STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JAMES EVANS,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 170363
LC No. 92-001985

Before: M.J. Kelly, P.J., and Hood and H. D. Soet,* JJ.

PER CURIAM.

Defendant was convicted, following a second jury trial[1], of receiving and concealing stolen property in excess of one hundred dollars, MCL 750.535(1); MSA 28.803(1), and attempted breaking and entering a vehicle with intent to steal property therein, MCL 750.92; MSA 28.287; MCL 750.356a; MSA 28.588(1). Defendant subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced five to ten years' imprisonment and appeals as of right. We affirm.

Defendant first argues that the Supreme Court lacked authority to assign a judge to perform judicial duties where there was no existing vacancy. Defendant specifically argues that retired and former Macomb Circuit Judge Jeannette had no authority to conduct the proceedings thereby rendering the trial result void under the Michigan Constitution. We disagree. As argued, defendant presents a question of law. We review questions of law de novo. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

Section 23 of our constitution provides:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election

> held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments. [Const 1963, art VI, § 23.]

This Court recently addressed this issue and held that the 1968 amendment to § 23 did not "restrict the Supreme Court's authority" to "authoriz[e] the appointment of visiting judges 'to perform judicial duties for limited periods or specific assignments.'" *People v Sardy*, 216 Mich App 111, 117; 549 NW2d 23 (1996). Therefore, under *Sardy*, there is no vacancy prerequisite to making a judicial appointment.

Defendant also contends that the trial judge's persistent assignments to the Macomb Circuit Court constitutes an abuse of the assignment system. Because defendant has provided no authority for his proposition, this issue is waived. *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). Nevertheless, § 23 does not restrict the Supreme Court's authority to appoint visiting judges. The limitations contained in § 23 are inapplicable to this claim.

Defendant next argues that the double jeopardy clause of the Michigan Constitution barred a retrial after the prosecutor's misconduct. We disagree. Double jeopardy issues are questions of law. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). We review questions of law de novo. *Id.*

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. Where the trial court declares a mistrial after jeopardy has attached,[2] the state is precluded from bringing the defendant to trial a second time, unless the defendant consented to a mistrial or the mistrial was of manifest necessity. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994).

Here, defense counsel clearly moved for a mistrial after Officer Jeffrey Dolsen volunteered, without any prompting by the prosecutor, that defendant was on parole at the time of his arrest. Defense counsel, at this first trial, even acknowledged that Dolsen's response was unsolicited. The mistrial was not the result of any intentional misconduct on the part of the prosecutor. See *People v Gaval*, 202 Mich App 51, 53-54; 507 NW2d 786 (1993). We therefore conclude that defendant's second trial did not violate the double jeopardy clause because he consented to a mistrial.

Defendant also argues that the trial court abused its discretion in granting the prosecutor's motion to consolidate two separate informations where the offenses were separate and distinct acts, and were not related. Again, we disagree. We review this issue for an abuse of discretion. *People v Solak*, 146 Mich App 659, 666-667 (1985).

Testimony from the preliminary examination reveals that the counts were properly consolidated under MCR 6.120(B)(2) as an "act[] constituting part of a single scheme or plan." See *People v Tobey*, 401 Mich 141, 150; 257 NW2d 537 (1977). Both charges occurred on the same date, August

24, 1992. We find that the temporal proximity between the two incidents leading to the charges were so closely connected in terms of defendant's overall scheme that the trial court was well within its authority to grant the prosecutor's motion for joinder.

Defendant next argues that a witnesses' identification testimony was improper and violated his right to an attorney under the Sixth Amendment. A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with a firm conviction that a mistake has been made. *Id.*

Contrary to defendant's assertion, Georgette Warren's on-the-scene identification of defendant did not violate his right to counsel. Our Supreme Court has recognized in dicta that the absence of counsel at an eyewitness identification procedure is justified where there is a prompt on-the-scene corporeal identification within minutes of the crime. *People v Anderson*, 389 Mich 155, 187, n 23; 205 NW2d 461 (1973). This Court has adopted three tests in order to determine whether a defendant is entitled to counsel during a prompt on-the-scene corporeal identification.

The first approach, enunciated in *People v Dixon*, 85 Mich App 271, 280-281; 271 NW2d 196 (1978), held that "when a police officer has more than a mere suspicion that the person in custody is wanted for a crime, the officer cannot return the suspect to the scene of the crime but must take him to the police station and have a line-up at which counsel is present." The second approach, articulated in *People v Coward*, 111 Mich App 55, 63-64; 315 NW2d 144 (1981), permitted counselless on-the-scene identifications where the police officer, acting in good faith must decide whether "there was a reasonable likelihood that the suspect was connected with the crime or merely an unfortunate victim of circumstances." The circumstances of the suspect's apprehension seem unimportant under the *Coward* rationale. See *People v Wilki*, 132 Mich App 140; 347 NW2d 735 (1984). The final approach, contained in *People v Turner*, 120 Mich App 23, 36; 328 NW2d 5 (1982), required counsel to be present where the police have detained a person and have strong evidence that this person the culprit. "Strong evidence" is found "where the suspect himself has decreased any exculpatory motive" such as through a confession or presents a very distinct appearance. *Id.* The police may also subject the suspect to an on-the-scene identification unless they harbor "more than a suspicion" that the suspect was responsible for a second crime. *Id.* at 37.

Although the conflict was resolved for a brief time after this Court issued *People v Miller*, 208 Mich App 495; 528 NW2d 819 (1995), that opinion was nullified by our Supreme Court in *People v Miller*, 450 Mich 952-953; 545 NW2d 646 (1995). Regardless of which test is applied, the prompt on-the-scene identification in this case did not violate any of the above articulated tests. Georgette Warren testified that when she awoke on the morning of August 24, 1992, at 4:00 a.m., she looked out her window and saw a car in front of her house with a person inside. Warren had a good view of defendant and was able to see his full face. She stated that she was able to see him for "quite a while." She described the person as a black male, medium height with a muscular built, and without any hair. Within fifteen minutes of this sighting, Warren made an on-the-scene identification of defendant. The arresting officer, Steven Binkowski, testified that Warren was brought to the scene "to rule out Mr.

Evans as a possible suspect." Officer Jeffrey Dolsen, the other officer involved with defendant's arrest, stated that he thought the man they detained was "probably" the culprit.

Under *Dixon,* Officer Dolsen's admission that he believed that defendant was "probably" the suspect suggests that defendant should have been taken to the police station for a line-up. *Dixon, supra* at 280. Defendant fit the description as broadcast by the police bulletin: "a lone black male" and was pulled over in a "small car," a Plymouth Horizon, near the site of the alleged break-in. Yet, Dolsen also maintained that he "didn't want to take an innocent man to jail" and that he as not "sure" that they had the correct man. Officer Binkowski indicated that Warren was brought to the scene in order to eliminate defendant as a possible suspect. This case can be distinguished from *Dixon*. This Court in *Dixon* concluded that the defendants were entitled to a line-up and counsel after noting that the defendant and his associates were "more than potential suspects whose innocence was in doubt." *Id.* at 281. The police were vested with "a significant amount of information" that indicated the defendant's involvement in the crime. *Id.* The police knew exactly who to take into custody. *Id.* Here, in contrast, even though the police harbored suspicions that defendant was the culprit, there is no evidence that they were entirely confident that they had the right man. Dolsen's admission that they "probably" had the suspect was not confirmed by Officer Binkowski, who was less confident. Most important, this rule has not gained wide support by subsequent panels. See *People v Fields*, 125 Mich App 377, 382; 336 NW2d 478 (1983) (Holbrook, Jr., J., concurring); *Wilki, supra* at 146 (Maher, J., concurring).

The test becomes less stringent under *Coward*, *supra,* where the facts here comport with the requirement that the police, in good faith, need "to decide whether there was a reasonable likelihood that defendant was connected with the crime or merely an unfortunate victim of circumstances." *Id.* at 64. Neither officer was certain that he held the proper culprit. Dolsen's remark, that he did not want "to take an innocent man to jail," and Binkowski's expressed doubt support the trial court's conclusion that counsel was not required for Warren's identification.

Applying the instant facts to the *Turner* theory, there was no "strong evidence" through a confession or any distinct features that would eliminate doubt that defendant was in fact the culprit. *Turner, supra* at 36. The identification occurred promptly after the crime and appears to be entirely valid under all three tests.

Defendant also maintains that the identification procedure in this case was "highly suggestive." Because defendant has failed to include any argument regarding this issue, we consider this issue abandoned. *Sowders*, *supra*. In any event, although Warren's testimony was not made a part of the trial court record, on the basis of her testimony from the evidentiary hearing, it appears that an independent-basis for defendant's identification existed as an alternative vehicle to admit Warren's identification testimony. However, the prosecuting attorney stated at trial that "we already heard from Miss Warren, and she told this jury and she was under cross-examination, how she described the person she had seen." Nevertheless, based on Warren's testimony from the preliminary examination, she had no prior relationship with defendant or knowledge of defendant She was able to observe defendant from her home window and testified that a street light illuminated defendant She testified that

she saw his "full face" that evening and could see him "quite well." Warren identified defendant at the scene as well as in court both at the preliminary examination and at trial. It seems reasonable to conclude that Warren was able to make an in-court identification of defendant without depending on the pretrial confrontation conducted at the arrest scene. *People v Kachar*, 400 Mich 78, 95; 252 NW2d 807 (1977). We therefore conclude that the trial court did not clearly err in admitting the identification evidence.

Finally, defendant argues that the trial court abused its discretion by denying his request for replacement counsel before trial commenced without any investigation. Defendant failed to include this portion of the transcript which normally forfeits this issue on appeal. *People v Coons*, 158 Mich App 735, 740; 405 NW2d 153 (1987). However, because of the constitutional dimensions of this issue and the fact that the relevant section of the transcript is contained in the prosecution's brief, we will review this issue. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1995). A trial court's decision to deny a defendant's request for replacement counsel is reviewed for abuse of discretion. *In re Conley*, 216 Mich App 41, 45; 549 NW2d 353 (1996).

Although an indigent defendant is guaranteed the right to counsel, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). In order to warrant appointment of substitute counsel, a defendant must show good cause and that the substitution will not unreasonably disrupt the judicial process. *Id.* at 14. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to fundamental trial tactics. *Id.* A mere allegation that a defendant lacks confidence in his lawyer does not constitute adequate cause. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989). Only where the defendant asserts adequate cause and a factual dispute exists regarding this assertion is the trial court required to take testimony and render findings on the matter. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).

Here, defendant failed to argue any of the recognized reasons such as inadequacy, lack of diligence or disinterest in order to establish good cause so as to merit replacement counsel. *Id.* The record indicates that Mr. Barr was not defendant's original attorney. The court had already granted defendant's request for new counsel at the preliminary examination. The excerpt contained in the prosecution's brief reveals that defendant was simply not satisfied with his attorney. Defendant failed to specify any reason for his request beyond the fact that his attorney did not "even remember his name." When the trial court stated that it was going to deny defendant's wish, defendant indicated that he would hire his own attorney. We therefore conclude that the trial court did not abuse its discretion in denying defendant's request for replacement counsel.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet

[1] Defendant's first trial ended in a mistrial.

[2] Jeopardy attaches once the jury is selected and sworn. *Booker, supra* at 172.