

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 20, 2012

v

WILLIAM JOSEPH JENNINGS,  
Defendant-Appellant.

No. 301941  
Jackson Circuit Court  
LC No. 10-005462-FH

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

JIMMY RAY LIPPS,  
Defendant-Appellant.

No. 302266  
Jackson Circuit Court  
LC No. 10-005461-FH

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Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals, defendants William Joseph Jennings and Jimmy Ray Lipps appeal by right after a joint jury trial.

In docket number 301941, Jennings appeals his convictions of possessing burglar's tools, MCL 750.116; entry without breaking, MCL 750.111; and larceny in a building, MCL 750.360. The trial court sentenced Jennings as a habitual offender, fourth offense, MCL 769.12, to serve concurrent terms of 46 months to 20 years in prison for his conviction of possessing burglar's tools, 46 months to 20 years in prison for his conviction of entry without breaking, and 46 months to 15 years in prison for his conviction of larceny. The trial court further ordered him to serve these sentences consecutively to the sentence for which he was on parole when he committed these offenses.

In docket number 302266, Lipps appeals his convictions of entry without breaking, MCL 750.111; and larceny in a building, MCL 750.360. The trial court sentenced Lipps as a habitual offender, fourth offense, MCL 769.12, to serve concurrent terms of 5 to 20 years in prison for his conviction of entry without breaking and to serve 5 to 15 years in prison for his conviction of larceny. The trial court ordered him to serve his sentences consecutively to the sentence for which he was on parole. Because we conclude that there were no errors warranting relief in either case, we affirm both.

Jennings first argues that the trial court effectively denied him the right to present a defense when it erroneously denied his request for an adjournment. This Court reviews a trial court's decision on a motion to adjourn for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

Jennings moved for—and received—the appointment of a new lawyer less than one month before his trial date. At a hearing before trial, Jennings' new lawyer moved for an adjournment after the prosecutor gave notice of the intent to use other acts evidence. He explained that he was investigating a possible witness and that he had some “other issues” in preparing for trial. The trial court recognized that Jennings' lawyer was new to the case, but stated that it had warned Jennings about getting a new lawyer so close to the date for trial. It also noted that it was not permitting the prosecutor to add new witnesses because it would be unfair and that Jennings had had plenty of time to investigate his witnesses prior to that point. For those reasons, it denied the request to adjourn.

A criminal defendant has a constitutionally guaranteed right to present a defense. *Yost*, 278 Mich App at 379. “But this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* (citations and internal quotation marks omitted). In assessing the propriety of an adjournment, this Court will look at a variety of factors; we will consider whether the defendant asserted a constitutional right and had a legitimate reason for asserting the right, whether the defendant was negligent or requested previous adjournments, and whether the defendant demonstrated prejudice from the trial court's refusal to adjourn. *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976).

Here, there is no record evidence that Jennings would have pursued a different defense had the trial court granted his motion. Similarly, although Jennings claimed that he wanted more time to investigate a witness, he failed to identify the witness and failed to explain how that witness might support his theory of the case. Moreover, to the extent that these shortcomings were the result of the witness' unavailability, a motion to adjourn on the basis of an unavailable witness must be made as soon as possible after ascertaining the facts. MCR 2.503(C)(1). And “[a]n adjournment may be granted on the ground of unavailability of a witness . . . only if the court finds that . . . diligent efforts have been made to produce the witness[.]” MCR 2.503(C)(2). Jennings' new lawyer noted that the witness was known since the preliminary examination. He also failed to present any evidence that he had made diligent efforts to produce the witness. See *People v Knox*, 364 Mich 620, 643-644; 111 NW2d 828 (1961). Finally, on appeal, Jennings still has not identified the witness or the witness' proposed testimony. He merely speculates that

the witness might have been helpful. As such, Jennings has not and cannot establish prejudice. Accordingly, under the totality of the circumstances, we cannot conclude that the trial court's decision to deny his motion to adjourn constituted an abuse of discretion. See *People v Wilson*, 397 Mich at 81.

