STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 3, 2000
v	No. 211386 Macomb Circuit Court
ERVIN BROCK STAIR, JR., Defendant-Appellant.	LC No. 97-002368-FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530; MSA 28.798, and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to fifteen to twenty-five years' imprisonment. He appeals as of right. We affirm.

I

Facts

This case arises from the robbery of a combination gas station and convenience store. The assistant manager on duty at the time testified that defendant approached him at the counter and demanded the money in the cash register, and that defendant further threatened to shoot him if he did not cooperate. According to the witness, defendant accompanied his threat by placing his hand under his shirt and revealing a bulge that implied the presence of a weapon.

Immediately after the assailant left, the assistant manager locked the door and called the police, who promptly thereafter identified a car and driver matching the assistant manager's description. The police brought the assistant manager to the location where the suspect had been pulled over, and the assistant manager identified the suspect, who was defendant, as his assailant.

Defendant was charged with armed robbery. The trial court instructed the jury on both armed and unarmed robbery, but refused a defense request to instruct on the lesser crime of larceny from a person. The jury found defendant guilty of unarmed robbery.

II

Appellate Counsel's Issue

Defendant's appellate attorney argues that the trial court erred in refusing to provide an instruction on larceny from the person. We agree, but find the error harmless.

"If evidence has been presented which would support a conviction of a lesser included offense, refusal to give a requested instruction is reversible error." *People v Ora Jones*, 395 Mich 379, 390; 236 NW2d 461 (1975). "If the lesser offense is one that is necessarily included within the greater, the evidence will always support the lesser if it supports the greater." *Id*. Larceny from the person is a necessarily included offense within armed or unarmed robbery; larceny from the person includes no additional elements, and differs only by its absence of the element of violence or intimidation. *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds, *People v Stephens*, 416 Mich 252, 260-261; 330 NW2d 675 (1982). "Robbery is committed only when there is larceny from the person . . . . [E]very robbery would necessarily include larceny from the person and every armed robbery would necessarily include both unarmed robbery and larceny from the person as lesser included offenses." *Chamblis, supra* at 425.

Plaintiff concedes that the requested instruction in this case covered a necessarily included offense, and that the trial court therefore erred in refusing to provide it. However, plaintiff argues that no miscarriage of justice resulted, and that the error must be considered harmless. We agree.

A trial court's failure to provide a requested instruction on a necessarily included offense is subject to harmless-error analysis. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26; MSA 28.1096. The defendant bears the burden of demonstrating that a preserved, nonconstitutional error resulted in a miscarriage of justice. *Lukity, supra* at 493-494. See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (appendix) (1999).

Defendant has failed to meet his burden in this instance. Defense counsel suggested to the jury that it might find that defendant took the money but did so not by way of committing any kind of assault. However, defendant chose not to testify in his own defense, and the defense presented no witnesses or other evidence that suggested any factual alternative to the prosecutor's theory and evidence. Instead, defense counsel, through cross-examination and argument, simply tried to instill doubts in the jurors' minds concerning the prosecutor's evidence concerning each element of the charged offense.

Had defendant taken the stand and insisted that he took the money for some innocent reason, or at least for a reason other than because he had threatened the assistant manager in order to get it, then an instruction on larceny from a person would have comported with a specific defense theory, and reversal might have been warranted for failure to provide it. Under the facts of this case, however, the only way the jury could have rationally found defendant guilty of larceny from a person, but not guilty of robbery, would have been to believe that the cash from the register was lying on the counter for

defendant to take, but to disbelieve the assistant manager's testimony that he put it there under threat from defendant. Such an interpretation of the evidence is not plausible.

Jury verdicts may not be disturbed on the basis of speculation or inquiry into whether the jurors made a mistake or compromised with each other. *People v Cazal*, 412 Mich 680, 688; 316 NW2d 705 (1982), citing *Duncan v Louisiana*, 391 US 145, 157; 88 S Ct 1444; 20 L Ed 2d 491 (1968). Nor must a court defer to a defendant's desire to exploit a jury's inherent power to dispense mercy rather than deliver a verdict that reflects a dispassionate reading of the evidence. See *People v Hendricks*, 446 Mich 435, 446; 521 NW2d 546 (1994).

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In this case, the court instructed the jury to judge the facts solely from the evidence before it, not to compromise, and not to be concerned about possible penalties. Because the jury could have found defendant guilty of larceny from a person but not of unarmed robbery only through speculation beyond the evidence, or exercises of compromise or mercy, any of which would have run counter to their instructions, it is more probable than not that the absence of an instruction on larceny from a person did not affect the outcome. The trial court's failure to provide the requested instruction was therefore harmless error.

III

Defendant's Issues *in Propria Persona*

A. Identification

Defendant challenges the propriety of the procedures the police used in arranging for the assistant manager to identify him when he was initially detained. Defendant argues that because the police had arrested him upon discovering that he was driving on a suspended license, he was entitled to have an attorney present at any subsequent identification procedure. Defendant moved the trial court to suppress the assistant manager's identification on these grounds. The trial court denied the motion, citing *People v Winters*, 225 Mich App 718; 571 NW2d 764 (1997). We agree with the trial court that, under *Winters*, the police properly conducted the corporeal identification of defendant at issue.

There is no factual dispute underlying this issue, rendering the legality of the challenged identification procedure a question of law. This Court reviews questions of law de novo. *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997).

It is not disputed that a suspect has a due process right, before as well as after the initiation of formal criminal proceedings, against being subjected to "unnecessarily suggestive" identification procedures that are "conducive to irreparable mistaken identification . . . ." *Winters*, *supra* at 725, citing *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). In this case, however, defense counsel stated on the record that the issue here is the lack of counsel, not suggestiveness.

In *Winters*, *supra* at 721-724, this Court surveyed the various developments in Michigan law concerning suspects' right to counsel attendant to corporeal identifications in the field. The right to

counsel guaranteed by the federal constitution[1] "attache[s] only to corporeal identifications conducted at or after the initiation of adversary judicial criminal proceedings," *Winters, supra* at 725, citing *Moore v Illinois*, 434 US 200, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977). However, our state constitution, and our Supreme Court's power to establish rules of evidence, have given rise in some instances to a broader right to counsel than that guaranteed by the federal charter. *Winters, supra* at 723, citing Const 1963, art 1, § 20 and *People v Jackson*, 391 Mich 323, 338-339; 217 NW2d 22 (1974).

People v Anderson, 389 Mich 155; 205 NW2d 461 (1973), is a seminal case. "[I]n *Anderson*, the Supreme Court, in dicta, recognized that the absence of counsel at an eyewitness identification procedure may be justified where there is a prompt, on-the-scene *corporeal* identification within minutes of the crime." *Winters, supra* at 726 (emphasis in original), citing *Anderson, supra* at 187, n 23. *Winters* reviewed the various treatments this Court has afforded this dicta, then resolved any uncertainties with the resounding conclusion that "it is proper and does not offend the *Anderson* requirements for the police to promptly conduct an on-the-scene identification." *Winters, supra* at 727.

Further, *Winters* impliedly shifted this state's case law away from regarding a suspect's arrest on an unrelated matter as bearing on the propriety of an identification conducted in the field promptly after the crime, disapprovingly referring to an earlier ruling from this Court that set forth a special standard to govern the propriety of the police conducting an on-the-spot corporeal identification of a suspect who stood validly arrested on an unrelated matter. *Winters, supra* at 727, n 5, citing *People v Turner*, 120 Mich App 23, 37; 328 NW2d 5 (1982). In this case, the trial court stated, "It doesn't make any sense to me that after *Winters* that the police couldn't eliminate an armed robbery suspect because he's been charged with a misdemeanor offense." We agree.

Safeguards concerning identification procedures exist to guard a suspect from being prejudiced as the result of uncertainties attendant to eyewitness identification, and the potential for improper influences, *Winters, supra* at 725, citing *Kirby v Illinois*, 406 US 682, 691; 92 S Ct 1877; 32 L Ed 2d 411 (1972). See also *Winters, supra* at 725, n 3, citing *United States v Wade*, 388 US 218, 228-233; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Given these purposes, it is difficult to see how defendant's having been arrested moments before for driving on a suspended license had any bearing on the propriety of the on-the-spot identification of defendant by the assistant manager attendant to an investigation of the robbery that just occurred.

It would be an unfortunate development if the police, upon detaining a suspect in the field on an unrelated matter, were inhibited from arresting the suspect when an on-the-spot check indicated that immediate arrest was proper, for fear that performing the arrest would complicate the investigation into the matter that originally led to the detention. In this case, defendant's having just been arrested on the misdemeanor matter increased none of the hazards of eyewitness identification, or of suggestive procedures, when the assistant manager was brought to him for identification in connection with the

[1] US Const, Am VI.

recent robbery. "[O]n-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *Winters, supra* at 728. This principle is valid concerning any particular investigation, regardless of the suspect's other legal troubles of the moment.

For these reasons, we conclude that the trial court did not err is denying defendant's motion to suppress the assistant manager's identification.

B. Effective Assistance of Counsel

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The constitutional right to counsel is a right to *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant alleges several missteps on the part of defense counsel in support of his argument that he was convicted without the effective assistance of counsel. We will examine these in turn.

Most significantly, defendant alleges that defense counsel failed to inform him that the prosecutor had offered a plea agreement. "The decision [whether] to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995), citing MRPC 1.2(a) and MRPC 1.4(b).

This Court remanded this case to the trial court for an evidentiary hearing on this issue, at which defendant's immediate family members testified that they overheard the prosecutor and defense counsel in court speaking of a plea agreement where defendant could plead guilty to unarmed robbery and receive a sentence of three to five years' imprisonment. Defendant testified that he never heard of such an agreement, and that had such a thing been brought to his attention he would have given it serious consideration.

The prosecutor, however, testified that no offer of any sort was formally tendered, and that at most he had discussed with defense counsel the possibility of capping the sentence in exchange for a plea of guilty to armed robbery. Defense counsel in turn testified that there had been no formal plea offer, adding that he had asked defendant what sort of agreement he might assent to, but that defendant showed a willingness to consider pleading guilty only in exchange for an unrealistically lenient sentence. The trial court, adding to this testimony that any actual plea offer would have required the court's

approval, and that none had been brought to the court's attention, ruled that no plea agreement had been offered, and thus that defense counsel had no obligation to inform defendant of such a thing.

"Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The testimony from the lawyers well supports the trial court's conclusion that no plea offer was ever made, and the court's own reflection that no plea bargain had been presented for the court's approval renders the court's conclusion that none had ever been formally offered virtually unassailable. Defendant has failed to show ineffective assistance of counsel with this allegation.

Because defendant did not challenge defense counsel's effectiveness at trial, and there has been no hearing[2] covering defendant's other allegations of ineffectiveness, our consideration of defendant's remaining allegations is limited to mistakes apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant first argues that counsel failed to investigate the assistant manager sufficiently, complaining that counsel failed to determine why the assistant manager eventually left that job, how many times the assistant manager had been robbed before, and how much money was taken at the incident in question. We conclude that the defense would not have been helped by having answers to those questions, and thus that defense counsel could not have breached any duty to ask them.

Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel's failure to prepare for trial resulted in counsel's remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642, 459 NW2d 80 (1990). In this case, in light of the assistant manager's testimony that he surrendered the money from the register in response to defendant's demands and threats, even assuming that defendant did admonish counsel to look into why the assistant manager eventually left that job, it is difficult to see how counsel could have strengthened the defense by doing so. Likewise, the number of times that the assistant manager had been robbed in the past would have no bearing on the present case. Defendant reminds this Court that the assistant manager initially thought that he was the victim of a joke, not a real robbery; however, the witness promptly explained that he soon realized that it was no joke, and that he cooperated with defendant out of fear. Only the most imaginative speculation could elevate innuendoes about a joke, or about how many times the manager had been robbed before, into a theory of some possible use to the defense. Finally, the amount of money taken is not relevant to a charge of unarmed robbery. The statute covers the taking of "*any money* or other property which may be the subject of larceny." MCL 750.530; MSA 28.798 (emphasis added). Thus, the precise amount taken was immaterial to the question of defendant's guilt or innocence.

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant next complains that counsel failed to raise the intoxication defense. Defendant points to evidence that he had been painting for four hours, then drinking at a bar, in the hours ahead of the crime, and asserts that the resulting intoxication could have negated the intent element of the crime for which he was convicted. However, the record suggests that counsel strategically chose not to invest efforts in a likely futile theory of defense. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Unarmed robbery is a "specific intent crime to which voluntary intoxication is a valid defense." *People v Booth*, 414 Mich 343, 361; 324 NW2d 741 (1982). "'Voluntary intoxication may be a defense . . . where it is of a degree which enables a jury to say that the accused was incapable of forming the specific and requisite intent.'" *People v Johnson*, 42 Mich App 544, 547; 202 NW2d 340 (1972), quoting *People v Comstock*, 115 Mich 305, 312; 73 NW 245 (1897).

In this case, defense counsel elicited from one witness on cross-examination that defendant had consumed one or two drinks on two occasions spread out over the several hours before the robbery in question. This account of defendant's drinking before the robbery does not suggest that defendant achieved a level of intoxication that could cause a reasonable juror to doubt that he was capable of forming the specific intent to rob that night. Defendant protests that he had been asked to leave a bar that night, and that witnesses from the bar could have testified that he appeared intoxicated at the time, but these exercises in speculation and assertion concerning matters not in evidence do not rebut the presumption that counsel did not pursue the intoxication defense as an exercise of sound trial strategy. *Julian, supra* at 158-159.

Defendant briefly complains of some "editorialized statement" on the part of an arresting police officer, implying that defense counsel failed to address some impropriety pursuant to the statement. However, defendant's few sentences of discussion include neither a presentation of the supposedly offending statement, nor a record citation where the statement may be found. Defendant further cites no authority in support of this nebulous argument. For these reasons, we deem any argument concerning the alleged "editorialized statement" to be waived. MCR 7.212(C)(7). See also *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997) (a party may not merely announce a position and then leave it to this Court to discover and rationalize the basis for the claim).

Finally, defendant complains that defense counsel did not endeavor to suppress evidence of defendant's extensive criminal record. However, defendant's earlier convictions never in fact came to the jury's attention. Defendant suggests, however, that if was for fear of impeachment by his prior convictions that he declined to testify in his own defense. Defendant thus appears to speculate that, had he chosen to testify, counsel would have failed to attempt to restrict any use of the prior convictions to the limited purposes for which they might be used. See MRE 609. We decline to join in this speculation. Because attorney competence is presumed, see, e.g., *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996), we will not credit defendant's implication that he did not testify because he stood to suffer prejudice from defense counsel's *anticipated* failure to minimize any damage that he might have suffered from any impeachment evidence that the prosecutor might try to elicit.

For these reasons, we conclude that defendant has failed to show any deficiency on the part of defense counsel.

C. Sufficiency of the Evidence

The unarmed robbery statute, MCL 750.530; MSA 28.798, provides as follows:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Defendant's last argument on appeal is that the prosecutor failed to present sufficient evidence to prove that he obtained the money from the assistant manager by way of violence or fear, leaving the first element of unarmed robbery unsatisfied. We disagree.

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Defendant points to the assistant manager's testimony that he thought the incident in question was a joke, and further argues that this victim did not state that he had felt fear for his life, and that he did not appear shaken to the police who arrived on the scene shortly after the incident. Defendant posits that the assistant manager thought it was a joke until the thief left the premises. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). We decline defendant's invitation to reweigh the evidence. The assistant manger's testimony that he surrendered the money out of fear of being shot clearly provided the jury with a sufficient basis for concluding that defendant did indeed put him in fear, for purposes of satisfying that element of the unarmed robbery statute.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald