STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYNN TONYA PASLEY,

Defendant-Appellant.

UNPUBLISHED
July 11, 2000

No. 210712
Recorder's Court
LC No. 97-001622

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY WILLIAMS,

Defendant-Appellant.

No. 210716
Recorder's Court
LC No. 97-001622

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

In Docket No. 210712, defendant Pasley appeals as of right from his bench trial conviction of armed robbery, MCL 750.529; MSA 28.797. Pasley was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to fifteen to thirty years' imprisonment. In Docket No. 210716, defendant Williams appeals as of right from his bench trial conviction of armed robbery, MCL 750.529; MSA 28.797. Williams was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty to forty years' imprisonment. We affirm both cases.

Both cases arose from an armed robbery that occurred on Park Street in Detroit. On February 8, 1997, between 9:15 p.m. and 9:30 p.m., complainant, Greg Pitts, parked his car on Park Street and began walking toward the State Theater on Woodward Avenue, where he was employed as a security

guard. Pitts claimed that as he neared Woodward Avenue, three men walking toward him stopped him and forced him to the ground. One of the men hit Pitts on the back of the head with the flashlight that Pitts was carrying. The men then took Pitts' wallet, necklace, watch and ring. Pasley, Williams, and a third man, who is not a party to the present appeals, were arrested soon after in the vicinity of where the attack occurred. Defendants were charged with armed robbery and tried together.

Docket No. 210712

Pasley argues that the trial court erred in admitting evidence at trial regarding Pitts' identification of him at a police lineup. We agree, but find the error to be harmless. "A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996) (citation omitted). The fairness of an identification procedure is evaluated considering the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 311-312 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993). The test is whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *People Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973).

The day after the robbery, Pitts identified Pasley and Williams at the same lineup. There are a number of factors concerning the lineup that, by themselves, are not dispositive. However, considered together, we do believe they indicate that the lineup was unduly suggestive with regard to Pasley. First, there is evidence that Pitts was told by the police that the perpetrators of the crime would be included in the lineup. Second, while the record does not contain photographic evidence of the lineup for us to review, the transcript of the motion hearing indicates that there were a number of differences in physical characteristics of the lineup participants. For one, the ages of the participants ranged from nineteen to the mid-fifty's. Pasley was aged 34 at the time of the offense. Most significantly, the transcript indicates that Pasley was the only participant who wore dreadlocks. Dreadlocks are a very unique and distinctive hairstyle. Pitts testified that one of the men who robbed him wore "braids . . . wild hair" that was "real long." Furthermore, the transcript indicates that three out of the five lineup participants were bald. See *Kurylczyk, supra* at 312 (Griffin, J), 318 (Boyle, J). Accordingly, evidence regarding the lineup identification should have been excluded with respect to Pasley.

Nonetheless, we find this error to be harmless, given that an independent basis existed for Pitts' in-court identification of Pasley. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). Pitts had opportunity to get a good view of Pasley during the assault, the lineup took place the day after the assault, and the description of Pasley given to the police was quite accurate. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998). Furthermore, Pitts was quite confident both at the pretrial lineup and in court that Pasley was one of his attackers. *Colon, supra* at 305. Under the totality of the circumstances, *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972), we believe that there is clear and convincing evidence that the in-court identification of Pasley was not undermined by the impermissibly suggestive pretrial lineup.

Pasley also argues that the prosecution presented insufficient evidence to support his conviction. We disagree. "In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a

light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt." *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). "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." *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Elements of an offense may be proved by circumstantial evidence and reasonable inferences arising from the evidence. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998).

Pitts testified that Pasley was among the men who forced him to the ground, and that Pasley told Pitts to "give me all you got." When Pasley grabbed Pitts' flashlight, Pitts explained that he then "covered up," knowing that he was about to be struck with the flashlight. Pitts also testified that either Pasley or Williams struck him on the head with the flashlight, causing a laceration that required stitches. After being struck, Pasley then took Pitts' gold necklace while Williams and the third man took his wallet, watch, and ring.

Detroit Police Officers Karl Paul, DeWitt Shelton and Michael Green all testified that they observed the three defendants together and that Williams and the third man were handling Pitts' wallet. Officers Paul and Shelton both testified that Williams was also found to have possessed Pitts' jewelry and flashlight, the later item having blood on it. Pitts identified Pasley as one of the perpetrators at a police lineup the day following the incident and identified him again at trial. Accordingly, and acknowledging the trial court's superior opportunity to access witness credibility, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), we believe that sufficient evidence was adduced to support Pasley conviction.

Additionally, Pasley argues that the trial court erred in denying his motion for a separate trial. We disagree. We review a trial court's decision on a motion to sever for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). We see no abuse of discretion under the facts of this case. Pasley's general assertion prior to trial that defendants would present antagonistic defenses was insufficient to demonstrate that separate trials were necessary to avoid prejudice to his substantial rights. *Hana, supra* at 346 (observing that severance is only mandated when a defendant "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice"). Indeed, the defenses actually advanced at trial by Pasley and Williams were not antagonistic or mutually exclusive. Both defendants claimed that they had never met one another prior to their arrests. Williams presented a version of events explaining how he came into possession of complainant's property that was not inconsistent with Pasley's theory that he was arrested simply because he was in the vicinity of the other defendants when the police arrived. Although a statement made by the third perpetrator to the police implicated Pasley and Williams in the crime, the trial court specifically indicated that it would not consider this statement when determining Pasley's guilt or innocence. See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

Pasley also argues that the trial court erred in admitting the third man's statement to the police because the statement was hearsay and the admission of the statement violated his constitutional right of

confrontation. Because Pasley did not object at trial to the admission of this statement, we review the trial court's handling of this evidentiary matter under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After reviewing the record, we conclude that Pasley fails to establish that the trial court's handling of the issue was error, let alone prejudicial. As noted above, the trial court indicated that the statement was not considered in Pasley's case. There is no evidence to the contrary.

Next, Pasley argues that the trial court erred in determining that he waived his right to a jury trial. We disagree. This Court reviews a trial court's determination that a defendant validly waived his right to a jury trial for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). Pasley submitted a form to the trial court indicating that he had been advised of his constitutional right to a jury trial, understood the right and voluntarily intended to waive the right. The form was signed by Pasley and his trial counsel. In addition, prior to trial, the trial court reviewed the form and asked Pasley if he intended to waive his right to a jury trial and have the trial court sit as the trier of fact. Pasley answered that he did indeed choose to so proceed. See MCR 6.402(B). We conclude that under such circumstances the trial court did not clearly err in determining that defendant Pasley validly waived his right to a jury trial. *Leonard, supra* at 595.

Pasley also argues that his trial counsel's failure to introduce evidence regarding tests that were performed on blood found on his coat constituted ineffective assistance. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[1] hearing, our review of his claim is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

The prosecution acknowledges that comparison tests were conducted on blood found on Pasley's jacket. The prosecution asserts that these tests showed that although Pasley could be excluded as the source of the blood, Pitts could not. Pasley does not dispute that assertion on appeal. Consequently, because this evidence was not exculpatory, we believe that Pasley fails to overcome the presumption that counsel's decision not to focus on this evidence constituted sound trial strategy. Further, we do not believe that Pasley has shown that he was prejudiced by the strategy.[2]

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] To the extent Pasley is arguing that he was denied a fair trial by the prosecution's failure to provide him with the results of the blood tests, the argument is meritless. There is no indication that the test results were favorable to defendant Pasley or material to his guilt or innocence and, therefore, defendant was not denied a fair trial by the prosecution's failure to provide him with the complained-of blood evidence. See *People v Fink*, 456 Mich 449, 458-459; 574 NW2d 28 (1998); *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Williams first argues that the trial court abused its discretion in denying his motion for new trial, which was brought on the basis that the trial court erred in ruling that he waived his right to a jury trial. We disagree. Williams submitted a waiver of trial by jury form that stated that he had been advised of his constitutional right to a jury trial, understood the right and voluntarily intended to waive the right. Both Williams and his counsel signed the form. Furthermore, the trial court specifically asked Williams if he intended to waive his right to a jury trial and have the trial court sit as the trier of fact. Williams answered that he did indeed choose to so proceed. See MCR 6.402(B). Therefore, we conclude that there was no clear error in the trial court's determination that Williams validly waived his right to a jury trial, *Leonard, supra* at 595, and the trial court did not abuse its discretion in denying defendant Williams' motion for new trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Williams also argues that the trial court erroneously relied upon unsupported evidence in scoring the sentencing guidelines. Specifically, Williams claims that the trial court erred in scoring the offense variables in a way that indicated he took a leadership role during the commission of the crime. We disagree. A claim challenging the "application of the 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 Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997).

Initially we note that judicial sentencing guidelines do not apply to habitual offenders, *People v Cervantes*, 448 Mich 620, 625 (Riley, J), 630 (Cavanagh, J); 532 NW2d 831 (1995), and are not considered on appeal in assessing the propriety of an habitual offender's sentence. *People v Gatewood* (*On Remand*), 216 Mich App 559, 560; 550 NW2d 265 (1996). In any event, we conclude that there was evidence from which the trial court could reasonably infer that Williams assumed a leadership role during the crime. Pitts testified that it was either Williams or Pasley who first grabbed him by the shirt. Pitts also testified that Williams may have been the individual who ordered Pitts to "shut up and get on the ground" and hit him with the flashlight. Pitts clearly testified that Williams removed Pitts' watch and ring and may have ordered the third man to take his wallet. Both Officers Paul and Shelton testified that Williams was seen handling Pitts' wallet and possessed all of Pitts' jewelry and Pitts' bloody flashlight at the time of arrest. Consequently, we conclude that Williams has failed to state a cognizable claim that the trial court misapplied the guidelines. *Mitchell, supra* at 176-177.

We affirm both defendants' convictions and sentences.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly