

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MENDELL DONNY FRITZ,

Defendant-Appellant.

---

UNPUBLISHED  
February 13, 2007

No. 264609  
Ingham Circuit Court  
LC No. 05-000137-FC

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant Mendell Fritz appeals as of right from his jury trial conviction of two counts of armed robbery,<sup>1</sup> first-degree criminal sexual conduct (CSC I),<sup>2</sup> second-degree criminal sexual conduct (CSC II),<sup>3</sup> unlawful driving away of a vehicle (UDAA),<sup>4</sup> and possession of a firearm during the commission of a felony (felony-firearm).<sup>5</sup> The trial court sentenced Fritz as a second-offense habitual offender<sup>6</sup> to concurrent prison terms of 281 to 800 months for armed robbery (2 counts), 281 to 600 months for CSC I, 142 to 270 months for CSC II, and 47 to 90 months for UDAA. Fritz's concurrent terms are to be preceded by a consecutive two-year term for felony-firearm. We affirm.

I. Basic Facts And Procedural History

Fritz's issues on appeal center on a mistake apparently made during jury selection, when his defense attorney erroneously calculated the number of peremptory challenges that had been used. This later resulted in the trial court concluding that Fritz had exercised all twelve of his peremptory challenges when he had actually only exercised eleven.

---

<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 750.520b(1)(c) (during felony).

<sup>3</sup> MCL 750.520c(1)(c) (during felony).

<sup>4</sup> MCL 750.413.

<sup>5</sup> MCL 750.227b.

<sup>6</sup> MCL 769.10.

## II. Fair Trial

### A. Standard Of Review

Fritz argues that he was denied a fair trial due to the trial court's erroneous determination that he had used all of his allotted peremptory challenges. Generally, defense counsel's expression of satisfaction with a trial court's determination waives any claim of error.<sup>7</sup> However, waiver requires an intentional relinquishment of a known right.<sup>8</sup> Here, because there is no indication that defense counsel's calculation of the number of peremptory challenges was a knowing act, we deem this issue forfeited. In the event of forfeiture, rather than waiver, our review is for plain error affecting Fritz's substantial rights.<sup>9</sup>

### B. The State Of The Record

The record here clearly indicates that when defense counsel inquired on whether he had only one peremptory challenge left, the trial court correctly indicated that only 10 had been used. Defense counsel continued to insist that eleven had been used and jury selection continued. After Fritz's counsel used the next peremptory challenge, counsel acquiesced to the trial court's assertion that he had used all of them and then indicated he was satisfied with the jury. Thus, we find no error requiring reversal given that defense counsel's negligence contributed to the trial court's alleged error.<sup>10</sup> Moreover, Fritz's assertion on appeal that his counsel likely would have used his last peremptory challenge to excuse the final juror seated amounts to mere speculation.

In any event, the evidence of Fritz's guilt in this case is overwhelming. In addition to testimony by the victims, the prosecution provided evidence that Fritz's DNA was found on a sperm sample taken from the sweater that one of the victims had been wearing when she was sexually assaulted during the commission of the armed robbery. Further, Fritz does not argue, and the record does not support a finding, that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.<sup>11</sup> The final juror seated established his ability to be impartial.<sup>12</sup> His responses during voir dire do not show an objectionable bias, a state of mind that would prevent him from rendering a just verdict, or the presence of an overarching opinion that would improperly influence the verdict.<sup>13</sup> Moreover, if defense counsel believed that good cause existed to request an additional peremptory challenge after the final juror's voir dire, he could have done so.<sup>14</sup>

---

<sup>7</sup> *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

<sup>8</sup> *Id.* at 215.

<sup>9</sup> *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

<sup>10</sup> *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (observing that "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence").

<sup>11</sup> See *Carines*, *supra* at 763.

<sup>12</sup> See *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986).

<sup>13</sup> MCR 2.511(D)(2), (3), (4); MCR 6.412(D).

<sup>14</sup> MCR 6.412(E)(2).

### III. Ineffective Assistance Of Counsel

#### A. Standard Of Review

Fritz argues that he was denied his Sixth Amendment<sup>15</sup> right to effective assistance of counsel when his trial attorney failed to keep an accurate track of the number of peremptory challenges that had been used. The determination whether counsel provided effective assistance at trial is a mixed question of law and fact.<sup>16</sup> We review the factual findings for clear error, and we review matters of law de novo.<sup>17</sup>

#### B. Legal Standards

A defendant who asserts that he has been denied the effective assistance of counsel must establish (1) the performance of his trial counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the trial would have been different.<sup>18</sup>

#### C. Applying The Standards

Here, while Fritz's trial counsel was arguably ineffective for failing to accurately keep track of the number of peremptory challenges used, Fritz fails to establish the requisite prejudice to establish an ineffective assistance claim. As previously discussed, the evidence adduced at trial—particularly the DNA evidence—was overwhelming. Moreover, the final juror's voir dire examination did not reveal that he had any underlying bias or predisposition that would call into doubt his impartiality.<sup>19</sup> Further, the argument that the final juror would have been struck from the jury had counsel been aware of the remaining peremptory challenge is entirely speculative and unsupported by the record. Under these circumstances, we conclude that there is no reasonable probability that the outcome of the trial would have been different had counsel been aware that one additional peremptory challenge remained unused.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Bill Schuette

---

<sup>15</sup> US Const, Am VI.

<sup>16</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>17</sup> *Id.*

<sup>18</sup> *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

<sup>19</sup> MCR 2.511(D).