STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON EUGENE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 26, 2007

No. 267149
Oakland Circuit Court
LC No. 2005-200796-FC

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529. Pursuant to MCL 769.11, defendant was sentenced as a third habitual offender to 15 to 40 years in prison. We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing.

Defendant first argues that the trial court erred by admitting the identification testimony of defendant's coworkers, who were not eyewitnesses to the incident. We disagree. To preserve an issue regarding identification procedures, the defendant must raise the issue at trial. *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Defense counsel did not object to the testimony of the three employees, so this issue is not properly preserved for appellate review.

Unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture (1) an error must have occurred, (2) the error must be clear or obvious, and (3) the error must have affected substantial rights, meaning it affected the outcome of the trial. *Id.* at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, *supra* at 763-764; see also *Olano*, *supra* at 736-737.

In this case, defendant's coworkers were not eyewitnesses to the robbery and were not used to identify defendant as the person who committed the offense. Thus, the law regarding unduly suggestive identification procedures is inapplicable in this matter.

The credibility of identification testimony is a question for the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). A witness may testify to a matter if

evidence is introduced to establish that the witness has personal knowledge of the matter. MRE 602; *People v Holleman*, 138 Mich App 108, 114; 358 NW2d 897 (1984). A lay witness may give opinion testimony that is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. MRE 701; *People v Dobek*, 274 Mich App 58, 77; ___ NW2d ___ (2007). Lay witnesses may testify concerning physical observations and their opinions formed as a result of those observations. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988).

Surveillance video shows a man wearing a dark jacket and brown boots committing an armed robbery at Ruby Tuesday in Farmington Hills on January 2, 2005. Detective Michael Flatt testified that he was provided with a still photo from the Ruby Tuesday surveillance equipment to take to Fishbones in Detroit, where defendant was employed, and to show to the employees there. Flatt believed that he went to Fishbones on the day after defendant was arrested. Flatt spoke with each employee individually. Flatt did not tell the employees why he was there or who he was investigating. Flatt testified that a manager at Fishbones identified defendant as the person in the photo. A cashier and a chef also responded that the photo looked like defendant. The chef specifically said it looked like defendant "because of the build, posture, and bald head." The surveillance photos were admitted into evidence at trial.

The Fishbones manager testified at trial that defendant was a cook at Fishbones, but that she did not know him well because she did not work in the kitchen. She testified that when the police officer came with the picture, he asked her if defendant worked there and if he was scheduled to work that day. She then looked at the picture and told the officer that the person in the photograph looked similar to defendant. She thought that the picture she had been shown at the restaurant was clearer than the picture she was shown in court. However, in her written statement to the police, the Fishbones manager confirmed her belief that the person in the picture was defendant.

A Fishbones cashier testified that the police officer showed her a blurred picture after defendant was arrested, and that she told the officer that it looked like defendant. Similarly, the chef testified that a police officer had shown him a blurry picture. He told the officer that that it looked like defendant, but that he was not sure because he always saw defendant in a cook's uniform. The chef was not certain if the officer mentioned defendant's name before showing him the picture, but testified that the type of jacket and the brand of boots defendant was wearing in the picture were both commonly worn in Detroit.

The testimony of defendant's coworkers was admissible. The coworkers had personal knowledge regarding how defendant looked at the time. MRE 602; *Holleman*, *supra* at 114. Their testimony constituted lay opinions that were rationally based on their perceptions of defendant's appearance. MRE 701; *Oliver*, *supra* at 50. We are unconvinced by defendant's arguments that the identification procedure was unduly suggestive, conducive to an irreparable misidentification, and unfairly prejudicial. Defendant's coworkers did not identify him as the person who actually committed the armed robbery. They merely stated that he resembled the person depicted in the surveillance photos. In addition, the jury was able to observe defendant throughout the trial and compare his appearance to the perpetrator depicted in the surveillance video and still photos. By doing so, the jury was able to determine whether the witness identifications were credible. We perceive no plain error in this regard.

Defendant also argues that his counsel was ineffective for failing to object to the admission of the testimony of the three coworkers. We disagree. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989); see also *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant did not move for a new trial or an evidentiary hearing before the trial court on this issue, so we review the issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). If the record does not contain sufficient detail to support defendant's ineffective assistance claim, he has waived the issue and is entitled to no relief. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove counsel's actions were not sound trial strategy. *Id*.

To prevail on a claim of ineffectiveness of counsel, a defendant must show (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland, supra* at 687; *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In other words, a defendant must show that, but for trial counsel's errors, there would have been a different outcome. *Strickland, supra* at 694; *Pickens, supra* at 314.

Defendant argues that defense counsel should have moved to suppress the coworkers' identifications on due process grounds. Because the evidence was admissible, defense counsel was not ineffective for failing to object to its admission. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995). In addition, defense counsel actually used the uncertainty of the witnesses' identifications as part of his strategy. In his closing argument, defense counsel repeatedly referred to the lack of trustworthy evidence linking defendant to the crime to show that there was reasonable doubt, and pointed to the "dubious" testimony of these three coworkers. This demonstrates that counsel's decision was the result of calculated reasoning, and we will not substitute our judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Trial counsel's performance did not fall below an objective standard of reasonableness, and defendant was not deprived of a fair trial.

Next, defendant argues that the evidence presented was insufficient to convict him of armed robbery. We disagree. A sufficiency of the evidence claim is reviewed de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.* at 428.

An armed robbery occurs where there is (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) the defendant is armed with a weapon described in the statute. *Carines, supra* at 757. The assault must have occurred before, or contemporaneous with, the taking of the property. *People v Scruggs*, 256 Mich App 303, 310; 662 NW2d 849 (2003).

Shortly after 9:00 a.m., the manager of the Ruby Tuesday in question entered the restaurant, locked the door behind her, disengaged the alarm, and walked to the office. She began reading a note that was left for her when a man entered the office pointing a gun at her head. The man told her to give him the money. The manager opened the file cabinet and took out the tills. The man asked for the contents of the safe, and she complied. The man used the back door to leave, setting off the alarm.

The restaurant had surveillance cameras in most of the rooms, including the office, and one outside the restaurant that showed the back door. Pictures from the video were entered into evidence, and the video was played for the jury. The video time stamps reflect that the robbery began when the robber entered the office at 9:09 a.m. The robber took off his ski mask as he walked through the kitchen, and the tape showed the robber exit through the back door at 9:10 a.m., without wearing the mask. The view of the robber without the mask is from the side and the back.

The parties do not dispute that an armed robbery took place as depicted in the surveillance video, so the only issue is whether the man in the video is defendant. The Ruby Tuesday manager gave the police a description of the robber as an African-American male, about 6'1" and 180 pounds, wearing a ski mask, a black leather bomber jacket with a lot of prints on it, jeans, and brown boots. China Reeves, defendant's fiancée, testified that defendant is "kind of bald," 6'1" and around 180 to 190 pounds. The police showed the Ruby Tuesday manager defendant's jacket and boots, and she agreed that they looked like the items the robber was wearing. She stated that she could not forget the pattern on the jacket, and that the person who robbed her was wearing a jacket identical to the one she was shown. The evidence presented regarding defendant's description and clothing corresponds to the video as well, which the jury was able to view. There was sufficient evidence to identify defendant as the armed robber in this case.

Defendant's argument that his cell phone records demonstrate that he could not have committed the armed robbery is without merit. The cell phone records indicated that a phone call to Reeves lasted from 8:35 a.m. to 9:05 a.m. The time stamps from the video show that the entire robbery was only about a minute and a half, from 9:09.01 a.m. to 9:10.33 a.m., with the robber exiting the restaurant at 9:10.41 a.m. There was another phone call to Reeves at 9:12 a.m., which lasted for zero minutes, and a subsequent call to defendant's sister at 9:18 a.m. Therefore, these phone calls occurred wholly outside the time frame of the robbery.

In addition, the distance from the Ruby Tuesday in question to defendant's sister's house is approximately 12 miles and takes about 15 minutes to drive in normal traffic. Therefore, it would have been physically possible for defendant to drive from Ruby Tuesday after the robbery to his sister's house, and to arrive between 9:30 and 9:35 a.m. as defendant's sister testified. A rational jury could have concluded that the prosecution proved beyond a reasonable doubt that defendant committed the armed robbery.

Finally, defendant contends that the trial court improperly scored offense variable (OV) 13 at 25 points, for a crime for which defendant was not convicted. We agree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, a sentencing factor must be proved by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

The statutory sentencing guidelines apply to enumerated felonies committed on or after January 1, 1999. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255 n 6; 666 NW2d 231 (2003). Offense variable 13 covers a continuing pattern of criminal behavior. MCL 777.43(1). Defendant should receive 25 points under OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). The statute requires that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The five-year period must encompass the sentencing offense. *Francisco*, *supra* at 86.

Defendant argues he should not have received any points for OV 13 because there was no evidence at trial that defendant committed two other crimes against a person within five years. Defendant cites *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), but then correctly concedes that *Blakely* does not apply to sentencing under the Michigan sentencing guidelines. *Drohan*, *supra* at 164.

The trial court found that 25 points should be scored because, in addition to the present conviction, the presentence report documented that defendant was arrested for a first-degree home invasion that occurred in August 2001, and that defendant pleaded guilty to a breaking and entering that occurred in November 2004. A court is required to review the presentence report before assigning a sentence for a felony because it gives the court as much information as possible to tailor the sentence to both the offense and the offender. MCL 771.14; *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997).

The presentence report indicated that defendant was arrested for a first-degree home invasion that occurred August 20, 2001, but it was dismissed for an unknown reason. Defendant was arrested for an armed robbery and felonious assault that occurred on January 25, 2005, but the warrant was denied. Finally, it is true that defendant pleaded guilty to breaking and entering with intent for an incident that occurred on November 3, 2004. However, breaking and entering is designated as a crime against property. MCL 777.16f.

Because the breaking and entering offense was a crime against property, it did not count against defendant for purposes of OV 13. MCL 777.43(1)(b). Moreover, although the presentence report indicated that defendant had been arrested for armed robbery, felonious assault, and first-degree home invasion, it also indicated that these charges were all dismissed. An arrest resulting in dismissal can hardly be said to constitute actual evidence of the commission of a crime by a preponderance of the evidence. *Drohan*, *supra* at 142-143; *Harris*, *supra* at 663. The presentence report did not support the finding that defendant had committed three or more crimes against a person in a five-year period, and the trial court erred in assigning

25 points under OV 13. We accordingly vacate defendant's sentence and remand for resentencing. On remand, the court may again consider the dismissed armed robbery, felonious assault, and first-degree home invasion charges only if it first determines by a preponderance of the evidence that defendant in fact committed these offenses. *Drohan*, *supra* at 142-143; *Harris*, *supra* at 663.

We affirm defendant's conviction. We vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette