

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE HILL,

Defendant-Appellant.

UNPUBLISHED

June 30, 2000

No. 213422

Wayne Circuit Court

LC No. 98-002819

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of larceny from a person, MCL 750.357; MSA 28.589. The trial court sentenced defendant to a year and one-half to ten years' imprisonment. This case arises out of an incident in which complainant alleged that defendant overtook him at a bus stop, injured his arm, and fled the scene with complainant's pager and approximately forty dollars in cash. Complainant's daughter, aged six, was with him at the time. Defendant contends on appeal that he was denied effective assistance of counsel and a fair trial. We disagree and affirm.

Defendant first argues that he was denied effective assistance of counsel, in violation of US Const, Am VI and Const 1963, art 1, § 20, because his attorney did not persuasively argue that he was a more credible witness than complainant. Defendant testified at trial that complainant gave a cigarette to him while both men were waiting for a bus. According to defendant, complainant asked him to leave the bus stop. When defendant refused, complainant picked up a bottle and struck him on the head with it. Defendant testified that he thereafter wrestled complainant to the ground, at which time a liquor bottle and some change spilled from complainant's pockets. Two strangers broke up the skirmish and when defendant began to walk away, complainant began to follow him. Complainant ceased trailing defendant upon hearing his daughter's cries. Defendant denied taking complainant's money or pager. The police later found the pager by a garbage can at a nearby location.

Defendant asserts that his trial counsel should have emphasized that defendant was carrying some money orders and a bus transfer at the time of the incident. Defendant essentially contends that his trial counsel failed to highlight the fact that he lacked any motivation to steal defendant's money or pager. Defendant further contends that his attorney should have argued alternative theories to account

for the location where the police found complainant's pager. We note that defendant did not move for an evidentiary hearing or a new trial on the basis of ineffective assistance of counsel.¹ Therefore, our review is limited to errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceedings was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). This Court will presume effective assistance of counsel; a defendant bears the heavy burden of proving otherwise. *Noble, supra* at 661-662.

In our view, defense counsel's performance was not deficient. Defendant essentially asks us to question and review his attorney's defense strategy, but we decline to substitute our own judgment in these matters. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Johnson (On Rehearing)*, 208 Mich App 137, 142-143; 526 NW2d 617 (1994). Moreover, defendant does not establish that the result would have been different in the absence of his attorney's alleged deficiency. The trial court had the benefit of hearing testimony from complainant, his daughter, defendant, and two police officers. As trier of fact, the court was able to weigh the evidence and assess the credibility of the respective witnesses. Finally, in our view, defense counsel provided competent representation. The lower court record reflects that defense counsel successfully argued a directed verdict motion at the close of the prosecutor's proofs on the more serious charge of armed robbery. Defense counsel also attempted to quash the original information, and he argued that the evidence supported only a conviction of misdemeanor larceny. Defendant's claim of ineffective assistance of counsel is without merit.

Defendant's second argument on appeal is that the trial court itself denied defendant a fair trial, contrary to US Const, Am VI; Const 1963, art 1, § 20; and MCL 768.1; MSA 28.1024, when it persistently questioned complainant on a particular matter. We again note that defendant did not object to the challenged questions. Therefore, we review the record for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999). We find no error in this case.

A trial court has wide, though not unlimited, discretion in conducting a trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A court "may interrogate witnesses, whether called by itself or by a party." MRE 614(b). See also MRE 611(a)(1). At trial, complainant testified on both direct and cross-examination that defendant went through his pockets and took his pager and some cash. The trial court interjected to ask complainant whether he actually saw defendant

¹ Furthermore, this Court, in an order of March 4, 1999, denied defendant's motion to remand for a *Ginther* hearing (*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)) because defendant failed to persuade this Court of the necessity for remand.

remove the pager and cash from his pockets, and complainant responded affirmatively.² Defendant does not explain how this questioning prejudiced his right to a fair trial. Our review of the record indicates only that the trial court sought to clarify the testimonial record as permitted by MRE 611(a)(1) and MRE 614. See also *People v Pawelczak*, 125 Mich App 231, 236; 336 NW2d 453 (1983). We conclude that the trial court's questioning of complainant did not deprive defendant of a fair trial.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Kelly

/s/ William C. Whitbeck

² We note that this was a bench trial and the trial court merely asked follow-up questions to clarify the issues.