STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 259863 Wayne Circuit Court
LAVALE LANSKI, Defendant-Appellant.	LC No. 04-004601-01

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and carjacking, MCL 750.529a. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 15 to 30 years' imprisonment for the convictions. We affirm.

Defendant first argues that he was denied his right to due process because the trial court erred in concluding that defendant had three prior felony convictions and thus erred in sentencing him as a fourth habitual offender. Defendant also argues that he was denied the effective assistance of counsel because defense counsel failed to object at sentencing to the enhancement of defendant's sentence as a fourth habitual offender. We find no support in the record for either of these arguments.

The existence of prior convictions can be established by information contained in the presentence investigation report (PSIR) under MCL 769.13(5)(c), and this Court has held that MCL 769.13 sufficiently protects a defendant's "due process rights to be sentenced on the basis of accurate information." *People v Zinn*, 217 Mich App 340, 348; 551 NW2d 704 (1996). The PSIR provided to the trial court after defendant was convicted contained information regarding defendant's three prior felony convictions. The PSIR "is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). At sentencing, defendant and defense counsel failed to "deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before defendant's sentence was imposed." MCL 769.13(6). In fact, when given the chance to refute the information contained in the PSIR, defense counsel noted that she had reviewed the report and that it was "factually" correct. Further, defense counsel indicated that defendant could be sentenced as a fourth habitual offender based on his previous

three felony convictions. Defendant thus waived the issue of the accuracy of the PSIR. *People v Carter*, 462 Mich 206, 214, 612 NW2d 144 (2000). We therefore conclude that the trial court did not err in sentencing defendant as a fourth habitual offender pursuant to MCL 769.12.

Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). The limited record below is devoid of any evidence that defendant did not commit the crimes listed in the habitual offender notice and the PSIR. Thus, any objection by defense counsel would have failed and been futile. On appeal, defendant has presented no evidence nor does he even claim that he did not commit the crimes listed in the habitual offender notice and the PSIR or that further investigation by defense counsel would have revealed that he did not commit them. Therefore, we conclude that defense counsel's alleged failure to investigate or object to the enhanced sentencing did not fall below an objective standard of reasonableness. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant next argues that counsel was ineffective for failing to present an alibi defense by calling a witness to testify that defendant was at another location when the armed robbery and carjacking occurred on April 18, 2004. In support of his position, defendant attached an "affidavit" from the witness to his Standard Four supplemental brief on appeal. We note that the affidavit does not appear to have been properly executed and notarized. Furthermore, because the affidavit was not part of defendant's motion for a new trial and a *Ginther* hearing, this Court cannot review it to determine whether defendant was denied the effective assistance of counsel. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

A defense counsel's failure to call a particular witness is presumed to be trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). It constitutes ineffective assistance of counsel only if it "deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). The record reveals that defense counsel presented an alibi defense through defendant's testimony. Defendant has failed to show that, but for defense counsel's alleged error in not calling the alibi witness, the outcome of the trial would have been different in light of Lavale Harvey's and Arnita Lester's testimony identifying defendant as the person who committed the armed robbery and carjacking. *Carbin, supra* at 599-600.

Defendant next argues that he was denied his constitutional right to confront Harvey when the trial court limited defense counsel's cross-examination of Harvey.

A review of the transcript reveals that the trial court limited defense counsel's questions about Harvey's alleged prior conviction. Evidence of a prior conviction may be admissible for impeachment purposes either automatically, in the case of an offense involving dishonesty or a false statement, or after the court determines its probative value, in the case of an offense

involving an element of theft. MRE 609; *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997).[1] Because defense counsel made no offer of proof after the jury was excused, the record does not reveal the nature of the alleged prior conviction. MRE 103(a)(2). Moreover, defendant entirely fails to identify the prior conviction in his appellate brief. Without a record or knowledge of the substance of the sought-after evidence, this Court cannot decide whether the trial court properly exercised its discretion in limiting the witness's cross-examination. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). Furthermore, defendant was given an opportunity to argue for admission of Harvey's prior conviction while Harvey was subject to recall as a witness. Thus, on the record before us, we cannot say that the trial court committed an error in limiting defense counsel's inquiry into Harvey's prior conviction.

Defendant also argues that the trial court improperly limited defense counsel's cross-examination regarding whether Harvey had previously lied to the police. Specific instances of a witness's conduct may be inquired into during cross-examination "at the discretion of the court, if probative of truthfulness or untruthfulness." MRE 608(b). Assuming that the court erred in ruling that this inquiry into Harvey's prior conduct was irrelevant to his credibility as a witness, and that a constitutional confrontation error was properly preserved, any error was harmless and harmless beyond a reasonable doubt. If the prosecution would benefit from the error, it has the burden of establishing that the error was "harmless beyond a reasonable doubt." *People v. Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The error is harmless if "the not-fully-impeached evidence" has not affected the reliability of the jury's verdict. *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986). In this case, the jury heard Harvey admit that, when he was a teenager, he had lied to the police that his car was stolen, and the jury was not instructed to disregard the testimony. Furthermore, Harvey's testimony corroborated the testimony of Arnita Lester, the other eyewitness in this case, whose credibility was not impeached. Therefore, the limitation of Harvey's cross-examination cannot be said to have affected the fact-finding process and the verdict.

Defendant next argues that his convictions for armed robbery and carjacking violated the state and federal constitutional prohibitions against double jeopardy. We disagree.

This Court has previously considered the issue under similar factual circumstances and rejected the argument that convictions for both armed robbery and carjacking arising out of the same transaction violate the state and federal constitutional prohibitions against double jeopardy. *People v Parker*, 230 Mich App 337, 341-345; 584 NW2d 336 (1998). The focus of the carjacking statute, MCL 750.529a, is on the particular type of property taken, while the focus of the armed robbery statute, MCL 750.529, is on the person assaulted and robbed. *People v Davis*, 468 Mich 77, 81-82; 658 NW2d 800 (2003). The Legislature intended the statutes to reach different types of harm, and it "specifically authorized two separate convictions arising out of the

[1] MRE 609(c) also precludes admission of a conviction where ten years has elapsed since the date of the conviction or of the release of the witness from confinement, whichever is later. A conviction for a crime involving theft must also be punishable by imprisonment for more than one year. MRE 609(a)(2)(A).

same transaction." *Parker, supra* at 343-344. Because carjacking and armed robbery do not constitute the same offense, *id.*, we reject defendant's double jeopardy argument.

Defendant finally argues that insufficient evidence was presented by the prosecution to prove the elements of armed robbery and carjacking beyond a reasonable doubt. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

"The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Carines, supra* at 757; MCL 750.529. Further, "to sustain a carjacking conviction, the prosecution must prove (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear." *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998); MCL 750.529a. Carjacking is a general intent crime, i.e., "no intent is required beyond the intent to do the act itself, that is, using force, threats, or putting in fear in order to take a vehicle from a person in lawful possession and in that person's presence." *Davenport, supra* at 580-581. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (internal citations omitted).

In the present case, Lester testified that defendant walked up behind her as she exited the gas station, placed a cold, "round object" to the back of her head and demanded that Lester give defendant the keys to the car. Harvey testified that defendant was, in fact, pointing a handgun at Lester and identified the handgun as a black "9 mm" or ".380." Lester complied with defendant's demand and gave defendant the keys to the car. The record indicates that defendant entered the 1997 Lincoln Continental and drove it away after pointing the gun at Lester and taking her keys. Both Lester and Harvey testified that they were "afraid" of defendant immediately after defendant took Lester's keys. Viewed in a light most favorable to the prosecution, sufficient evidence was presented to allow a rational trier of fact to conclude that the essential elements of carjacking and armed robbery were proved beyond a reasonable doubt.

Defendant argues that, regardless of Lester's and Harvey's testimony, there was no physical evidence linking him to the Mystic Gas Station and that his convictions were the result of a "credibility contest" between defendant, and Lester and Harvey. However, any alleged inconsistencies in Harvey's and Lester's testimony were minor and were immaterial to the basic elements of armed robbery and carjacking. Further, "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. The jury chose to discredit defendant's alibi, i.e., that he was not the person who committed the armed robbery and

carjacking on April 18, 2004, and to accept Lester's and Harvey's identification of defendant. In light of the fact that the prosecution presented sufficient evidence to sustain defendant's convictions, defendant's argument is without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood