

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK JAMES FISHER,

Defendant-Appellant.

UNPUBLISHED

March 23, 1999

No. 202821

Tuscola Circuit Court

LC No. 96-006920 FC

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, first-degree home-invasion, MCL 750.110a(2); MSA 28.305(a)(2), larceny in a building, MCL 750.360; MSA 28.592, and cutting telephone lines, MCL 750.540; MSA 28.808. He was sentenced to concurrent terms of twenty-five to fifty years' imprisonment for the armed robbery conviction, twelve to twenty years' imprisonment for the home invasion conviction, three to four years' imprisonment for the larceny conviction, and one to two years' imprisonment for the cutting telephone lines conviction. Defendant appeals as of right. We vacate the larceny conviction, affirm the remaining convictions, and remand for resentencing.

Defendant contends that the trial court's removal of his appointed counsel, Clinton House, denied him his right to counsel. We disagree. "A court may remove a defendant's attorney on the basis of gross incompetence, physical incapacity, or contumacious conduct." *People v Johnson*, 215 Mich App 658, 663; 547 NW2d 65 (1996). House informed the court that he was unable to try defendant's case on the dates scheduled for trial because he was scheduled to undergo spinal surgery. House's anticipated physical incapacity constituted sufficient grounds for the trial court to replace him with substitute counsel. Although defendant argues that the trial court should have granted a continuance so that House could continue to represent him, we find no abuse of discretion in the trial court's decision to appoint substitute counsel rather than grant a continuance, particularly where the court had granted two previous adjournments and it was not certain that House would be able to timely resume his representation of defendant. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Furthermore, because defendant has not established any prejudice stemming from the denial of a continuance, he is not entitled to relief on this basis. *Id.*

Defendant also asserts that the trial court improperly replaced his first substituted attorney, Robert A. Betts, with Brian Schrope. According to the trial court's order, which was entered only four days after Betts was appointed, Betts indicated that he was unable to represent defendant because of a scheduling conflict. Under the circumstances, we find no abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

The trial court did not abuse its discretion in admitting the testimony of Mrs. Beste. The evidence was offered to show defendant's identity as the perpetrator of the crime, which was the central issue at trial. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Defendant's contention that the prosecutor denied him a fair trial by admitting evidence of drug usage is not preserved for appeal. Defendant waived any error when defense counsel acknowledged during opening statements that defendant was a drug addict. *People v Castelli*, 370 Mich 147, 154; 121 NW2d 438 (1963); *People v Marrow*, 210 Mich App 455, 465-466; 534 NW2d 153 (1995).

The prosecutor's remark that he had done his job and had proven defendant guilty beyond a reasonable doubt was not improper. Viewed in context, the remark did not suggest that the jury should decide the case on the authority of the prosecutor's office. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988).

No error occurred because of the trial court's failure to give the addict-informer instruction, CJI2d 5.7. Although Theresa Lynch was an addict, she was not an informant as contemplated by the instruction, and her testimony was not the only evidence linking defendant to the crime. Therefore, the instruction was not applicable to this case. *People v McKenzie* 206 Mich App 425, 432; 522 NW2d 661 (1994).

Reversal is not required because of the admission of a police officer's testimony concerning Lynch's statements to him. On appeal, defendant claims that the testimony was not admissible under MRE 801(d)(1)(B), because he did not claim that Lynch's trial testimony was recently fabricated. "[A] charge of recent fabrication is a narrow subset of impeachment for credibility. One may impeach for lack of credibility without going so far as to charge recent fabrication." *Thomas v United States*, 41 F3d 1109, 1119 (CA 7, 1994). Even if a defendant's attack does amount to a claim of recent fabrication, the prosecution must show that the statements were made before the motive to fabricate arose in order for the statements to be admitted under MRE 801(d)(1)(B). *People v Rodriguez (On Remand)*, 216 Mich App 329; 549 NW2d 359 (1996). In this case, defense counsel's impeachment of Lynch was primarily an attack on her credibility, rather than a suggestion that she recently fabricated the story. However, even if the statements were not admissible under MRE 801(d)(1)(B), the statements were admissible to rehabilitate the witness. *People v Sayles*, 200 Mich App 594, 595; 504

NW2d 738 (1993); see also *United States v Ellis*, 121 F3d 908 (CA 4, 1997). In any event, any error was harmless because the officer's testimony only reiterated Lynch's testimony and, therefore, was mere cumulative evidence. *Rodriquez, supra* at 332.

Defendant claims that his multiple convictions of home invasion, armed robbery and larceny in a building violate his right against double jeopardy. Plaintiff concedes that the larceny conviction should be vacated in light of the armed robbery conviction. However, the dual convictions of home invasion and armed robbery do not violate the constitutional prohibition against double jeopardy. The offense of home invasion was complete upon entry and the subsequent armed robbery offense, committed inside the building, constituted a separate act. See *People v Patterson*, 212 Mich App 393, 395; 538 NW2d 29 (1995). Furthermore, the home invasion statute suggests that the Legislature intended that multiple punishments could be imposed for both first degree home-invasion and any other felony committed after entry, during the course of the same criminal transaction. See MCL 750.110a(6); MSA 28.305(a)(6).

Regarding defendant's sentences, we agree that the trial court improperly punished defendant for the victim's stroke, which occurred approximately eight months after the robbery. Although it is appropriate for a trial court to consider the impact of a crime on a victim, *People v Jones*, 179 Mich App 339, 342-343; 445 NW2d 518 (1989), a defendant must also be sentenced on the basis of accurate information, *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Here, there is no factual support in the record for the trial court's determination at sentencing that defendant caused the stroke. Accordingly, we vacate defendant's sentences and remand for resentencing. Defendant's remaining sentencing issues need not be addressed in light of our decision to remand for resentencing.

Defendant's larceny conviction is vacated, the remaining convictions of armed robbery, first-degree home invasion, and cutting telephone lines are affirmed, but defendant's sentences are vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

/s/ Michael R. Smolenski