

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR EUGENE CURRY,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 184287
LC No. 94-000971

Before: Corrigan, P.J., and Taylor and D.A. Johnston,* JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of two counts of kidnapping, MCL 750.349; MSA 28.581, felonious assault, MCL 750.82; MSA 28.277, unarmed robbery, MCL 750.530; MSA 28.798, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to concurrent terms of thirteen to thirty years' imprisonment for each kidnapping conviction, two to four years' imprisonment for the felonious assault conviction, and eight to fifteen years' imprisonment for the unarmed robbery conviction, to be served consecutively to the two-year concurrent terms for the felony-firearm convictions. We affirm.

I. REQUEST FOR SELF-REPRESENTATION

Defendant first claims that the trial court erroneously denied several requests to represent himself. The right to self-representation is constitutionally guaranteed, U.S. Const Am VI, Const. 1963, art 1, § 13; *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). Nonetheless, because defendant's request to proceed *pro se* was equivocal, the court did not constitutionally err in denying defendant's request.

Three successive attorneys represented defendant over several months. Defendant's first court-appointed attorney was succeeded by retained counsel, whom defendant subsequently discharged. The court then appointed a third attorney, Patti Shirley. She moved to withdraw and to permit defendant to represent himself. The record reflects that defendant was persistently uncooperative with the court

* Circuit judge, sitting on the Court of Appeals by assignment.

throughout the proceedings regarding the question whether his representation should be *pro se* or through counsel. On this record, the trial court did not abuse its discretion when it refused to allow defendant to represent himself.

Defendant's request for self-representation was equivocal under *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994) and *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). Defendant stated that although he would prefer to be represented by retained counsel, he would represent himself because he could not afford to hire an attorney. During one of several motion hearings regarding this issue, the trial court directly asked defendant whether he wished to represent himself. Defendant said, "No. I'm talking to [another] attorney now." Defendant complained that Ms. Shirley had never asked him "why what happened happened." At that hearing, defendant admitted that he was seeking other counsel, but declined to identify the attorney. Defendant did not unequivocally state that he wished to represent himself; instead, he essentially stated that self-representation was the lesser of two evils, the other being representation by appointed counsel. Because such statements do not constitute unequivocal requests for self-representation, the trial court did not improperly deny defendant's request for self-representation. *Dennany*, *supra* at 446; *People v Pruitt*, 28 Mich App 270, 272; 184 NW2d 292 (1970).

II. SUBSTITUTION OF COUNSEL

Defendant next claims that the court abused its discretion in refusing to substitute counsel. The decision regarding substitution of counsel is discretionary and will not be reversed absent an abuse. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Defendant failed to show good cause for the removal of his third attorney. Although defendant wanted his stepdaughter's allegations of sexual abuse placed before the jury, contrary to Ms. Shirley's sound professional judgment, this disagreement was not a *legitimate* difference of opinion. *Mack*, *supra* at 14. Clearly, placing before the jury evidence that defendant's stepdaughter had fled to a shelter to escape defendant's sexual advances would have been detrimental to his case. Appointed counsel plainly acted with competence in moving to bar evidence of alleged sexual abuse from jury consideration. Appointed counsel's eminently sound professional judgment did not warrant her removal, nor did it justify yet another substitution of counsel. *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979).

Moreover, the court previously had allowed substitution of counsel. Defendant had hired an attorney the day before the rescheduled preliminary examination. Defendant's retained counsel withdrew and trial counsel was appointed. The court adjourned the first trial date so that appointed counsel could adequately prepare for trial. To allow a second substitution of counsel one week before the second trial date would have unreasonably disrupted the judicial process. *People v Morgan*, 144 Mich App 399, 401-402; 375 NW2d 757 (1985).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Because defendant did not move for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) or for a new trial, this Court's review of defendant's claim of ineffective assistance

of counsel is limited to the facts on the existing record. *Ginther, supra* at 443-444; *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by US Const, Am VI. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy and show that any deficiency prejudiced his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). A review of the record reveals that defendant was not denied the effective assistance of counsel. *LaVearn, supra* at 213. Counsel's failure to inform the jury about defendant's alleged sexual abuse of defendant's stepdaughter was sound trial strategy. *Id.*

IV. JUROR COMMUNICATIONS

Next, defendant contends that the trial court abused its discretion in denying his motion for a mistrial because some jurors had conversed with two prosecution witnesses in the hallway outside the courtroom. We disagree.

A trial court's grant or denial of a motion for mistrial will not be reversed on appeal absent 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 in the proceedings that is prejudicial to the defendant and impairs his ability to obtain a fair trial. *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988). Because the communication between the jurors and the two police officers did not bear either on a substantive issue or on the jury's deliberations, and because defendant failed to show that any prejudice from the innocent contact, reversal is not warranted. *People v Schram*, 378 Mich 145, 157-161; 142 NW2d 662 (1966); *People v Montgomery*, 176 Mich App 501, 503-504; 440 NW2d 21 (1989); *People v Hayes*, 126 Mich App 721, 729-730; 337 NW2d 905 (1983); *People v Hoag*, 113 Mich App 789, 799-800; 318 NW2d 579 (1982). See also *People v Davis*, 122 Mich App 597, 602-603; 333 NW2d 99 (1983). The trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Haywood, supra* at 228.

V. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues that the evidence was insufficient to support his conviction of unarmed robbery because the prosecution did not prove that defendant intended to permanently deprive his second victim of her automobile. Defendant asserts that the trial court should have granted his motion for a directed verdict. We disagree.

In a challenge to the sufficiency of the evidence on a motion for directed verdict, this Court views the evidence up to the time when the defendant made the motion in a light most favorable to the prosecution and determines whether a rational trier of fact could find that all the elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Sufficient evidence established the elements of unarmed robbery. Defendant, who was unarmed, took the victim's car through force and violence. *People v Gary Johnson*, 206 Mich App

122, 125-126; 520 NW2d 672 (1994). With regard to defendant's intent to permanently deprive the victim of her car, *People v Compian*, 38 Mich App 289, 293-294; 196 NW2d 353 (1972), the jury could reasonably infer that defendant did not intend to return the car to her. Defendant first wrestled the keys from the pregnant victim and then hit, kicked, and tossed her into the trunk of her car. Even though defendant took the victim with him in the car, he did not release her from the trunk after he reached Kalamazoo. Instead, defendant left the victim in the trunk and told her he would be back in ten minutes. This Court does not interfere with the trier of fact's role in determining the weight of evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1993). Questions of intent are left to the trier of fact to resolve, *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988); *People v Queenan*, 158 Mich App 38, 55; 404 NW2d 693 (1987). Accordingly, we affirm defendant's conviction of unarmed robbery. Sufficient evidence supported defendant's conviction of unarmed robbery. *Petrella, supra* at 268-270.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston