STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE REID,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 189370
Recorder's Court
LC No. 95-001676

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions for assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2), arising out of the robbery and shooting of a pizza delivery person. Defendant was sentenced to concurrent terms of ten to thirty years in prison for the assault with intent to commit murder conviction, and ten to thirty years in prison for the armed robbery conviction, to be served consecutively to the mandatory two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that his trial attorney failed to provide him with effective assistance of counsel. We disagree. Because defendant failed to preserve this issue by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors of counsel evident from the existing record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). To establish ineffective assistance of counsel, the defendant must show that his trial counsel's performance was deficient, and that the deficient performance prejudiced the defense. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first claims his attorney failed to prepare for the testimony of one defense witness who identified defendant as having been present at an earlier attempted pizza delivery that appeared to have been a set-up for a robbery. This testimony contradicted defendant's own testimony that he only telephoned in the order to the first pizza place. A defendant is entitled to have his attorney prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d

569 (1990). A defendant must demonstrate prejudice from counsel's alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Assuming counsel was unprepared, defendant cannot demonstrate sufficient prejudice. The identification testimony of the actual victim at trial was strong and he had previously identified defendant in a non-suggestive lineup. The challenged statement of the witness was not of such importance to the prosecution's case or argument that, without it, defendant might not have been convicted.

Additionally, assuming counsel did not know that the witness could identify defendant, we question how defendant's case would have changed once his counsel learned this information. If defendant knew the witness would identify him as being at the scene of the earlier possible robbery, he would either have had to abandon a plan to commit perjury, which he has no right to do, and therefore cannot be the basis for a claim of ineffective assistance of counsel, *LaVearn*, *supra*, or, assuming defendant told the truth in his testimony, counsel would have been forced to make a strategic decision to present testimony that helped corroborate the claim of duress or abandon the helpful testimony entirely. Presenting the testimony or not calling the witness would be a strategic decision, either of which would not deprive defendant of a substantial defense and, therefore, cannot be the basis for a finding of ineffective assistance of counsel. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant also claims counsel failed to develop the defense of duress despite mentioning it in his opening statement and closing argument. This claim is without merit. Counsel had defendant's girlfriend testify about men coming to her door and trying to push their way in to see defendant, and counsel had defendant testify that he feared for his own life and the lives of his family and friends if he did not cooperate with the men at the door of his girlfriend's house. Defendant's argument that certain witnesses should have been asked more is questioning counsel's conduct based on hindsight. "Actions which may appear erroneous in hindsight but which were taken for reasons which would appear sound to a competent criminal attorney do not amount to the ineffective assistance of counsel." *People v Pawelczak*, 125 Mich App 231, 240; 336 NW2d 453 (1983).

Defendant also challenges counsel's failure to object to potentially confusing language in the jury instruction given on duress. Taken as a whole, the instructions fairly presented to the jury this issue and protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996).

Defendant also challenges counsel's failure to present any evidence of diminished capacity despite having filed a pre-trial notice. "A defense attorney must enjoy great discretion in the trying of a case--especially with regard to trial strategy and tactics." *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). It would be reasonable trial strategy for counsel not to present to the jury evidence that defendant was addicted to multiple substances. Counsel may have concluded, based on general experience or his observations of the jurors chosen for this case, that admission of drug use could so undermine his client's credibility on the witness stand that any denial or claim of duress would not be believed. There are also significant procedural hurdles in presenting a diminished capacity defense, *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978); MCL 768.21a; MSA 28.1044(1), such that defense counsel might have believed would hinder his client's defense or

unnecessarily confuse the jury. With such potential justifications for a valid strategic decision to forego a diminished capacity defense, defendant has not met his heavy burden of showing how counsel's performance was ineffective. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Defendant has also failed to show that such a defense had any reasonable likelihood of success. The report defendant references was prepared for a different purpose using different criteria and did not establish that defendant was incapable of forming the requisite intent to commit these crimes on the day of the offense.

Defendant further argues the cumulative effect of his counsel's errors establishes ineffective assistance of counsel. The purported admission of guilt by counsel while questioning the victim was only done when counsel was pointing out the difficulties of a proper identification on a dark street around midnight. The contrast between counsel's use of "my client" and other terms for the assailant was not an admission but an appropriate method of highlighting possible over-eagerness of the victim to make an identification. Similarly, counsel's comment in closing argument that defendant was the one left "holding the bag" was made in the context of counsel's argument that any act defendant might have done was done under duress. The statement emphasized that the wrong person, or at least the less culpable person, was being prosecuted. It was not an outright admission of guilt.

Defendant's claim that witnesses should have been questioned more elaborately to challenge the victim's timeline is likewise without merit. "As to the questioning of witnesses, this is properly attributable to trial strategy, and therefore not a basis for a claim of ineffective assistance of counsel." *People v Robideau*, 94 Mich App 663, 669; 289 NW2d 846 (1980), aff'd 419 Mich 458; 355 NW2d 592 (1984). Defendant only speculates that the victim's timeline might have been undermined. Without more, defendant has not met his burden.

Defendant next argues his counsel should have objected to some of the questions of the prosecutor during cross-examination of defendant. Defendant said, "I'm just playing," while on the witness stand, and the prosecutor used that testimony to have defendant repeat the words he had said at the lineup which led to his identification by the victim. "Probative evidence of guilt is always prejudicial from a defendant's point of view. The relevant question is whether the evidence was unfairly prejudicial." *People v Oswald (After Remand)*, 188 Mich App 1; 469 NW2d 306 (1991). Defendant has provided no support for his claim that the evidence was unduly prejudicial under MRE 403. Singly or cumulatively, counsel's conduct did not deprive defendant of a fair trial. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant next contends that the trial court's factual findings in support of its decision to sentence him as an adult were clearly erroneous and that the trial court abused its discretion in sentencing defendant as an adult. We review challenges to a juvenile disposition hearing under a bifurcated standard. Findings of fact are reviewed under the clearly erroneous standard, meaning the court must be "left with a definite and firm conviction that a mistake has been made." *People v Lyons*, 203 Mich App 465, 468; 513 NW2d 170 (1994). The ultimate decision of whether to sentence a defendant as an adult or juvenile is reviewed for an abuse of discretion. *Id.*

The criteria the court had to consider are stated in MCL 769.1(3); MSA 28.1072(3), and MCR 6.931(E). The burden is on the prosecutor to establish by a preponderance of the evidence that the best interests of the juvenile and the public would be served by sentencing a defendant as an adult. MCR 6.931(E)(2). The factors to be considered in making this decision are listed in MCR 6.931(E)(3). All criteria are to be considered. *People v Schumacher*, 75 Mich App 505, 512; 256 NW2d 39 (1977). In particular, the seriousness of the offense alone cannot justify a waiver of jurisdiction. *People v Dunbar*, 423 Mich 380, 393; 377 NW2d 262 (1985). Rather, the court must give each factor weight as appropriate to the circumstances. MCR 6.931(E)(3). While *Dunbar* addresses the discretionary waiver of a juvenile to the adult courts prior to trial pursuant to MCL 712A.4; MSA 27.3178(598.4), and MCR 5.950, rather than a sentencing decision for a juvenile automatically waived into the adult courts pursuant to MCL 600.606; MSA 27A.606, the criteria are the same and the two tests are essentially equivalent. *People v Parrish*, 216 Mich App 178, 183; 549 NW2d 32 (1996).

Most of defendant's challenges to the court's factual findings are based on a disagreement with the court over which expert's evaluation should be believed. This second-guessing does not establish clear error. It merely establishes that another conclusion was possible. For instance, defendant argues the youth home supervisor's evaluation should be given more weight, as to whether he would disrupt the rehabilitation of others, than the court's reliance on his thirteen incident reports in roughly six months at the youth home. Who to believe is a judgment call, and the trial court's decision does not leave us with "a definite and firm conviction that a mistake has been made."

Defendant also argues that the court improperly relied solely on the severity of the offense in concluding he should be sentenced as an adult. The court, however, also relied on defendant's potential for disrupting the treatment of other juveniles and defendant's need for long term treatment. The court did not rely on the inadequacy of the juvenile system's programs, which the Supreme Court disapproved of in *Dunbar, supra* at 394, but on defendant's need for more than four years of treatment regardless of the quality of the programs offered. Thus, there is no clear error in the court's factual findings that defendant and the public would best be served by sentencing defendant as an adult.

The court gave the weight it thought appropriate to each of these factors and concluded defendant should be sentenced as an adult. This conclusion is not so wrong that "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Accordingly, there was no abuse of discretion, and there is no basis to reverse defendant's sentence as an adult.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra