

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 24, 2013

v

DAVID DANIEL CARR,  
Defendant-Appellant.

No. 310645  
Oakland Circuit Court  
LC No. 2011-238953-FH

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Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

A jury convicted defendant of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant to 7 to 40 years' imprisonment, as a fourth habitual offender, MCL 769.12. Defendant appeals as of right. We affirm.

Defendant argues in both his brief on appeal and his supplemental brief that the prosecution failed to present sufficient evidence to prove that defendant was the perpetrator of the home invasion. We disagree.

Sufficiency of the evidence questions are reviewed de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). The prosecution may use circumstantial evidence and reasonable inferences to prove the elements of the crimes. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In order “to establish that the evidence presented was sufficient to support the defendant’s conviction, the prosecutor need not negate every reasonable theory consistent with innocence.” *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011) (internal quotation marks omitted).

The elements of second-degree home invasion include “proof that [the] defendant (1) entered a dwelling, either by a breaking or without permission, (2) with the intent to commit a felony or a larceny in the dwelling.” *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). Identity of the defendant is an element of every offense. *People v Yost*, 278 Mich App 341, 356;

749 NW2d 753 (2008). “Identity may be shown by either direct testimony or circumstantial evidence.” *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

The prosecution’s evidence that police discovered defendant’s palm print on the kitchen window was sufficient to prove, beyond a reasonable doubt, that defendant was the perpetrator. “The general rule is that fingerprint evidence alone is sufficient to establish identity if the prints are found at the scene of the crime under such circumstances that they could have only been made at the time of the commission of the crime.” *People v Himmelein*, 177 Mich App 365, 374-375; 442 NW2d 667 (1989), citing *People v Ware*, 12 Mich App 512, 515; 163 NW2d 250 (1968). The prosecution’s circumstantial evidence regarding the circumstances surrounding defendant’s palm print could have convinced a reasonable jury that the palm print “could have only been made at the time of the commission of the crime.” 177 Mich App at 375.

First, the location of the palm print supports an inference that defendant left it at the time of the crime. Defendant’s print was located at the point of entry for the home invasion. The illegal point of entry was the kitchen window. The homeowner, Marilyn Jane Foster, did not leave any doors or windows open when she left in the morning. She had not given anyone permission to come to the house when she was gone. Someone had removed the screen and opened the window. Someone left muddy shoeprints underneath the open kitchen window. Foster’s home was on an isolated five-acre plot of land. The kitchen window was in the back of the house. The house was set back from the street.

Second, there was no legitimate reason that placed defendant at Foster’s home. Foster stated that she did not know defendant. Defendant told police that he had never been to the home. Therefore, it is unlikely that defendant left his palm print at any other time.

Third, the prosecution’s failure to present evidence regarding the age of the print and defendant’s position (inside or outside the house) when he left the print is irrelevant. The prosecution may prove identity by direct or circumstantial evidence. *Kern*, 6 Mich App at 409. As described above, there was ample circumstantial evidence that defendant left the print during the home invasion. Therefore, the prosecution did not have to present direct scientific evidence of the age of the print or defendant’s positioning at the time he left the print. Furthermore, the prosecution is not required to “negate every reasonable theory consistent with innocence.” *Kissner*, 292 Mich App at 534. Finally, the position of defendant when he made the palm print is irrelevant to his identity as the perpetrator because he could have made the palm print either before or after he entered the home.

Defendant additionally argues in his supplemental brief that the trial judge should have disqualified himself. We disagree.

Defendant did not object to either postponing the jury deliberations, or to reading the jury the deadlocked jury instruction. Furthermore, defendant did not request that the trial judge recuse himself. Therefore, defendant failed to preserve this issue. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). “In order to avoid forfeiting an unpreserved error, a defendant has the burden of establishing that the (1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights.” *People v Osby*, 291 Mich App 412, 414; 804 NW2d 903 (2011) (internal quotation marks omitted).

A judge will not be disqualified unless the aggrieved party demonstrates “actual personal bias or prejudice against either a party or the party’s attorney.” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), citing MCR 2.003(B)(1). There is a “heavy presumption of judicial impartiality.” *Id.*

Defendant cannot demonstrate that the trial judge coerced the jury into finding defendant guilty. First, delaying the deliberations because of scheduling did not have a coercive effect on the jury. It was in the trial court’s discretion to postpone deliberations until the next week because of a scheduling conflict. See *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997), rev’d on other grounds *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012) (“trial judges have the authority and discretion to manage dockets.”) The trial court stated on the record that it was excusing the jury for the remainder of the week because its “schedule . . . d[id] not allow for deliberations to proceed th[at] afternoon nor on Thursday and Friday of th[at] week.”

Second, the trial court did not coerce the jury into convicting defendant when the jury indicated that it could not agree on a verdict. The trial court read the standard Michigan Criminal Jury Instructions deadlock jury instruction verbatim CJI2d 3.12. The Michigan Supreme Court approved the use of the ABA standard jury instruction 5.4. *People v Sullivan*, 392 Mich 324, 342; 220 NW2d 441 (1974). The ABA standard jury instruction 5.4 is incorporated, as relating to a deadlocked jury, into CJI2d 3.12. *People v Pollick*, 448 Mich 376, n 12; 531 NW2d 159 (1995). Therefore, the trial court’s actions were proper.

Defendant also argues in his supplemental brief that defense counsel provided defendant with ineffective assistance of counsel. We disagree.

“The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law.” *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). This Court reviews the trial court’s factual findings for clear error and its constitutional determinations de novo. *Id.* Since, the trial court did not hold a *Ginther*<sup>1</sup> hearing, this Court’s review “is limited to mistakes apparent on the record.” *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To establish that a defendant’s trial counsel was ineffective, the defendant must prove that “(1) counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Id.* at 187. A defendant must also establish that the proceedings were fundamentally unfair or unreliable. *Id.* “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.*

Defendant did not show that defense counsel provided ineffective assistance of counsel. First, defense counsel’s alleged physical touching is not apparent from the record before this

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Court. Defendant claims that during defense counsel's motion for directed verdict, defense counsel pulled defendant by his arm back into his chair. However, the record lacks any indication that this incident actually occurred. This Court's review "is limited to mistakes apparent on the record." *Payne*, 285 Mich App at 188. Second, assuming that defense counsel pulled defendant into his chair, there was not a reasonable probability that, but for the action, the result of the proceedings would have been different. The alleged incident did not occur in front of the jury. Furthermore, defense counsel was likely indicating to defendant that it was improper to address the court at that point.

Finally, defendant argues in his supplemental brief that the trial court erred by failing to replace defense counsel. We disagree.

This issue was not raised and decided below. *Cameron*, 291 Mich App at 617. Therefore, the issue is unpreserved. "In order to avoid forfeiting an unpreserved error, a defendant has the burden of establishing that the (1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights." *Osby*, 291 Mich App at 414 (internal quotation marks omitted).

"Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011).

Defendant failed to argue any good cause to substitute counsel. Defendant only argues that defense counsel should not have sent him to the Center for Forensic Psychiatry because it caused his defense an unspecified harm. First, a defendant must state his claims regarding good cause justifying substitution of counsel with specificity. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Second, neither the prosecution, nor the defense attorney, mentioned any information that was obtained from the Center for Forensic Psychiatry at trial. In fact, defense counsel only used the information about defendant's forensic evaluation at sentencing to argue that the trial court should impose a lesser sentence.

Affirmed.

/s/ Henry William Saad  
/s/ David H. Sawyer  
/s/ Kathleen Jansen