STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN FALCONER,

Defendant-Appellant.

UNPUBLISHED
March 23, 1999

No. 195893
Recorder's Court
LC No. 95-010438

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, and of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of ten to twenty years' imprisonment for the armed robbery convictions and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that the trial court erred in allowing evidence of other similar robberies by a bicycle bandit. Defendant failed to object to this evidence at trial and, therefore, has failed to preserve this issue for appellate review. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Defendant's claim of prosecutorial misconduct predicated on this same issue is likewise not preserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Further, we conclude that the admission of this evidence did not result in manifest injustice because the evidence was admissible for the purpose of showing the circumstances surrounding defendant's arrest, see *People v Eaton*, 114 Mich App 330, 337-338; 319 NW2d 344 (1982), and to establish defendant's system in doing an act (modus operandi) or identity, both proper purposes under MRE 404(b)(1). *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993); *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982).

Defendant also complains that the trial court erred by failing to give a cautionary instruction to the jurors regarding the limited purpose for which they could consider the foregoing evidence. See CJI2d 4.11. Because defendant did not request such an instruction at trial, there was no error.

VanderVliet, *supra* at 75; *People v Mitchell*, 223 Mich App 395, 397; 566 NW2d 312 (1997), remanded on other grounds 456 Mich 948; 576 NW2d 169 (1998).

Defendant argues that he was denied his right to a fair trial when the trial court failed to reinstruct the jury on the issue of reasonable doubt. In response to a deliberating jury's request to have testimony reread, the rereading and extent of rereading are within the trial court's discretion, and this Court reviews decisions regarding the rereading of testimony for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). By analogy, we believe decisions regarding the rereading of an instruction are also within the trial court's discretion and should be reviewed for an abuse of discretion.

MCR 6.414(A) prohibits the trial court from communicating with the jury pertaining to the case without notifying the parties and permitting them to be present, and the court must ensure that all communications pertaining to the case between the court and the jury are made a part of the record. Although communication with juries in the process of deliberation must be limited, the Supreme Court in *People v France*, 436 Mich 138, 166; 461 NW2d 621 (1990), tempered the long-standing automatic-reversal rule when an ex parte communication takes place in favor of a more realistic evaluation of the defendant's right to a fair trial. *People v Gonzalez*, 197 Mich App 385, 402; 496 NW2d 312 (1992). The Court concluded that the communication must be categorized as substantive, administrative, or housekeeping. *France*, *supra* at 163-164. Substantive communications are those that include instructions regarding matters of law while the jury is deliberating. *Id.* There is a presumption of prejudice where this type of communication occurs. *Id.*

Although reinstructing the jury on the issue of reasonable doubt would have been a substantive communication by the trial court, the circumstances surrounding the jury's request for reinstruction are not clear from the trial court record. The record contains a note from the jury requesting reinstruction on the issue of reasonable doubt, and writing on the back of this note states "4-26-96," "10:55," and initials are provided. From this, we conclude that the note was received by a person with those initials at 10:55 a.m. on April 26, 1996. However, there is no evidence that the trial court received the note, or that it had any ex parte communication with the jury regarding the note. Moreover, the record indicates that the jury rendered its verdict shortly after the time indicated in the note, thus making it clear that the jurors did not require reinstruction in order to reach a verdict. On this record, there is no basis to conclude that the trial court erred by either participating in an improper ex parte communication with the jury or refusing to reinstruct the jury, or that defendant was prejudiced by the absence of reinstruction on the issue of reasonable doubt.

Defendant also argues that he was denied a fair trial by the trial court's failure to give an alibi instruction. Although defendant provided some alibi evidence at trial, he did not request an alibi instruction. The trial court has no sua sponte duty to give an unrequested alibi instruction where, as here, the court properly instructs the jury on the elements of the offense and the prosecution's burden of proof. *People v Duff*, 165 Mich App 530, 541-542; 419 NW2d 600 (1987).

Defendant argues that the trial court deprived him of a fair trial by questioning a defense witness in a manner that challenged the witness' credibility. MRE 614(b) provides that a court "may interrogate

witnesses, whether called by itself or by a party." While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v Cheeks*, 216 Mich App 470, 480-481; 549 NW2d 584 (1996). The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Id.*

Defendant's friend testified that he saw defendant as defendant left his house at 10:45 to 10:50 p.m. on the night of the robbery, that they went to a restaurant for half an hour to eat, and then returned home between 11:30 and 11:40 p.m. After defense counsel's redirect examination of the witness, the trial court asked whether the witness was told what time the robbery occurred and how he remembered what time he saw defendant on the night of the robbery. We believe that the trial court's questions were not partial and were not calculated to influence the jury to the detriment of defendant's case. The questions clarified how the witness knew what time it was when he was with defendant on the night of the robbery. The questions did not deprive defendant of a fair trial.

Defendant argues that he was denied the effective assistance of trial counsel and that the trial court erred in denying him a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). In order to establish a claim of ineffective assistance of counsel, it must be shown that (1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). There is a strong presumption that the assistance of counsel was sound trial strategy. *Id.*

If the trial record does not factually support a claim of ineffective assistance of counsel, the defendant should move in the trial court for a new trial or an evidentiary hearing on the issue. *Ginther*, *supra* at 443. In denying defendant's motion for a new trial or an evidentiary hearing, the trial court found that defendant failed to overcome the presumption that his trial counsel was effective. Because the record contains sufficient detail to consider defendant's claims of ineffective assistance of counsel, we conclude that an evidentiary hearing was not necessary under *Ginther*.

Defendant claims that his arrest was illegal and that trial counsel was ineffective for failing to suppress evidence seized at the time of this illegal arrest. Based on the information the police had regarding the bicycle bandit robberies in the precinct, we find no merit to defendant's claim that the police did not have probable cause to conduct a traffic stop when they observed him driving the same type of vehicle used in the robberies. See *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996). Moreover, the items that were in plain view on the truck seat were also properly seized. *Id.* at 101.

Defendant also claims that his trial counsel was ineffective for failing to call witnesses concerning his hair style at the time of the robbery. Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial

defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). This Court will not second-guess defense counsel's trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Furthermore, the victim who identified defendant as the perpetrator testified that it was his eyes, not his hair style, that enabled her to identify defendant. Additionally, both victims testified that the perpetrator was wearing a bandanna during the offense. Under these circumstances, there is no reasonable probability that the result of the proceeding would have been different had such a witness been called.

With regard to defendant's claim that counsel should have requested an alibi instruction, we find no basis in the record for concluding that defendant was prejudiced by the absence of an alibi instruction. Moreover, because the evidence referring to robberies by a bicycle bandit was admissible for the purpose of showing the circumstances surrounding defendant's arrest and did not raise an issue of defendant's character under MRE 404(a), *Eaton*, *supra*, and was also admissible to establish defendant's system in doing an act (modus operandi) or identity, purposes for which prior acts evidence is admissible under MRE 404(b)(1), *VanderVliet*, *supra* at 66, defense counsel was not ineffective for failing to object to this evidence, or request a cautionary instruction.

With respect to defendant's claim that trial counsel should have ensured that the jury was reinstructed on the issue of reasonable doubt, as discussed previously, it appears that trial counsel did not have knowledge of the jury's request for reinstruction because there is no reference to the request in the trial court record and, in any event, there is no basis for finding that defendant was prejudiced by the failure to reinstruct.

Defendant also argues that the trial court erred in admitting the identification evidence at trial after determining that the pretrial lineup procedure was not unduly suggestive. A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Defendant argues that the lineup was so impermissibly suggestive as to constitute a denial of his due process rights. The determination whether an identification procedure constitutes a denial of due process is made in light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). Defendant claims that one of the victims must have guessed at the lineup because the robber's face was covered with a bandanna during the robbery and he was sitting on a bicycle so that his height was distorted. Although the victim acknowledged at the *Wade*[1] hearing that the robber had a bandanna covering his mouth and nose, she stated that she could see his eyes and that she identified defendant at the lineup by his eyes. In light of these circumstances, the trial court did not err in finding that the lineup was not unduly suggestive. Accordingly, there was no need to establish an independent basis for the victim's in-court identification. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995); *McElhaney*, *supra* at 288.

Defendant argues that he is entitled to a new trial because the trial court failed to ascertain on the record whether he knowingly and intelligently waived his right to testify. This argument is without merit. The trial court had no duty to advise defendant of his right to testify, nor was it required to determine whether he made a knowing and intelligent waiver of the right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

Defendant argues that he is entitled to be resentenced because the sentencing guidelines scores for Offense Variables 2 and 17 were based on inaccurate information. However, "application of the [sentencing] guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998), quoting *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Because defendant does not challenge the proportionality of his sentence, but only contends that the trial court erred in scoring the applicable guidelines, defendant has not presented a cognizable claim on appeal.

Finally, defendant argues that the cumulative effect of all the alleged errors in this case denied him a fair trial. Considering the lack of merit of the claims defendant raises on appeal, we disagree. See *People v Cadle*, 204 Mich App 646, 658; 516 NW2d 520 (1994).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).