

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD D. MICHEAU,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 241076

Delta Circuit Court

LC No. 01-006687-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of operating a pyramid scheme or chain promotion, MCL 445.1528. The trial court sentenced him to forty-five days in jail and eighteen months' probation. We affirm.

Defendant first argues that he was denied due process when the prosecutor testified at an evidentiary hearing during his trial. We disagree. Because the issue of the alleged error is unpreserved, we review the record for a clear or obvious error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). If such an error exists, this Court will only reverse the trial court's decision if the defendant is actually innocent or if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Carines, supra* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant's argument fails for two reasons. First, there was no error. The prosecutor testified while the jury was excused. In *People v Reed*, 393 Mich 342, 354; 224 NW2d 567 (1975), our Supreme Court noted that a prosecutor's testimony may be necessary at an evidentiary hearing as long as cross-examination is allowed. See also *People v Lundberg*, 364 Mich 596, 601; 111 NW2d 809 (1961) (holding that defense counsel was not ineffective for calling the prosecutor as a witness at a bench trial). Here, because the prosecutor did not testify before the jury, we find no error and no danger of prejudice.

Second, defendant stipulated to the prosecutor's testimony in order to raise the defense of entrapment by estoppel and thus waived any error. Our Supreme Court has defined waiver as "the intentional relinquishment or abandonment of a known right." *Carines, supra* at 762-763 n 7, quoting *Olano, supra* at 733. Waiver occurs when a party expressly approves the alleged

error, and the error is thereby extinguished. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). The stipulation that the prosecutor could testify was an express approval and extinguished any claim of error. In summary, we reject defendant's argument because there was no error when the prosecutor testified and because defendant waived any error through stipulation.

Defendant next argues that he received ineffective assistance of counsel. We disagree. Because there has been no evidentiary hearing and defendant does not challenge findings of fact, the issue presents a question of constitutional law to be reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994), our Supreme Court adopted the federal test from *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) for determining whether a defendant has received ineffective assistance of counsel: the defendant must establish (1) deficient performance by counsel and (2) prejudice. *LeBlanc*, *supra* at 578. There is a presumption that counsel's performance was sufficient. *Id.*

Defendant asserts that his trial attorney was ineffective when she failed to move to disqualify the prosecutor when the prosecutor testified at trial. However, allowing the prosecutor to testify was integral to defendant's entrapment by estoppel defense because the defense turned on what the prosecutor told defendant's brother. If successful, the entrapment defense would have ended the case in defendant's favor. Moreover, any possible prejudice from the prosecutor's testimony was minimal and not outcome-determinative because the jury was not present during the testimony. We conclude that the decision to allow the testimony of the prosecutor was sound trial strategy. See, generally, *Lundberg*, *supra* at 601.

Defendant also asserts that his trial attorney was ineffective when she failed to move for a change of venue or a continuance. He alleges that the pretrial publicity was so extensive that no one in the jury pool could have remained objective about this case. In *People v Jendrzewski*, 455 Mich 495, 509; 566 NW2d 530 (1997), our Supreme Court held that when the question of juror bias from pretrial publicity arises, "jurors should be adequately questioned so that challenges for cause and peremptory challenges can be intelligently exercised."

In this case, the court gave the jurors a list of witnesses to determine how many jurors knew people involved in the case, and defense counsel participated in questioning the jurors. She used her peremptory challenges, and some potential jurors were dismissed for cause. It is thus apparent that defense counsel adequately questioned the jurors and determined that she could address potential prejudice through the voir dire process. Her decision not to move for a change of venue or a continuance was a matter of trial strategy and was not ineffective in light of her other efforts to alleviate prejudice. Moreover, there is no indication in this case that the pretrial publicity was inflammatorily prejudicial. See *id.* at 506-509. As a result, we reject defendant's argument that he received ineffective assistance of counsel. See, generally, *id.* at 509-510.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette