

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MOXLEY,

Defendant-Appellant.

UNPUBLISHED
February 21, 1997

No. 182615
Recorder's Court
LC No. 94-001303

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of uttering and publishing, MCL 750.249; MSA 28.446, and forgery, MCL 750.248; MSA 28.445. He was sentenced to concurrent terms of three to fourteen years' imprisonment on each conviction. He appeals as of right. We affirm.

Defendant first argues that the district court which conducted the preliminary examination erred when it granted the prosecution's motion to bind him over on a forgery charge where the prosecutor added that charge at the examination after the close of evidence.

A magistrate can allow a prosecutor to add additional charges at a preliminary examination. To do so, however, two conditions must be met. First, the prosecutor must present evidence sufficient to justify a probable cause finding that the defendant committed the crime. Second, the amendment cannot cause "unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). An amendment does not cause unacceptable prejudice where the elements of the original offense and the added offense were shown and where the defendant fails to demonstrate that his attorney would have conducted the preliminary examination differently had the amended charge been included in the original charge. *Id.* at 365.

At the preliminary examination defendant presented an alibi defense, i.e., that he was not the person who passed the false check and promissory note. The prosecution witness, however, testified

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

that he saw defendant sign the promissory note and give both the note and the check in exchange for the diamond. Despite defendant's evidence, he could not defeat the uttering and publishing bindover. If so, then the same evidence would also have been insufficient to defeat the forgery bindover. Therefore, defendant cannot demonstrate that he would have conducted the examination differently had the forgery charge been included with the original charge.

Next, defendant argues that he was denied his Fifth Amendment right to remain silent when a police officer testified that he "spoke" with defendant while defendant was in custody, but that defendant did not make a statement. Defendant argues that by giving this testimony, the witness informed the jury that defendant invoked his right to remain silent when questioned by police. Defendant is correct that, except for certain impeachment purposes, a prosecutor may not use a defendant's exercise of his Fifth Amendment right to remain silent against him at trial. *People v Bobo*, 390 Mich 335, 359; 212 NW2d 190 (1973); *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). However, the prosecutor did not do so in the present case. The witness testified only that he did not take defendant's statement; he did not testify that he asked defendant any questions, that defendant refused to answer questions, or that defendant otherwise invoked his right to remain silent. Therefore, there was no *Bobo* violation.

Defendant next argues that he was denied a fair trial when, on cross-examination, the prosecutor impeached him with prior convictions and then used this evidence in the rebuttal summation. However, defendant failed to object or request a curative instruction at trial. A defendant's failure to object or request a curative instruction forecloses appellate review of improper remarks by the prosecutor unless the prejudicial effect of the remarks is so serious that no objection or instruction could have cured he prejudice or manifest injustice would result from failure to review the misconduct. *People v Buck*, 197 Mich App 404, 418; 496 NW2d 321 (1992). After careful review of all of defendant's allegations of misconduct, we conclude that any error could have been cured had defendant brought it to the court's attention. Further, failure to review defendant's claims of misconduct would not result in manifest injustice.

Finally, defendant argues that he was denied effective assistance of counsel. To establish that counsel's assistance was so defective as to require reversal of a conviction, the defendant must establish (1) that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense, i.e., that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

At a hearing on defendant's new trial motion, the trial court concluded that counsel's performance was not deficient. We agree. Defendant claims that trial counsel's decision not to call an alibi witness was unreasonable. That witness, however, did not come forward with his version of events until after defense counsel discovered that defendant's other alibi witnesses could not verify his whereabouts at the time of the crime. Trial counsel testified that this new witness would have been subject to impeachment on this basis and that he discussed his decision with defendant. We find that

this was a decision involving trial strategy, *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988), not a failure to prepare for trial which resulted in counsel's ignorance of and failure to present valuable evidence that would have substantially benefited the accused. *People v Callabero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Therefore, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Marilyn Kelly

/s/ Kathleen Jansen

/s/ Meyer Warshawsky