

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON KELLY JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2009

No. 283847

Wayne Circuit Court

LC No. 07-014790-FC

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, carjacking, MCL 750.529a, two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a single term of life imprisonment for the first-degree murder conviction, concurrent prison terms of 30 to 50 years for the assault, carjacking, and armed robbery convictions, and three to five years for the felon in possession conviction, which sentences are to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's sole argument on appeal is that he was denied his due process right to meaningfully participate in his trial because he did not have a hearing aid for a majority of the trial. Defendant contends that the trial court, having been apprised that he had a hearing impairment, had an affirmative duty to inquire of him directly to determine whether he understood the proceedings and was satisfied that defense counsel was adequately communicating with him and that he was able to adequately hear witness testimony.

At trial, defense counsel informed the trial court that defendant had a hearing problem that required the use of a hearing aid, which defendant did not have at the start of the trial. However, counsel indicated that he was able to communicate with defendant, that defendant was involved with the trial, and that counsel was completely satisfied that defendant was aware of what was going on. Because there was no objection to proceeding with the trial despite defendant's lack of a hearing aid, or any request to adjourn trial until a hearing aid could be obtained, this issue is unpreserved. Therefore, defendant has the burden of establishing a plain

error affecting his substantial rights. *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007).

Whether an accused is accorded due process depends on the facts of each case. *People v McGee*, 258 Mich App 683, 699-700; 672 NW2d 191 (2003). As defendant correctly observes, he had a right to be able to meaningfully participate in his trial. In the case of a hearing impairment, MCL 775.19a is implicated, and the statute provides that where a defendant suffers from a physical defect that impairs his ability to adequately understand a charge or present a defense to the charge, or that impairs his ability to maintain his rights, the court is required to appoint a qualified person to act as an interpreter. While defendant only complains about lacking a hearing aid and not the absence of an interpreter, the record in this case simply does not support defendant's claim that he was incapable of understanding the proceedings or meaningfully participating in his trial.

When defense counsel informed the trial court at trial that defendant did not have his hearing aid, counsel explained that he had been able to effectively communicate with defendant in the past despite the lack of a hearing aid, that defendant was totally involved in the earlier jury selection process at trial, and that counsel was completely satisfied that defendant was aware of what was going on. Further, the record discloses that defendant did not have his hearing aid during several pretrial proceedings and the only accommodation requested at those proceedings was that persons speaking in the courtroom speak more loudly. Testimony at trial also indicated that defendant did not have his hearing aid when he was interviewed by the police on the day after the offense and that the police had no problems communicating with him then. Similarly, an attorney who was present at a pretrial corporeal lineup testified that he did not notice any problems communicating with defendant. Additionally, several instances throughout the lower court proceedings evidenced that defendant was aware of what was being said around him.<sup>1</sup> Thus, defendant's claim that he was incapable of effectively participating in his trial because of

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<sup>1</sup> At sentencing, the trial court noted that it had observed defendant responding to things being said throughout the trial. Further, at the sentencing, defendant again behaved as if he could not hear anything that was being said, which led the court and the victim, who was making a statement, to tell defendant to stop playing games. The following exchange then occurred:

*Victim.* You disrupted my life. I hope you pay for it.

*Defendant.* You disrupting mine right now.

*Court.* Note that he did respond to you. I guess he just heard you, right.

*Victim.* Yes. He heard me very well. It's amazing. You hear what you want and see what you want.

the lack of a hearing aid is not supported by the record.<sup>2</sup> Accordingly, defendant has not established a plain due process error.

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Christopher M. Murray

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<sup>2</sup> Defendant cites no authority to support his contention that the trial court had an affirmative duty to inquire personally of defendant, rather than counsel, regarding the alleged impairment. Further, with defendant now having the benefit of the transcript, he fails to state what matters he could not hear in court because of the supposed impairment, let alone explain how the defense would have proceeded differently absent the missed communications. The evidence of defendant's guilt in this case, which involved a particularly brutal murder, was overwhelming.