

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EUGENE SMITH,

Defendant-Appellant.

UNPUBLISHED

December 3, 1996

No. 182815

LC No. 93-007379-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY LAVEQUE,

Defendant-Appellant.

No. 185401

LC No. 93-007380-FC

Before: Neff, P.J., and Hoekstra and G.D. Lostracco,* JJ.

PER CURIAM.

Defendants Thomas Eugene Smith and Mark Anthony Laveque were convicted after a bench trial¹ of safe breaking, MCL 750.531; MSA 28.799, and breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. Each defendant was sentenced to concurrent terms of five to twenty years' imprisonment for his safe breaking conviction, and three to fifteen years' imprisonment for his breaking and entering conviction. Defendant Smith appeals as a matter of right; defendant Laveque appeals by leave granted. We affirm.

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

Defendants first contend that the trial judge repeatedly usurped the prosecutor's role and denied them a fair trial. Defendants failed to object to the trial judge's actions at trial, and therefore, this issue is not preserved for appellate review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Nevertheless, we find no error on the part of the trial judge. A trial judge may question witnesses to clarify testimony or elicit additional relevant information, *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), and a trial judge has more discretion to question witnesses during a bench trial than during a jury trial, *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). See MRE 611(a)(1); MRE 614(b). A thorough review of the record indicates that the trial judge merely asked neutral questions to elicit information necessary for him to understand an expert's testimony; to clarify testimony which was already elicited; or to elicit information which might have exonerated or inculpated defendants. Merely because testimony elicited is unfavorable does not make the question unfair. See *People v Davis*, 216 Mich App 47, 51, n 1; 549 NW2d 1 (1996). Moreover, the trial judge did not usurp the prosecution's role when it recalled witnesses, because the trial judge may call his or her own witnesses at any time, MRE 614(a), or interrogate a party's witness, MRE 614(b). See *People v Betts*, 155 Mich App 478, 483; 400 NW2d 650 (1986). The trial judge's actions did not deny defendants a fair trial.

Defendants next contend that the trial court committed error warranting reversal when it failed to comply with MCR 6.005. MCR 6.005(F) was enacted to ensure that jointly represented defendants were not denied their constitutional right to effective assistance of counsel. *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990); *People v Rhinehart*, 149 Mich App 172, 177-178; 385 NW2d 640 (1986) (discussing MCR 6.101(C)(4), the previous version of MCR 6.005(F)). A conflict is not presumed. *Lafay, supra* at 530. Here, the record establishes that at a hearing prior to trial, the trial court found in compliance with MCR 6.005 that there was no basis to believe that joint representation would result in a potential for conflict. Furthermore, the record does not indicate that a conflict arose during trial. See MCR 6.005(G). A defendant has the burden of establishing a prima facie case of ineffective assistance of counsel by showing that an actual conflict of interest existed and adversely affected the adequacy of his representation. *Lafay, supra* at 530. Factors to consider are whether: (1) the defendants lost the benefit of arguments stressing the codefendants' links to specific evidence, or the evidence in general, is greater than another codefendant's; and (2) the cross-examination of an eyewitness may be inhibited by conflicting loyalties. *People v Villarreal*, 100 Mich App 379, 390; 298 NW2d 738 (1980) (citations omitted). A review of the record establishes that the evidence tying each defendant to the crime was separate and distinct, so defendants' trial counsel could attack each piece without harming the defense of either defendant. Further, the record reveals trial counsel's efforts to attack both specific evidence and the lack of evidence in general. Hence, we find that the trial court's failure to discuss the problems of joint representation on the record does not amount to error requiring reversal.

Defendants also contend that they were denied their confrontation rights when the trial court decided the admissibility of statements from two of the three defendants tried in this case in chambers with counsel, but without defendants present. "[T]he Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to be present in the courtroom at every stage of his trial, and a face-to-face meeting with witnesses appearing before the trier of fact." *People v Staffney*, 187 Mich

App 660, 663; 468 NW2d 238 (1990) (internal citations and quotations omitted). See also *People v Baskin*, 145 Mich App 526, 544; 378 NW2d 535 (1985), citing MCL 768.3; MSA 28.1026. However, a defendant's confrontation rights are not violated when an in-chambers conference is held to discuss matters of procedure or law, his counsel is present, and the defendant raises no objection. *Id.* at 545. In this case, defendant did not object and the in-chambers conference was to discuss a question of law. Therefore, defendants' confrontation rights were not violated.

Finally, defendants contend that they were denied effective assistance of counsel. We disagree. Because there was no *Ginther*² hearing, our review is limited to errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

Defendants contend that the following prejudiced them: (1) multiple representation, in and of itself, made defendants susceptible to the prosecution's theory of guilt by association; (2) defendants' chance of acquittal was prejudiced by the in-camera proceeding; (3) counsel failed to question the most apparent inconsistencies in the testimony by the prosecution's witnesses; (4) counsel failed to object to the trial court's continued usurpation of the prosecutor's role; and (5) counsel failed to present any form of defense. For the reasons previously discussed, we find no prejudice from the first four allegations. The fifth allegation is factually infirm, as a defense was presented. Defendants were not denied effective assistance of counsel.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco

¹ Defendants were tried together, along with a third codefendant who is not a party to this appeal.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).