

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL P. GEOGHEGAN, a/k/a MICHAEL P.
GEOGHAGAN,

Defendant-Appellant.

UNPUBLISHED

July 21, 1998

No. 210652

Oakland Circuit Court

LC Nos. 93-122365,

93-122382

ON REMAND

Before: White, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court for the second time. In our first opinion, *People v Geoghegan*, unpublished opinion per curiam, issued November 26, 1996 (Docket No. 170140), we reversed and remanded for a new trial on the basis that the trial court failed to advise defendant of the dangers and disadvantages of self-representation. We concluded that the trial court had thus failed to substantially comply with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D), before granting defendant's request to proceed in propria persona. Finding that issue dispositive, we did not address defendant's remaining challenges.

In lieu of granting leave to appeal, the Supreme Court remanded to this Court to consider "whether waiver of the right to counsel is subject to a harmless error analysis and, if so, whether any error in advising defendant about the dangers of self-representation was harmless beyond a reasonable doubt." We determined that a court's failure to engage in the prescribed colloquy regarding the waiver of counsel is subject to a harmless-error analysis, and that the error is harmless if it can be shown that, notwithstanding the failure, the waiver of counsel was nevertheless voluntary, knowing and intelligent. We concluded that the record as a whole established such a waiver in the instant case. *People v Geoghegan*, unpublished opinion per curiam, issued September 26, 1997 (Docket No. 170140).

By order dated March 24, 1998, the Supreme Court denied defendant's application for leave to appeal but remanded to this Court for consideration of the remaining issues in defendant's appeal of right. We have considered the remaining issues and affirm.

I

At approximately 4:00 p.m. on December 21, 1992, defendant entered the Comerica Bank in the Twelve Oaks Mall in Novi and handed a note to a teller (Diane Fletcher) demanding twenty and fifty dollar bills. Fletcher testified at trial that she gave defendant a half packet of twenty dollar bills and additional money. As defendant turned toward the door, Fletcher pressed the alarm button and the button that triggered the security camera. Fletcher testified that she did not see defendant with a gun, but believed he was carrying one because his note mentioned a gun. Fletcher identified defendant as being in the security photographs taken on the day of the robbery, and identified him in court, testifying that she had no doubt that defendant had robbed her.

The bank customer Fletcher assisted immediately after defendant also identified defendant and testified that he saw defendant place a large bundle of bills in his pocket and leave the bank. The customer testified that Fletcher appeared extremely frightened and that he believed a robbery had occurred.

At approximately 4:15 p.m. on December 23, 1992, defendant returned to the same bank branch and gave a note to another teller, Patricia McLaughlin. McLaughlin testified that defendant's note stated that he had a gun and would not hesitate to shoot, and requested fifty and one-hundred dollar bills. McLaughlin testified that she said to defendant, "you have got to be kidding," and that defendant responded by pulling something out of his right pocket that had a wood grain, and replied, "Does this look like I'm kidding?" McLaughlin testified that she did not see an actual gun but believed that she saw the handle of a gun. McLaughlin gave defendant money and testified that when she started to back up, defendant threatened to shoot her and a manager, also present at the time, if they left. McLaughlin identified defendant in court as the robber.

Defendant was arrested on December 26, 1992, and gave a statement to the Michigan State Police and the FBI, confessing to committing both robberies.

II

Defendant proceeded in propria persona. Before trial, defendant made a motion for severance. The trial court denied the motion.

Defendant argues that the trial court committed error requiring reversal by denying his motion to sever the two bank robbery charges. While the court may have erred, MCR 6.120(B); *People v Tobey*, 401 Mich 141, 152-153; 257 NW2d 537 (1977); *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690, modified in part 441 Mich 867 (1992), we conclude that any error was harmless because of the overwhelming evidence of defendant's guilt regarding both robberies. *People v Beets*,

105 Mich App 350, 353; 306 NW2d 508 (1981). Defendant confessed to the crimes, was identified by a number of bank employees and several bank customers as the robber on each of the two dates in question, and appeared in bank photographs made from the security camera films.

Defendant also argues that he would have had a “fairer trial” had the cases been severed because evidence of the other bank robbery should have been excluded under MRE 404(b), and he would have been able to request a limiting instruction pursuant to MRE 105 to exclude evidence from one robbery in the trial of the other robbery. The overwhelming evidence of defendant’s guilt regarding both robberies precludes a finding of reversible error even were we to conclude that this claim has merit.

III

Defendant next argues that the trial court erred in denying his motion for an adjournment. We disagree.

