

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK L. EVANS,

Defendant-Appellant.

UNPUBLISHED

November 16, 1999

No. 207457

Recorder's Court

LC No. 97-003940

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). These convictions arose out of an incident where defendant forced the victim at gunpoint to withdraw her savings from a bank and turn the money over to him. The trial court sentenced defendant to two to twenty years' imprisonment for the armed-robbery conviction and to the mandatory consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant now appeals by right and we affirm.

Defendant first contends that his rights to effective assistance of counsel and to due process were violated by the prosecutor's failure to turn over the police reports prepared in conjunction with the robbery until the day the trial was scheduled to begin. Because defendant failed to object to counsel's performance in the trial court and establish a factual record regarding his claim of ineffective assistance of counsel, our review is limited to mistakes apparent from the record below. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To justify reversal, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by this deficient representation such that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

When defense counsel received the police reports on the date scheduled for trial, the only relief he requested from the trial court was a brief adjournment of one or two days in order to familiarize himself with the information contained in the reports. The trial court granted a four-day adjournment. Before trial commenced on the adjourned date, defense counsel acknowledged that he had received the

police reports and was prepared to proceed to trial. Defendant has not identified any specific information in the police reports that required a longer adjournment in order to adequately prepare for trial, such as the identity of other witnesses that could have been presented, or the existence of physical evidence that needed to be tested or evaluated. Defendant generally indicates that if the police reports had been disclosed sooner, he could have made pretrial motions; however, other than a motion for a lineup,¹ defendant fails to identify any other pretrial motions that could have been made. Defendant does not point to any exculpatory or impeachment evidence of which he was unaware as a result of the tardy delivery of the police reports. Defendant has therefore failed to demonstrate that his counsel was unable to effectively represent him due to the prosecutor's failure to provide defendant with the police reports before the scheduled trial date. Absent a showing of prejudice, defendant's claim that he was not afforded effective assistance of counsel is without merit. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998).

We also conclude that defendant has failed to demonstrate that the prosecutor's tardy disclosure of the police reports deprived him of his right to due process of law. A defendant's due process right to discovery is implicated where (1) the prosecutor allowed false testimony to stand uncorrected; (2) the defendant served a timely discovery request on the prosecutor, yet material evidence favorable to the defendant was suppressed; or (3) the defendant made only a general request for exculpatory information, or no request, and exculpatory evidence was suppressed. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). This case does not involve any of the above situations because defendant does not allege that the prosecutor allowed false testimony to go uncorrected or that any favorable or exculpatory evidence was suppressed. Defendant has therefore failed to demonstrate that his right to due process of law was violated.

Defendant next challenges the validity of the waiver of his right to a jury trial. Specifically, defendant argues that the trial court failed to adequately inform him of the significance of his decision to waive this right and failed to adequately determine whether his waiver was understandingly and voluntarily made. Because defendant did not object at the time of the waiver, or move for a new trial on this basis, this claim is unpreserved for appellate review. To avoid forfeiture of review of this unpreserved, constitutional issue, defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because we find no error, let alone outcome-determinative plain error, we decline to grant relief on this issue.

The record demonstrates that the requirements of the applicable court rule, MCR 6.402(B), were met.² Defendant was personally addressed by the trial court and affirmed under oath that he understood that he had an absolute right to a jury trial, that no one had forced him to waive that right, and that he made this decision after discussing it with his attorney. Defendant argues that the trial court should have done more to ascertain whether defendant's waiver was voluntary, and that the trial court should have explained the benefits of a jury trial, such as the requirement of a unanimous verdict for a conviction. The trial court need not explain that a jury must reach a unanimous verdict in order to convict. *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992). We conclude that the record reflects that the trial court complied with the requirements of the court rule.

See *People v Leonard*, 224 Mich App 569, 595-596; 569 NW2d 663 (1997); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993).³

Defendant next contends that the prosecutor abused his power when he coerced defendant into waiving his right to a preliminary examination by threatening to file an additional felony charge of kidnapping. Therefore, according to defendant, his waiver of a preliminary examination was not voluntary. However, defendant has not provided this Court with a transcript of the preliminary examination waiver proceeding and has therefore waived appellate consideration of this issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). Furthermore, although defense counsel at a later hearing mentioned that defendant waived the preliminary examination in order to avoid having the prosecutor add a kidnapping charge, at no time did defendant object to the waiver or claim that it was not voluntary. By not raising the issue in the trial court, defendant has failed to preserve this issue for appellate review. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). We review unpreserved issues for plain error. *Carines, supra* at 752-753; *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). To avoid forfeiture under the plain-error rule, defendant must demonstrate plain error that was outcome determinative. *Carines, supra* at 763.

A preliminary examination is a statutory right. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). A prosecutor may not punish a person for asserting a constitutional or statutory right. *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). “Such punishment is referred to as prosecutorial vindictiveness.” *Id.* at 36. However, “[t]he mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor’s charging discretion.” *Id.* The prosecutor is given broad charging discretion to decide what charges to bring against a defendant. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972); *People v Conat*, ___ Mich App ___; ___ NW2d ___ (Docket No. 218204, issued 10/19/99), slip op at 7-8.

Because a prosecutor may forego the filing of additional charges where a defendant agrees to plead guilty to the existing charges, we conclude that it is also appropriate for a prosecutor to forego filing additional charges where a defendant agrees to waive the preliminary examination. As a result of pleading guilty, defendants give up their right to a trial and stand convicted and ready for sentencing; the result of a waived preliminary examination, on the other hand, is simply that the defendant is bound over to the circuit court for trial. The defendant is not deprived of the right to make pretrial motions to dismiss the charges, or to assert applicable defenses, or to go to trial and seek an acquittal. Defendant fails to establish how pleading guilty to avoid additional charges is less coercive than simply waiving the right to a preliminary examination. Furthermore, defendant eventually went to trial and was found guilty beyond a reasonable doubt. At a preliminary examination, the prosecutor must merely establish probable cause to believe the defendant committed the charged offense. MCR 6.110(E). Defendant has failed to demonstrate plain error and has not provided any basis for overturning his valid trial and remanding this case so that a preliminary examination and a second trial could be conducted.

Finally, defendant argues that his trial counsel was ineffective by failing to move for a pretrial lineup. Because defendant failed to object or to establish a factual record, our review is limited to mistakes apparent from the existing record. *Fike, supra* at 181. We conclude that defendant has failed

to demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's deficient performance. *Pickens, supra* at 302-303 To demonstrate that counsel's performance was deficient, defendant must overcome a presumption that the challenged action was trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The victim positively identified defendant at trial as the man who had come to her house on the morning of the incident and then returned early in the afternoon to force her, at gunpoint, to withdraw money from her bank account. The victim had ample time to observe defendant during the course of driving to the bank and withdrawing the money. The victim's identification was corroborated by the testimony of her next-door neighbor, defendant's cousin. In light of the strong identification evidence, defendant has not overcome the presumption that defense counsel's decision not to seek a pretrial lineup was trial strategy. It was reasonably probable that the victim would have selected defendant at the lineup; therefore, by not seeking a lineup, defense counsel could argue at trial that the victim's identification was mistaken and unsupported by a lineup. We will not second-guess counsel in matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

¹ Defendant's argument that defense counsel was ineffective by failing to move for a pre-trial lineup is addressed *infra*.

² MCR 6.402(B) governs the procedure for accepting a waiver of the right to a jury trial and provides as follows:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

³ We reject defendant's attempt to graft the requirements of MCR 6.302, the guilty-plea court rule, onto the rule governing waiver of his right to a jury trial. The guilty-plea rule consists of a number of required specific inquiries that are not contained in the jury-waiver rule. Moreover, rote compliance with the guilty-plea rule requirements is not necessary. *Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975). Finally, the trial court's "determination that the plea is freely, understandingly and voluntarily made may be concluded from the judge's acceptance of the plea even though he makes no separate finding of fact on this issue." *Id.* at 126. Thus, even if the requirements of the guilty-plea rule were applied by analogy, we would conclude that the trial court adequately determined that defendant's waiver was given freely, understandingly, and voluntarily.