Jennings and Lipps both argue that the trial court improperly questioned witnesses and that these questions prejudiced their trials. Because neither defendant objected to the questioning,<sup>1</sup> we will review the claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

It is well-settled that trial courts may question witnesses to clarify testimony or elicit additional relevant information. See *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992); see also MRE 614(b). Nevertheless, "the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Id.* at 405. The test to determine whether a new trial is warranted is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the juror's minds regarding a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Id.*

We have reviewed the questions and comments cited by both defendants and conclude that the majority were appropriate. However, during the cross-examination of the employee responsible for the tools that were stolen from the hotel, the trial judge commented: "[y]ou sound like you're pretty fastidious about your tools." And the witness agreed: "I need them to work." This comment plainly overstepped the bounds of propriety. The witness' testimony was essential to establish that the items found in Jennings and Lipps' possession were stolen. By commenting that the witness was fastidious with his tools, the trial court essentially stated to the jury that it had listened to the witness' testimony and drawn an inference about his habit and character: he was careful with his tools to the point of fastidiousness. By making this comment and inviting the witness to agree, the trial court intimated that it found the witness' testimony to be credible and impliedly suggested that the jury should also conclude that he is quite credible. As such, we conclude that the trial court plainly erred in making this comment; it should know better than to comment on the quality of a witness' testimony because the jury might be tempted to defer to the trial court's opinion. And, although the record does not support the conclusion that the trial court deliberately attempted to persuade the jury, by repeatedly interjecting itself into the examination of witnesses, the trial court invited such an error. Nevertheless, given the overwhelming evidence that Jennings and Lipps committed the offenses at issue, we cannot conclude that this error prejudiced either defendant's trial. Consequently, the error does not warrant relief. *Carines*, 460 Mich at 763.

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<sup>1</sup> Both also cite the record at points without analyzing the cited material. Therefore, they have abandoned any claim of error with regard to those cites and we shall limit our analysis accordingly. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Jennings and Lipps next argue that the trial court erred when it failed to instruct the jury that it should not discuss the case prior to deliberations. Neither defendant objected to the error; therefore, we shall review the claims for plain error. *Id.*

Our Supreme Court has held that “jurors should not be encouraged to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made and the jury charged by the court but that, rather, juries should be directed by the court not to do so until ready to deliberate upon their verdict at the conclusion of the trial.” *People v Hunter*, 370 Mich 262, 269; 121 NW2d 442 (1963). On the record, it appears that the trial court plainly erred. However, “[w]hile prudence would dictate that the trial judge should remind the jury not to discuss the case [among themselves], failure to do so does not require reversal absent a showing of prejudice.” *People v Haugabook*, 23 Mich App 356, 358-359; 178 NW2d 556 (1970). Both defendants allege prejudice on the basis of “premature deliberation” revealed through the jury’s questions. However, no inference can be drawn that the jurors actually began deliberating or discussed the case solely because they had questions. This Court has specifically held that “the asking of questions by the jury does not prove that jurors discussed the case among themselves[.]” *People v White*, 144 Mich App 698, 701; 376 NW2d 184 (1985). Because there is no evidence that the jury actually engaged in premature deliberations, Jennings and Lipps have not established that the trial court’s failure to instruct the jury prejudiced them. *Carines*, 460 Mich at 763.<sup>2</sup>

Jennings and Lipps next allege various instances of prosecutorial misconduct, none of which were properly preserved. Where “there was no contemporaneous objection or request for a curative instruction in regard to any alleged error [of prosecutorial misconduct] . . . review is limited to ascertaining whether plain error affected [the] defendant’s substantial rights.” *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Jennings argues that the prosecutor referred to evidence outside the record when he discussed the burglar’s tools at issue. However, Jennings fails to identify what specific evidence was outside the record. Further, a careful review of the record reveals that the prosecutor’s argument was fully supported in the record and did not constitute plain error. Lipps argues that the prosecutor engaged in misconduct by eliciting evidence that he was unemployed at the time of the crimes at issue. Evidence of a defendant’s financial condition may be admissible depending on the circumstances of a particular case. *People v McLaughlin*, 258 Mich App 635, 665-666; 672 NW2d 860 (2003). Viewed in context, the prosecutor did not elicit evidence of Lipps’ unemployment for the impermissible purpose of showing that he had a motive to steal the hotel’s equipment. Rather, the prosecutor elicited evidence of Lipps’ unemployment to show that it was more likely that the money actually found in his possession came from breaking and entering vending machines than from a legitimate source. MRE 401. The probative value of

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<sup>2</sup> To the extent that defendants argue that the trial court erred in failing to implement the safeguards of AO 2008-2, we note that MCR 2.513(K) became effective September 1, 2011, and, as adopted, only pertains to civil cases. ADM File No. 2005-19, June 29, 2011.

Lipps' unemployment was not substantially outweighed by the danger of unfair prejudice, MRE 403, especially in light of the fact that the jury acquitted Lipps of possession of burglar's tools. The singular elicitation that Lipps was unemployed at the time the crimes at issue occurred did not amount to plain error affecting Lipps' substantial rights.

Lipps also argues that his counsel was ineffective in failing to move to suppress a witness' in-court identification. Because the trial court did not hold an evidentiary hearing on this claim, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish a claim of ineffective assistance of counsel, a defendant must show that his trial lawyer's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the proceeding's outcome would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Lipps argues that his trial lawyer should have moved to suppress the hotel maintenance man's in-court identification because the on-the-scene identification was "so unnecessarily suggestive and conducive to irreparable mistaken identification" that he was denied due process of law. *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), overruled on other grounds by *Griffith v Kentucky*, 479 US 314, 107 S Ct 708, 93 L Ed2d 649 (1987). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). "[P]rompt, on-the-scene identifications are reasonable, 'indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime, and subject to arrest, or merely an unfortunate victim of circumstance.'" *People v Libbett*, 251 Mich App 353, 359; 650 NW2d 407 (2002), quoting *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

In this case, the hotel maintenance man came face to face with Lipps in the maintenance room and questioned Lipps regarding his presence there. Based on the maintenance man's description, the police searched for and located Lipps in the parking lot of a nearby hotel. The police then took the maintenance man to see if Lipps was the man he had encountered. Lipps was in handcuffs standing next to a police car, and the maintenance man positively identified Lipps. The identification occurred within 10 or 15 minutes after a responding officers arrived on the scene. Under these circumstances, Lipps' trial lawyer might reasonably conclude that the witness' on-site identification was proper and, as such, the motion to suppress the in-court identification would have been futile. Defense counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997). For that reason, Lipps has not overcome the presumption that his trial lawyer's decision was a matter of trial strategy. *Uphaus*, 278 Mich App at 186.

Lipps lastly argues that the trial court erred in engaging in an upward sentencing departure which violated the principle of proportionality.

[C]ourts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is

reviewed for an abuse of discretion as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).]

Lipps' recommended minimum sentence range under the legislative guidelines was 7 to 46 months for the entry without breaking conviction. See MCL 777.16f; MCL 777.66. However, the trial court sentenced Lipps to 5 to 20 years in prison, an upward departure of 14 months. The trial court's stated reasons for departure were Lipps' recidivism, including the fact that he committed the new offenses after being paroled for only two months; lack of rehabilitation; and, to a lesser degree, the fact that he repeatedly engaged in similar types of crimes. Lipps argues that the trial court's stated reasons for departure were already accounted for by his prior record variables (PRVs). See MCL 769.34(3)(b).

Lipps' criminal history began with a misdemeanor larceny conviction in 1983, and continued with 16 felony convictions spanning more than 20 years. Although the trial court scored PRV 2 at the maximum of 30 points for having four or more prior low severity felony convictions, the score did not account for the fact that he had more than triple the number of convictions which would warrant that score, and that he repeatedly committed the same type of crime. See MCL 777.52(1)(a). The trial court also scored PRV 7 for Lipps' concurrent felony conviction, but the score did not account for the fact that Lipps' criminal behavior had escalated—he had only been on parole for two months when he committed the crimes at issue here. See MCL 777.57. Thus, the trial court's stated reasons for departure were supported by the record and were not adequately accounted under the prior record variables. Those reasons were also objective and verifiable. *Smith*, 482 Mich at 300. The trial court's determination that the reasons were substantial and compelling enough to justify the departure fell within the range of principled outcomes. *Id.*

Lipps also challenges the extent of the departure. “The ‘principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.’” *Id.* at 304, quoting *People v Babcock*, 469 Mich 247, 262; 666 NW2d 231 (2003). A proportionality review considers “whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record . . . .” *Babcock*, 469 Mich at 262. Here, in light of Lipps’ extensive criminal history, an upward departure of one year, two months “contribute[d] to a more proportionate criminal sentence than [was] available within the guidelines range.” *Id.* at 264. Therefore, the departure does not warrant relief.

There were no errors warranting relief.

Affirmed in both dockets.

/s/ Michael J. Kelly  
/s/ Kurtis T. Wilder  
/s/ Douglas B. Shapiro