The matter of a continuance is within the trial court’s discretion, and not every denial of a request for more time violates due process. *People v Charles O Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972), quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964).

There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances presented in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [*Id.*]

A reviewing court considers whether 1) defendant was asserting a constitutional right; 2) he had a legitimate reason for asserting that right; 3) he was not negligent in asserting it; and 4) prior adjournments of trial were at his request. *Id.* at 578. A trial court’s desire to expedite the docket is not a sufficient reason to deny an otherwise proper request for a continuance. *Id.* at 577.

If a material witness is absent at trial, it is within the trial court’s discretion to grant a motion for a continuance or stay of proceedings. *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988). An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence. MCR 2.503(C)(2); MCR 6.001(D). Reversal will be granted only where denial of the motion is an abuse of discretion and the moving party is prejudiced so that he is denied a fair trial. *Bailey*, supra at 499. A trial court’s determination regarding a discovery request is reviewed for abuse of discretion. *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994).

Defendant argues that the trial court’s denial of his motion to adjourn rendered him unable to present his defense of duress and post-traumatic stress disorder (PTSD) at trial. He has thus asserted a

constitutional right. The next question is whether defendant had a legitimate reason for asserting that right.

Defendant argues that adjournment was required in order for his expert, Dr. Linda Cahalan, of Traverse City, Michigan, to recover from cancer surgery, and to produce three members of the Aryan Brotherhood incarcerated in federal prisons, who would testify that they had ordered that defendant either rob the banks or die. Defendant eventually provided the trial court with three full names: Thomas Silverstein, incarcerated at Leavenworth, John Campbell and Barry Mills from Marion, and a person named "Bill" who acted as the gang's messenger. Defendant argued that the gang members were in the immediate area of the bank robberies and that he would have been killed had he not turned over the bank money to them. Defendant also argues that there was previous FBI evidence of threats against his life by the Aryan Brotherhood. Defendant argued that he suffered from PTSD, stemming from nine years of incarceration at Marion, where he witnessed five murders and was stabbed himself. Defendant asserted that he would show through Dr. Cahalan's expert testimony and other evidence that he was diagnosed with PTSD, was being treated for it until his arrest, and that he would show the causes and effects of the disorder, especially while under duress. He argued that Dr. Cahalan would assist in establishing his state of mind at the time of the offenses. Defendant also argued that he was waiting for out-of-state medical records to arrive; that he had not been able to locate an address book he needed that the FBI had; and that he needed more time to prepare pretrial motions and briefs.

The prosecution opposed adjournment, arguing that it would not pay for Silverstein to be present because he was at Leavenworth, and that locating a "Bill" would be next to impossible. It further argued that it knew of no address book, that defendant's claims were frivolous, and that defendant was using a diminished capacity or intoxication defense in Livingston County and had decided to try something similar in the instant case.

The prosecution further argued below that duress was not a valid defense to the specific intent crimes involved here and that PTSD was not a valid defense to having committed two bank robberies within two days. We disagree.

Defendant's use of his alleged PTSD was in support of his duress defense. He argued that his having PTSD made him more vulnerable or susceptible to duress by the Aryan Brotherhood gang.

In Michigan, an act that might otherwise constitute a crime may be excused on the ground that it was done under compulsion or duress, but the compulsion must be present, imminent and impending, and of such a nature as to induce a well-founded apprehension of death or serious bodily harm if the act is not done. *People v Merhige*, 212 Mich 601; 180 NW 418 (1920); *People v Hocquard*, 64 Mich App 331; 236 NW2d 72 (1975); *People v Hubbard*, 115 Mich App 73; 320 NW2d 294 (1982); *People v Kelly*, 51 Mich App 28; 214 NW2d 334 (1973).¹ Threats of future injury will not excuse an offense. *Hocquard, supra* at 78. Duress is not a defense to homicide. *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987). To establish a defense of duress, a defendant must show 1) The threatening conduct was sufficient to create in the mind of a reasonable person fear of death or serious

bodily harm, 2) that this conduct in fact caused fear of death or serious bodily harm in the defendant's mind, 3) The fear or duress was operating upon his or her mind at the time of the act, and 4) that the defendant committed the act to avoid the threatened harm. *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975). The defense bears the burden of producing some evidence from which the jury can conclude that the essential elements of duress are present. *People v Lemons*, 454 Mich 234, 248; 562 NW2d 447 (1997). Once this burden of production is satisfied, the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act under duress. See *People v Field*, 28 Mich App 476, 477-478; 184 NW2d 551 (1970).

We conclude, however, that defendant was negligent in asserting his constitutional right where he first raised his need for witnesses and documents to support a duress defense at trial. Although this was the only adjournment defendant requested, we conclude that under the circumstances presented here, the trial court did not abuse its discretion in denying an adjournment that, according to defendant, was necessitated in large part in order for the prosecution to produce prisoners incarcerated at Marion and Leavenworth. Defendant had appeared in court on motions a number of times prior to trial, and his statements to the police and FBI, taken months earlier, were devoid of any mention of duress.² Regarding the medical records, the record establishes that defendant had some records when he argued his motion, and that the other medical records arrived during trial but defendant chose not to present that evidence. Regarding Dr. Cahalan, defendant made no showing that he had tried to secure her testimony or that he had tried to secure another expert witness in her stead. The record also establishes that the address book defendant asserted a need for was not in the prosecution's possession and, under questioning by the court, defendant stated that the names in the address book were of persons who had been deposed regarding the Aryan Brotherhood's general inclination to threaten persons with death. The court noted that this information did not go to the instant robberies.

Further, one would reasonably question whether the prisoners, if made available, would incriminate themselves by testifying that they threatened defendant with death if he did not rob the banks, and whether they would invoke the Fifth Amendment privilege against self-incrimination. We find no error.

III

Defendant next argues that the trial court erred in denying him a *Walker*³ hearing. We disagree.

We review a trial court's denial of a defendant's motion for a *Walker* hearing for abuse of discretion. *People v Soltis*, 104 Mich App 53, 55; 304 NW2d 811 (1981). Although a *Walker* hearing contemplates a pretrial motion, under proper circumstances the trial court should exercise its discretion to entertain a motion to suppress at trial. *Id.* Whether a trial court abuses its discretion by not turning aside the trial of a criminal case to conduct a separate hearing regarding the admissibility of evidence may be tested by the existence of special circumstances justifying the delay. *People v Mitchell*, 44 Mich App 679, 683-684; 205 NW2d 876 (1973), rev'd on other grounds 402 Mich 506 (1978). A primary example of special circumstances is a case where the

factual circumstances constituting the illegality are not known prior to trial. *Id.* (citing *People v Ferguson*, 376 Mich 90, 94; 135 NW2d 357 (1965), in which defense counsel had first raised the issue of the admissibility of the defendant's confession after the jury had been sworn and before opening statement, on the basis that he had no knowledge that the prosecution was in possession of a confession of the defendant. The defendant had told his counsel only that he had made a statement in connection with the dismissal of certain charges).

After the prosecution referred in its opening statement to defendant's admitting to the FBI that he had robbed the bank, defendant objected and requested a sidebar. After the prosecutor finished her opening statement, the trial court excused the jury and then stated on the record that defendant had stated at sidebar that since the prosecutor was talking about his confession, he desired a *Walker* hearing. The trial court denied the motion as untimely, noting that defendant had not challenged the admissibility of his statements until trial was underway.

At trial, defendant was given the opportunity to voir dire and cross examine Officer Cremonte regarding his statement to the police, and defendant cross-examined FBI agent Wilson. The record is devoid of testimony or evidence of coercion with regard to either confession. Under these circumstances, find no reversible error. *Soltis, supra* at 58.

IV

Defendant next argues that he was denied his due process right of access to crucial information possessed by the prosecution by not being permitted to view the bank's film of the robberies, because he was thus unable to determine if the films contained exculpatory evidence that Aryan Brotherhood gang members were in the immediate area of the robberies. We disagree.

This Court reviews a trial court's discovery rulings for abuse of discretion. *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994). The test for determining whether a defendant's due process rights have been violated where a defendant has been denied access to certain information possessed by the prosecution is whether the suppressed evidence might have affected the outcome of the trial. *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

The record establishes that six weeks before trial, defendant argued a motion for discovery requesting to view any film of the robberies. The prosecutor indicated that she did not know if the films existed. The trial court agreed that defendant should be permitted to view the film if it existed, and that advisory counsel could view it before trial. After the jury was sworn, the trial court asked advisory counsel if he had viewed the film and he answered that he had not. The prosecutor indicated she did not have the film but that photographs had been made from the film and she had the photos with her. The court stated that defendant could review the photos. Defendant objected, arguing that the photos were inculpatory and that the film may have been exculpatory. The trial court asked the prosecutor to inquire whether the film was available, and told defendant that if the film became available, defendant

could view it and advise the court whether it contained exculpatory material, but in the meantime trial would proceed.

At trial, several photos were admitted depicting the conditions at the bank on the robbery dates. The teller defendant robbed on December 21, 1992 had testified that she activated the security camera during the robbery. The photos showed defendant at the bank on December 21, 1992. Defendant objected to the admission of the photos and was given an opportunity to voir dire the bank security guard who testified that he had the film from that date developed.⁴ The court admitted the photos into evidence.

Regarding the December 23, 1992 robbery, the prosecution submitted several photos into evidence that the prosecution had had made from the bank surveillance film of that date. The record establishes that before the photos were admitted into evidence, defendant was permitted to view the negatives from which the photographs were made, taken from the bank surveillance film, of December 23, 1992. Defendant objected on the basis that he could not make out who the persons were in the negatives. The prosecutor explained that defendant had been advised the previous Tuesday that the prosecution only had rolls of negatives, that there were 3,000 negatives on each roll of film, and that the prosecution would not have a photograph made from each negative because of the expense. The prosecutor indicated that there was no portable viewing machine available for defendant to view all the negatives. The trial court questioned whether the negatives were crucial, noting that the testimony thus far demonstrated a prima facie case that the crime had been committed by defendant. The trial court determined that the cost and effort of defendant viewing each negative outweighed any prejudice defendant might suffer by not viewing each negative, and denied defendant's motion.

We find no abuse of discretion under the circumstances that the photos presented by the prosecution at trial were available for inspection by the defense prior to their admission into evidence, and defendant was not denied access to any evidence the prosecution possessed. The record establishes that the trial court repeatedly attempted to accommodate defendant's requests. When the impediments to defendant's being able to view 6,000 negatives became clear, the trial court properly denied defendant's motion. Further, defendant has failed to demonstrate that this ruling affected the trial's outcome. *Canter, supra* at 568-569.

V

Defendant next argues that the trial court improperly allowed his impeachment by a 1977 robbery conviction. This issue is not properly preserved, as defendant did not testify at trial. *People v Finley*, 431 Mich 506, 509-510; 431 NW2d 19 (1988).

VI

Defendant's final argument is that the trial court erred in refusing to instruct on defendant's requested lesser included offenses of larceny in a building and larceny from a person because there was no evidence of an actual gun and the lesser charges applied. Defendant requested an instruction on

larceny in a building but not larceny from a person. However, after reading the jury instructions, the trial court indicated on the record, in error, that defendant had preserved by objection the request for an instruction on larceny from a person. In any event, for purposes of this analysis we consider both instructional claims preserved for review.

Harmless error analysis is properly employed where a court errs by failing to give a requested instruction on a cognate offense, *People v Beach*, 429 Mich 450; 418 NW2d 861 (1988), and where a court errs by failing to give a requested instruction on a necessarily included offense. *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992).

The trial court instructed on bank robbery and unarmed robbery. Larceny in a building is a cognate lesser included offense of armed robbery. *People v Stein*, 90 Mich App 159, 167; 282 NW2d 269 (1979). Larceny from a person is a necessarily included offense of armed and unarmed robbery. *People v Douglas (On Remand)*, 191 Mich App 660, 664; 478 NW2d 737 (1991). Because the jury was permitted to consider the lesser offense of unarmed robbery, any error in failing to instruct on additional lesser offenses or cognate offenses is harmless. *Mosko, supra* at 502-503; *People v Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995).

Affirmed.

/s/ Helene N. White

/s/ Donald E. Holbrook, Jr.

/s/ Michael R. Smolenski

¹ Several of these cases are discussed in 1 ALR 4th 481, Annotation: *Coercion, Compulsion, or Duress as Defense to Charge of Robbery, Larceny, or Related Crime*, pp 490, 502.

² The prosecution notes on appeal, and defendant does not dispute, that on July 8, 1993 the court set a trial date of September 10, and that on September 10 trial was rescheduled for September 13. Defendant filed his motion on September 10 and it was heard on September 13. The prosecution noted below that testimony would be presented that defendant's confession to the FBI nowhere mentioned duress or threats, and that nine months later, at trial, defendant was raising this issue for the first time.

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

⁴ Donald Hunt, an employee with Comerica Bank's security services department, testified that he was called to the Novi branch on December 21, 1992 and secured the bank surveillance film. He testified that he took the film to be processed in Oak Park the following day. He took witness statements that included a description of the perpetrator, and the processing company and Hunt viewed the negatives to

see if the perpetrator was on the film. The film processing took about four hours, and Hunt then picked up the film. As a result of viewing the negatives, Hunt ordered several photographs