STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON DEON CHANDLER, a/k/a CLINTON HOPSON, a/k/a DION MILLS, a/k/a CLINTON MILLS, a/k/a DAVID EARL CHANDLER,

Defendant-Appellant.

UNPUBLISHED
June 29, 2006

No. 259430
Wayne Circuit Court
LC No. 04-008198-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVIN PORTER JOHNSON, a/k/a ERVIN PORTER JOHNSON III,

Defendant-Appellant.

No. 259582
Wayne Circuit Court
LC No. 04-008318-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendants Clinton Chandler and Ervin Johnson were tried jointly before a single jury. Each defendant was convicted of two counts of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and assault with intent to do great bodily harm less than murder, MCL 750.84 (as a lesser offense to assault with intent to commit murder, MCL 750.83). Defendant Johnson was also convicted of possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b; defendant Chandler was acquitted of each of these firearm offenses. Defendant Chandler was sentenced to concurrent prison terms of 25 to 50 years for the robbery convictions, 5 to 15 years for the felonious assault conviction, and 5 to 10 years for the assault with intent to do great bodily harm conviction. Defendant Johnson was sentenced to concurrent prison terms of 25 to 50 years for the robbery convictions, 1 to 4 years for the felonious assault conviction, 5 to 10 years for the assault with intent to do great bodily harm conviction, and 2 to 5 years for the felon in possession conviction, to be served consecutive

to a five-year term of imprisonment for the felony-firearm conviction. Defendant Chandler appeals as of right in Docket No. 259430, and defendant Johnson appeals as of right in Docket No. 259582. For the reasons set forth in this opinion, we affirm the conviction and sentence of each defendant.

Defendants were convicted of robbing Brandon Tiffner and John Pappas, and of separately feloniously assaulting Tiffner, and assaulting Pappas with the intent to do great bodily harm, while Tiffner and Pappas were attempting to purchase a pound of marijuana. According to the testimony of the victims in this case, they drove near a residence to purchase the marijuana when defendants approached the car and asked if the victims were there to purchase marijuana. Because they were under the impression that they would be purchasing the marijuana from a different individual, they initially told defendants they were not there to purchase marijuana. After making a telephone call to their "contact" who told them defendants were the people they needed to talk to, they summoned defendants back and they got into the victim's car. Johnson got in the back seat behind Pappas and Chandler got in the back seat behind Tiffner. Chandler told Pappas to drive up the street because they were going to a safe house to get the marijuana. After driving about two blocks, Chandler told Pappas to park on the side of the street. Once they stopped and parked, Johnson opened his door and two guns were pulled out. Tiffner turned around and saw Johnson point one gun at Pappas's neck and Chandler pointed the other gun at Pappas's side. As soon as the guns were drawn, Chandler tried to grab the car keys and both defendants yelled for Pappas to give them the money. Chandler then got out of the car and opened Tiffner's door and pulled him out of the car by his shirt. Chandler searched Tiffner and removed his telephone, wallet, keys, and shoes. He had Tiffner bent over the car's windshield and continued to pat Tiffner down. When Tiffner tried to look back, he was struck in the face with something hard that resulted in a black eye and swelling of his face.

As he was held over the windshield, Tiffner could see that Johnson was still in the back seat and was reaching around the front seat as he pointed the gun at Pappas. Tiffner then saw Johnson shoot Pappas in the back. Pappas had the money under his leg and, when he was shot, he curled up in a ball. Tiffner saw Johnson take the money after shooting Pappas. Johnson also ripped out the compact disc player from Pappas's car. After Johnson said that he had the money, both defendants ran off.

When he talked to the police, Tiffner gave a description of both defendants. Chandler was wearing a white tank top at the time of this offense, Tiffner did not recall seeing any tattoos, but was not paying close attention to whether he had any. Tiffner identified both defendants in a photographic lineup and stated to police officers he had no doubt that they were the responsible parties.

John Pappas testified that he had about $1,250 with him to buy marijuana. He identified both defendants at trial as the men who approached his vehicle and asked if he and Tiffner were waiting to purchase marijuana. According to Pappas, one of the defendants tried to grab his keys and then Johnson stuck a gun in his ribs. One of defendants yelled to give him the money. After both Pappas and Tiffner told defendants that they did not have the money, Pappas saw Chandler strike Tiffner in the side of his head. Pappas saw that Chandler had a small handgun and after he saw that Tiffner was hit, Pappas decided it was not worth it to get shot, so he gave Johnson the money, but he still shot him.

The principal issue at trial was identification. Tiffner identified both defendants in a photographic lineup and had no doubt they were the responsible parties. Pappas also identified defendants at trial as the men involved in this offense. Chandler presented an alibi defense through his girlfriend, who testified that he was with her the entire day on the date of the charged offense.

I. Docket No. 259430

Chandler first argues that he was denied the opportunity to present exculpatory evidence when the trial court refused to allow him to display his tattoos to the jury at trial. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Evidence at trial indicated that Tiffner gave a description of the perpetrators to the police, but did not mention anything about one of the perpetrators having a large number of tattoos on his arms. At trial, Chandler requested an opportunity to stand before the jury in either a tank top or without a shirt to display the many tattoos that covered his arms in an effort to discredit his identity as a perpetrator. Contrary to what Chandler argues, the trial court did not refuse to allow him to display his tattoos, but only refused to allow him to remove his shirt before the jury. The court observed that Chandler was wearing a short-sleeved shirt and that the jury was able to see that he had tattoos on his arms. The court also allowed Chandler's girlfriend to testify about the many tattoos on Chandler's body. The trial court allowed Chandler to wear a tank top which exposed his tattoos to the jury and also allowed his girlfriend to testify to the number of tattoos he had, thus we find no error in the trial court's decision not to allow Chandler to stand before the jury and remove his shirt.

Next, Chandler argues that the trial court erroneously failed to instruct the jury on the requisite specific intent necessary to commit armed robbery, and also failed to instruct the jury that an aider and abettor must possess the same specific intent as the principal in order to be found guilty. Because Chandler did not object to the trial court's jury instructions, or request a separate instruction on specific intent, this issue is not preserved and our review is limited to plain error affecting defendant Chandler's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Chandler concedes that this issue was not preserved in the trial court, but argues that reversal is required because either plain error occurred or counsel was ineffective.

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

"This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). The instructions must clearly present the case and the applicable law to the jury and include all elements of the charged offenses and any material issues, defenses, and theories, if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). This Court

"will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Gonzalez*, *supra.*

Armed robbery is a specific intent crime that requires proof that the defendant intended to permanently deprive the victim of property. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998). But a trial court is not required to use the phrase "specific intent" when instructing the jury on the elements of armed robbery. *People v Peery*, 119 Mich App 207, 214; 326 NW2d 451 (1982). An instruction that the property must be taken by the defendant with a felonious intent and without any claim or power of right in order to constitute a robbery is sufficient to convey the concept of specific intent for armed robbery. *People v Mitchell*, 61 Mich App 153, 163; 232 NW2d 340 (1975). In this case, the trial court instructed the jury that in order to convict defendant Chandler of armed robbery, it was required to find that defendant Chandler intended to permanently deprive the victims of their money or property at the time he took it. Review of the instructions given by the trial court reveals that the trial court's instructions sufficiently informed the jury of the specific intent necessary to convict defendant Chandler of armed robbery.

To the extent that Chandler also argues that the trial court should have given CJI2d 3.9, the former standard jury instruction on specific intent,[1] we find no plain error. Intent was not an issue in this case. Rather, Chandler presented an alibi defense, as well as claiming misidentification. Further, the jury did not express confusion regarding this element. Therefore, the trial court's failure to give CJI2d 3.9 was not plain error. See *People v Curry*, 175 Mich App 33, 37-38; 437 NW2d 310 (1989).

The trial court also instructed the jury on the requisite intent to be convicted as an aider and abettor, in accordance with CJI2d 8.1. In particular, the jury was instructed that "defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance." This instruction, together with the court's armed robbery instruction, sufficiently apprised the jury that it was required to find that defendant Chandler possessed the same specific intent for armed robbery as the principal. *Carines*, *supra* at 757; *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

Because the trial court's jury instructions were not erroneous, and sufficiently conveyed the intent necessary to support a conviction for armed robbery, defense counsel was not ineffective for not objecting to the court's instructions or requesting a separate instruction on specific intent.

Defendant Chandler next argues that he is entitled to a new trial based on newly discovered evidence. Because defendant Chandler did not raise this issue in an appropriate

[1] Although CJI2d 3.9 was in existence at the time of defendant Chandler's trial, our Supreme Court indicated in *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004), that this instruction is unnecessary because the instructions concerning the elements of each offense contain any necessary instructions on specific intent. CJI2d 3.9 was later deleted in response to the decision in *Maynor*.

motion in the trial court, we review this issue for plain error affecting defendant Chandler's substantial rights. *Carines, supra* at 761-767.

In order to obtain a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

The alleged newly discovered evidence consists of a letter from William Moore, the person whom Papas and Tiffner thought was selling them the marijuana, in which he stated that the police wanted him to testify that defendants were probably the persons who committed this crime, but he refused to do so because he had no knowledge about who committed the offense and he refused to lie. Moore also stated that he heard the prosecutor, the police, and the witnesses going over the police reports and rehearsing the questions the witnesses would be asked and their responses. According to Moore, the prosecutor and the police also emphasized to the witnesses how important it was to convict defendant Chandler because of his past and that he needed to be removed from the streets.

Moore's statement that he was unable to testify that defendants committed the charged crime is consistent with his trial testimony. After defendants approached the victims' car, they called Moore who told them that defendants were the persons that had the marijuana. Thus, at trial, Moore testified that he was not present with the victims when they were allegedly robbed and didn't know what happened to them. The fact that Moore did not view defendants' actions does not constitute new evidence, and even if we were to hold that it does, this evidence would not have caused a different result in the case. Additionally, Moore's statements that he observed witnesses discussing their proposed testimony with the police and the prosecutor before trial, would be relevant only for impeachment. "Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *People v David Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Chandler also fails to explain why this evidence could not have been discovered and produced at trial with reasonable diligence. For these reasons, Chandler has not established a plain error affecting his substantial rights with respect to this issue.

In a pro se brief, Chandler argues that a photographic lineup shown to Tiffner before trial was unduly suggestive and, therefore, Tiffner's in-court identification was also improper. Because defendant Chandler did not object to the identification testimony at trial, our review is again limited to plain error affecting defendant Chandler's substantial rights. *Carines, supra.*

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To show a due process violation, the "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). The remedy for an unduly suggestive identification procedure is the suppression of the in-court identification unless there is an independent basis for its admission. *People v Thomas Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000).

The record discloses that the photographic lineup used in this case consisted of eight photographs of individuals with similar facial characteristics, complexions, and hairstyles. Only the men's heads appeared in the photographs, so their height or the presence or absence of tattoos on their arms was not apparent. Two of the photographs depict men wearing white tank tops, one of whom is Chandler, although the shirt style of the participants is only partially apparent. While the perpetrator was also described as wearing a white tank top, we do not believe this characteristic is so distinctive that it made the lineup impermissibly suggestive. Unlike many physical features, a white tank top is not a unique clothing style. Moreover, clothing is easily changed and the photographic lineup was not conducted until approximately two weeks after the offense was committed, so there was little reason to suspect that the clothing of the participants in the lineup would be suggestive of the perpetrator. For these reasons, defendant Chandler has not demonstrated that Tiffner's identification testimony amounted to plain error.

We also reject Chandler's claim that defense counsel was ineffective for not calling an expert witness to testify about eyewitness identifications. Limiting our review to the existing record, *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), Chandler has not overcome the presumption that counsel declined to call an expert witness as a matter of trial strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Further, the failure to call an expert witness did not deprive Chandler of a substantial defense because counsel was able to pursue other available methods for attempting to discredit Tiffner's identification testimony. *Marcus Davis*, *supra* at 368.

II. Docket No. 259582

Johnson argues that the trial court erred by refusing to appoint new counsel shortly before trial began. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Two days prior to trial, Johnson's attorney advised the court that Johnson wanted a new attorney because he did not trust her. Counsel apparently requested an adjournment at that time because Johnson had not provided her with the names of witnesses he wanted to be called at trial. At that time, Johnson confirmed that he wanted a new lawyer. The trial court refused to appoint a new attorney because trial was scheduled in two days and directed Johnson to cooperate with his attorney.

In *Traylor*, *supra* at 462, this Court, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), observed:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. 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. [Citations omitted.]

The record does not demonstrate that there was good cause to appoint a new attorney for Johnson. Rather, the record discloses that Johnson refused to cooperate with his attorney by providing her with the names of his witnesses. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Traylor, supra,* quoting *People v Meyers (On Remand),* 124 Mich App 148, 166-167; 335 NW2d 189 (1983). Further, Johnson's request was untimely, having been made just two days before trial. The late substitution would have unreasonably disrupted the judicial process. *Traylor, supra*. Therefore, the trial court did not abuse its discretion by denying defendant Johnson's request for a new attorney.

Johnson also argues that trial counsel was ineffective. Because Johnson did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent from the record. *Matuszak, supra* at 48.

Johnson first argues that his attorney was ineffective for not calling witnesses at trial in support of his alibi defense. Although counsel filed a notice of alibi and named one witness, Shantoria Green, that witness did not testify at trial. It is not apparent from the record whether there were other alibi witnesses who could have testified at trial. Rather, the record discloses that Johnson was not cooperating with his attorney in naming his witnesses. Because there is no basis in the record for concluding that Johnson made reasonable efforts to advise his attorney of the identity of other witnesses, or that any other witnesses (if they existed) could have provided favorable testimony, defendant Johnson has not demonstrated that his attorney was ineffective in this regard.

With respect to Green, the record discloses that counsel attempted to call her at trial, but was unable to secure her presence. Even if counsel was deficient in her efforts to produce Green at trial, Johnson has not made an offer of proof showing the substance of her proposed testimony. Thus, there is no basis in the record for concluding that Johnson was prejudiced by counsel's failure to call Green at trial.

Johnson also argues that his attorney was ineffective in her cross-examination of Pappas and Tiffner. The only basis for this argument is that Chandler's attorney cross-examined Tiffner about his identification of defendant Chandler twice as long as Johnson's attorney questioned Tiffner. The length of the counsel's cross-examination alone does not demonstrate that counsel was ineffective. Further, Johnson does not explain what additional questions his attorney could have asked in her cross-examination of Tiffner, nor does he explain how counsel's cross-examination of Pappas was deficient. Accordingly, we find no merit to this claim.

Johnson also argues that his attorney was ineffective for not presenting evidence that he had a debilitating medical condition at the time of the offense. Although the record indicates that Johnson was diagnosed with aplastic anemia in January 2004, Johnson does not explain how this medical condition was relevant to the question of his guilt or innocence. Thus, Johnson has not shown that his attorney's failure to present this evidence deprived him of the effective assistance of counsel.

Johnson also argues that the trial court erroneously denied his request to adjourn trial until he could produce Shantoria Green as a witness. "A trial court's decision whether to grant a

continuance is reviewed for an abuse of discretion. MCR 2.503(D)(1)." *People v Walter Jackson, Jr*, 467 Mich 272, 276; 650 NW2d 665 (2002).

On the last day of trial, Johnson's attorney asked the court to adjourn trial until Green could be produced to testify. The trial court expressed that it was willing to reopen the proofs to allow Green to testify, but after ascertaining that Green was not present and that the defense had not made arrangements to secure her presence, refused to adjourn the trial to enable her to testify.

The court may, in its discretion, grant an adjournment to promote the cause of justice. *Jackson, supra* at 276. "[A] defendant must show prejudice as a result of the trial court's abuse of discretion." *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). MCR 2.503(C) addresses adjournments due to the unavailability of witnesses:

> (C) Absence of Witness or Evidence.
>
> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
>
> (2) 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.
>
> (3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary.

Even if the motion to adjourn was timely made, the record does not establish that diligent efforts were made to secure Green's presence at trial. Green was listed on Johnson's notice of alibi almost a month before trial. Johnson's attorney admitted that she had heard from Green at the end of the second day of trial, which was a Thursday. The trial did not resume until the following Monday. On that day, defense counsel was aware that Green had possible transportation problems, but apparently did nothing about it in preparation for that day's proceedings. The record does not demonstrate that diligent efforts were made to produce Green for trial. More importantly, Johnson never established through an offer of proof below, or in his brief on appeal what Green would have testified about or even that she was willing to testify. Thus, Johnson has not shown that Green's testimony was material or that he was prejudiced by her absence. Accordingly, we cannot conclude that the trial court abused its discretion by denying defendant Johnson's request for an adjournment.

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello