STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 260107 Saginaw Circuit Court
LARRY LAJUNE HIBLER, Defendant-Appellant.	LC No. 04-024432-FC

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of conspiracy to commit armed robbery, MCL 750.157a, armed robbery, MCL 750.529, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

Defendant first argues that he was entitled to a mistrial after an alleged discovery violation by the prosecutor. This Court reviews a trial court's decision on a discovery question for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). Defendant argues that the prosecutor did not notify him of the existence of a hair found on a bandana defendant was believed to have worn during the robbery until the fifth day of trial. The prosecutor never tested the hair for DNA. However, we conclude that even if the failure to inform defendant of the hair until trial was a discovery violation, reversal is not required.

A prosecutor's failure to disclose evidence will only result in reversal if the Court finds that the evidence was material. *People v Harris*, 261 Mich App 44, 49; 680 NW2d 17 (2004).

> Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, undisclosed evidence is material and reversal is required only if the undiscovered evidence "'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" [*Id.* at 49-50 (citations omitted).]

The hair in this case was not material. There was overwhelming evidence of defendant's guilt, and the hair would not have put the case in "'a different light as to undermine confidence in the

verdict.'" *Id*. One of the Burger King employees identified defendant as one of the men who jumped over the counter during the robbery. Police found defendant near the scene of the robbery, hiding in a backyard playhouse, and wearing clothing that matched the description given by the Burger King employees. Further, the police had recorded a telephone conversation that defendant made from jail in which he confessed to the robbery. The jury was informed of the existence of the hair and that the prosecutor failed to have it tested. Defendant has not shown that reversal is required. The trial court did not abuse its discretion in denying the motion for a mistrial.

Defendant next argues that the trial court should have excluded the recording of a telephone call defendant made from jail. Defendant argues that the prosecutor did not show a proper foundation to admit the recording and that it was more prejudicial than probative. We review the trial court's decision on the admissibility of evidence for an abuse of discretion. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). However, because defendant did not argue that the evidence was overly prejudicial at the trial court, we review the issue for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." MRE 901(b)(5) allows authentication by "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." To authenticate the voice on the telephone recording as being defendant's, the prosecutor offered the testimony of Detective Scott Richmond. Richmond testified that when inmates make phone calls they use an inmate PIN number and the recorded call was made using defendant's PIN number. Richmond also testified that the caller referred to himself as Flip, a nickname Richmond had heard defendant use during other phone calls. Richmond also testified that he had spoken with defendant previously and recognized his voice as being the voice on the recording. Richmond's testimony provided sufficient foundation to allow the identification of defendant as the voice on the recording.

Defendant has also not shown that the recording evidence was more prejudicial than probative. Unfairly prejudicial evidence is not evidence that is merely damaging, but rather evidence that is likely to be given disproportionate weight by the jury or evidence that cannot be equitably used by its proponent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). This evidence was highly probative because defendant confessed to his involvement in the robbery. Defendant argues that it was unfairly prejudicial because the caller uses a nickname in the phone call. However, any possible prejudice from this information was not substantial enough to outweigh the probative value of the recording.

Defendant next argues that a witness, Tameaka Brown, should not have been allowed to identify him at trial. Defendant did not object to the identification testimony at trial. Therefore, we review for plain error that affected defendant's substantial rights. *Jones*, *supra* at 355. Defendant argues that an impermissibly suggestive pre-trial identification tainted Brown's identification. See *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). But, Brown's first identification of defendant was at trial. Brown made no identification at the preliminary examination or any other pre-trial proceeding. In any event, defendant has

abandoned this argument because he fails to argue how a preliminary examination was impermissibly suggestive or why Brown lacked an independent basis to identify defendant, except to note that defendant had darker skin than a co-defendant. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997) (stating that a defendant cannot announce his position and then leave it to the Court to "discover and rationalize the basis for the claim.") Further, "[w]here issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless the refusal to do so would result in manifest injustice." *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Based on the other evidence of defendant's guilt presented at trial, defendant has not shown that failure to reverse based on this issue would result in manifest injustice.

Defendant next argues that the trial court erred in failing to instruct the jury on the lesser offenses of unarmed robbery and attempted armed robbery. Claims of errors in jury instructions are questions of law that are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, remanded in part on other grounds 467 Mich 888 (2002). The trial court did not err in declining to instruct the jury on unarmed robbery because the fact that defendant was armed with a weapon during the robbery was not in dispute at trial. All witnesses to the robbery testified that defendant had a gun. There were also surveillance photographs admitted at trial that showed a gun in the hand of the person identified as defendant. Defendant's argument at trial was that he was not the person who committed the robbery, not that the person who committed the robbery did not have a gun. Therefore, a rational view of the evidence presented at trial did not support the jury being instructed on unarmed robbery and the trial court did not err in declining to give this instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Also, a rational view of the evidence did not support an instruction on attempted armed robbery. The evidence clearly showed that a completed armed robbery occurred in this case. Although the police arrived while defendant and his co-defendants were still in the restaurant, the robbery had been completed. It was undisputed that defendant and his co-defendant actually took the money from the safe and completed the robbery. Again, defendant argued at trial that the identity of the robber was at issue, not that an armed robbery was attempted, but not completed. Therefore, the trial court did not err in declining to instruct the jury on attempted armed robbery.[1]

Defendant finally argues that the trial court was biased. Defendant did not preserve this issue in the trial court, and we review it for plain error that affected defendant's substantial rights. *Jones*, *supra* at 355. MCR 2.003(B)(1) provides that a judge may be disqualified when the "judge is personally biased or prejudiced for or against a party or attorney." A showing of actual prejudice against a party is required in order to have a judge disqualified. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). "A party that challenges a judge for bias must

[1] Defendant also argues that the failure to instruct on lesser-included offenses violated the holding in *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, because the elements of each crime were submitted to the jury, *Blakely* does not apply to this situation.

overcome a heavy presumption of judicial impartiality." *Id*. Defendant failed to present any evidence of actual prejudice on the part of the trial court. This argument is without merit.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto