STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2000
v	No. 210004 Wayne Circuit Court
LAWRENCE DEMETRI BLANTON, Defendant-Appellant.	Criminal Division LC No. 96-504010

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to four to fifteen years' imprisonment for the armed robbery conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

John Barnum testified that, on the night of November 21, 1996, he was working as the manager of the Terrace Theater. Between 10:00 p.m. and midnight, Barnum had some conversations with defendant, who had approached Barnum, asking if he was accepting job applications. Defendant indicated that he was at the theater to see a movie. Barnum went to his office, retrieving an application from a new stack, and gave it to defendant. Defendant went away, and Barnum went back to his work.

A short while later, Barnum was working in his office. The office was locked, and the door had a peephole. Barnum heard a knock on the door and, when he looked through the peephole, he saw defendant. He opened the door, and defendant gave Barnum the completed application. Defendant used the name "John Smith" on the application. Barnum took the application and told defendant that he would get back to him.

Barnum went back to work in his office. After a short period of time, he heard a knock on the office door. It was about midnight. He looked through the peephole and saw defendant again. Defendant told Barnum that he wished to borrow some money for a telephone call. Barnum opened the

office door to give defendant some change. When he opened the door, he noticed that defendant had a gun.

Defendant told Barnum to be calm and indicated he did not want to hurt Barnum. Barnum complied with defendant's directions. Apparently the men went into the office and closed the door. Defendant told Barnum to open the safe, which Barnum did. Next, he told Barnum to turn around, and Barnum did so, putting his hands behind his back. Defendant handcuffed Barnum. Barnum then heard the sound of what he believed was defendant putting on latex gloves. Defendant emptied the safe into an empty garbage can. He took money and Barnum's driver's license from Barnum's wallet. Defendant made a comment to Barnum that he now knew where Barnum lived and made a threat against Barnum's life. Defendant then left the office.

Barnum, who remained handcuffed, was able to maneuver himself to call 911. The police arrived, and Barnum described the incident. He described the man as a dark-complected black man who was clean shaven. In fact, defendant has light skin and wears a mustache. Barnum testified that the safe contained a little over $4,000. The police took the handcuffs and job application form filled out by the man.

While no identifiable fingerprints were found on the handcuffs, the police were able to identify two fingerprints on the job application. These fingerprints matched defendant and led the police to him. The last address they had for defendant was the home of his mother, Sadie Graves. Police surveilled Graves' home. They followed defendant from Graves' home on November 27, 1996 and arrested him. Defendant was driving a Cadillac. Paperwork from the car indicated that defendant had purchased the car on November 22, 1996, putting down a cash deposit of over $2,300.

Graves testified for the prosecution. She had ejected defendant from her home in early November. She told him to leave because, on New Years' Eve 1995, he had fired a gun. She said that she worried that defendant might be using drugs, but denied knowing whether he actually did. Defendant had been giving her some money to save for him so he could purchase a house. She gave defendant the money, $2,000, when defendant moved out of her home. She denied that defendant had come to her house earlier during the week of November 27, 1996, with a large sum of money, which he said he had found. She testified that defendant offered to give her twenty dollars. According to Graves, defendant's girlfriend had called, indicating that there was a problem with defendant and that he had found some money.

According to Graves, defendant was at her house with the rest of her family during the evening of November 21, 1996. Defendant left there around midnight. She testified that defendant and his brother, John Rice, had argued about a car that night.

After the police arrested defendant, Livonia Police Detective Sergeant Todd Bredin met with defendant at the station. Bredin read defendant his rights. Defendant asked Bredin how they caught him and whether he was going to get life. When Bredin explained that the police obtained defendant's fingerprints off the job application, defendant said he thought he had not given the application back to

the "guy." Defendant denied owning or using a gun. When Bredin asked defendant why he committed the offense, defendant told him that he had a heroin problem, which made him do "dumb stuff."

Bredin gave defendant a form to write out a statement. Defendant wrote only about taking several applications from Barnum and giving none back. Bredin asked defendant why he did not write out the other things they had talked about. Defendant told him that what he wrote was true, but he did not want to write that he had robbed the theater; he did not like to use the word "robbed." Defendant told Bredin that, after more careful consideration, he did not wish to write any more until he consulted with an attorney. Bredin terminated the interview.

After the prosecution rested, defendant presented his only witness, Rice. Rice testified that he was with defendant at Graves' home the night of November 21, 1996. He and defendant argued over whether Rice could use defendant's car, a Honda. They left Graves' home at about the same time, shortly after midnight.

Following Rice's testimony, the prosecution asked to recall Bredin to offer testimony to rebut Graves' testimony. The prosecution claimed that Graves had given testimony inconsistent with her statement to Bredin when Bredin interviewed her at her home on November 27, 1996. Over defendant's objection, the trial court allowed the testimony,

Bredin testified that, on November 27, 1996, Graves told him that defendant had come to her house with a large sum of money. Defendant could not explain to her from where the money came. He offered her some of the money. Bredin testified that Graves never told him that defendant had offered her twenty dollars. She did tell him that she had ejected defendant from her home because of his drug use.

Defendant argues that the trial court erred in allowing Bredin's testimony as rebuttal testimony.

This Court reviews the admission of evidence for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996). Whether evidence is admissible by a rule of evidence or statute is a question of law, which we review de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991), this Court explained:

> Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut. A prosecutor cannot elicit a denial during the cross-examination of a defense witness and use such denial to inject a new issue into the case. Cross-examination cannot be used to revive a right to introduce evidence that could have been, but was not, introduced in the prosecutor's case in chief. [Citations omitted.]

Bredin's testimony was not proper rebuttal testimony. It did not respond to evidence presented by defendant. Rather, the prosecution sought to impeach the testimony of one of its own witnesses. The prosecution should have recalled Bredin as part of its case in chief.

Although admission of the testimony as rebuttal evidence was erroneous, the error was harmless. Defendant has the burden of demonstrating that, "'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 496.

We find that error in the admission of Bredin's "rebuttal" testimony was harmless. Barnum testified as to the circumstances of the robbery. He testified that he got a good look at the robber. Barnum testified that there was no doubt in his mind that defendant was the man who robbed him, even though he had earlier described the man as dark-complected and clean shaven. Defendant's fingerprints were found on the job application that Barnum previously gave to and was returned by the man who robbed him. According to Barnum, the robber stole about $4,000, and, the day after the robbery, defendant made a $2,300 cash deposit for a car.

Graves and Rice offered testimony to contradict some of the inferences that could be drawn from the untainted evidence. However, considering the untainted evidence, we find that defendant has failed to establish that it is more probable than not that Bredin's improper testimony was outcome determinative. Thus, he has not demonstrated that the error in the admission of Bredin's testimony requires reversal.

Next, defendant claims that he received ineffective assistance of counsel at the trial level. He argues that trial counsel should have challenged the validity of his arrest and search without a warrant. We disagree.

To establish that counsel was ineffective, defendant must demonstrate, through the record, that his counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him to the extent that he was denied a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), citing *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant must demonstrate that, but for the alleged error, the result of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). There exists a strong presumption that the assistance provided constituted sound trial strategy, and defendant must overcome this presumption. *Id.*

A police officer may arrest a person if the officer has information demonstrating probable cause to believe that an offense has occurred and the defendant committed it. MCL 764.15; MSA 28.874; *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "Probable cause to arrest exists when the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id*. A search incident to arrest requires no additional justification. *Id*.

Barnum turned over to police a job application that had been handled by the person who robbed him. Police performed a fingerprint analysis of the application, and the number one candidate was identified as defendant. Based on this information, the police had probable cause to arrest defendant. Therefore, the admission of the evidence seized incident to defendant's arrest was not erroneous. Because his arrest and the seizure of evidence were not improper, defendant cannot demonstrate error on the part of trial counsel in failing to challenge these matters. Thus, defendant has failed to establish that he was denied the effective assistance of counsel.

Affirmed.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder