly allowed the prosecutor to amend her witness list on the first day of trial. The trial court's decision to permit the prosecutor to add or delete witnesses to be called at trial is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). The prosecution is permitted to amend its witness list at any time upon leave of the court and for good cause. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). Defendant does not assert that the prosecutor lacked good cause to amend her witness list and he has not shown prejudice. We conclude that the trial court did not abuse its discretion by allowing the prosecutor to amend her witness list.

G. Ineffective Assistance of Counsel

Defendant next argues in his Standard 11 brief that he was denied the effective assistance of counsel because his counsel stipulated to the fact that defendant had a prior conviction and because counsel failed to request the trial court to rule on the motion to suppress the photographs of the clothes that he was allegedly wearing at the time of his encounter with Feagan.

Because defendant did not move below for a new trial or a *Ginther*² hearing, this Court's review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

As previously discussed, the prosecutor was required to prove the element of a prior conviction. Defendant's counsel stipulated to this fact so that the jury would not be exposed to the nature of the prior conviction. Defendant may not now claim error in the admission of the evidence. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Further, the photographs were cumulative evidence that did not affect the outcome of the case. Thus, defendant was not deprived of the effective assistance of counsel.

H. Cumulative Error

Defendant argues in his Standard 11 brief that the cumulative effect of the above-discussed claims in this case denied him a fair trial. "[O]nly actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

reversal where the prejudice of any one error would not.” *Id.* at 591. Because we find no error, defendant’s claim is without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello