

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD LAMAR TERRY,

Defendant-Appellant.

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UNPUBLISHED

August 16, 2002

No. 223284

Oakland Circuit Court

LC No. 99-167196-FC

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and was sentenced to concurrent prison terms of 17-1/2 to 30 years for each conviction. He appeals as of right. We affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence to convict him of two counts of armed robbery. We disagree.

Defendant's convictions arise from the robbery of two employees of a video store. The evidence indicated that the two employees, Vezina and Angus, were both required to take the store receipts to the bank, thereby establishing that each had a right to possession of the store receipts superior to that of defendant. *People v Rodgers*, 248 Mich App 702, 707-708, 712-713; \_\_\_ NW2d \_\_\_ (2001); *People v Beebe*, 70 Mich App 154, 158-159; 245 NW2d 547 (1976). Vezina's temporary relinquishment of physical control of the bank receipts did not preclude the jury from finding that the money was taken from her presence, nor was the jury precluded from finding that defendant was equally responsible for the robbery of Angus, where the evidence indicated that defendant was acting in concert with an unidentified assailant who took the money from Angus while defendant was assaulting Vezina with a handgun. *Rodgers, supra*; *Beebe, supra*; see also MCL 767.39, *People v Wakeford*, 418 Mich 95, 112-113; 341 NW2d 68 (1983), *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972), and *People v Dykes*, 37 Mich App 555, 559; 195 NW2d 14 (1972). Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to find defendant guilty of two counts of armed robbery beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *Rodgers, supra*.

## II

Defendant next argues that he was denied the effective assistance of counsel. This issue presents a mixed question of law and fact in which the trial court first finds the facts and then decides whether those facts constitute a violation of defendant's constitutional right to effective assistance. *People v LeBlanc*, 465 Mich 575, 579; \_\_\_\_ NW2d \_\_\_\_ (2002). We review the trial court's factual findings for clear error and decide the constitutional issue de novo. *Id.*

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Second, defendant must show that the deficiency was prejudicial by showing that counsel's errors were so serious as to deprive defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *LeBlanc*, *supra* at 575.

Defendant argues that trial counsel failed to adequately prepare for trial, thereby preventing him from properly cross-examining witness Pillion and victim Vezina. Our review of counsel's cross-examination of these witnesses in light of the strategy outlined at the *Ginther*<sup>1</sup> hearing demonstrates that counsel was not constitutionally deficient in his trial preparation or cross-examination. The fact that the strategy employed was not successful does not establish that counsel was ineffective. *People v Mitchell*, 454 Mich 145, 151 n 6, 167; 560 NW2d 600 (1997); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also argues that trial counsel was ineffective for not requesting a *Wade*<sup>2</sup> hearing to challenge Vezina's pretrial identification of him at a custodial lineup. We agree with the trial court that the record does not factually support this claim. Defendant failed to present evidence that the pretrial identification was unduly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Defendant also argues that trial counsel was ineffective for failing to object to testimony by a police officer that defendant made incriminating statements during a videotaped interview. Although defendant maintains that the officer misrepresented defendant's recorded statements during his trial testimony, our review of the videotaped interview fails to disclose factual support for this claim.

We likewise reject defendant's claim that counsel was ineffective for failing to introduce the videotape into evidence to contradict the officer's testimony. Counsel decided, as a matter of trial strategy, to cross-examine the officer about the interview and have defendant testify personally regarding his version of the events. Defendant has not overcome the presumption of sound trial strategy. Counsel's failure to object to the officer's reference to defendant's criminal

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

<sup>2</sup> *US v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

record so as not to draw attention to the matter to a seemingly inattentive jury was also a matter of trial strategy that we will not second guess.

Defendant also argues that counsel was ineffective for failing to object to several allegedly improper remarks by the prosecutor during closing arguments. We disagree. Viewed in context, the prosecutor's remarks regarding the testimony of the investigating police officer were proper comments on the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Similarly, the prosecutor's comments concerning the assault on the victim, although reflecting hard language, were supported by the evidence and, therefore, were proper. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Although the prosecutor argued that the victim should be believed and that defendant and his alibi witnesses were not credible because they had a reason to lie, the remarks were based on the evidence and the prosecutor did not suggest that she had special knowledge to this effect. Thus, the remarks were not improper. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Accordingly, we agree with the trial court that counsel's failure to object to the prosecutor's remarks was not objectively unreasonable. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that counsel was ineffective for calling Lisa Miller as an alibi witness, thereby allowing the prosecutor to introduce a number of incriminating statements made by Miller to the investigating police officer. Defendant has failed to overcome the presumption of sound trial strategy in connection with counsel's decision to call Miller. *Mitchell, supra* at 163; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Similarly, counsel was not ineffective for failing to object to the rebuttal testimony of Detective Dare. The testimony was responsive to the denials made by Miller regarding statements made during the investigative interview. Also, the substance of Miller's denials were first raised by defense counsel on direct examination and related to the central issue of defendant's involvement in the charged robbery. As such, Dare's testimony was admissible as rebuttal evidence. MRE 613(b); *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996); *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

Defendant also argues that counsel was ineffective for failing to call an expert witness on eyewitness identification. Following an evidentiary hearing, the trial court rejected defendant's testimony regarding this issue and, instead, credited the testimony of trial counsel, who claimed that it was defendant who decided not to retain an expert and to proceed instead with alibi witnesses. Recognizing the trial court's superior ability to judge the credibility of the witnesses, *People v Northey*, 231 Mich App 568, 577; 591 NW2d 227 (1998), we find no clear error in this regard.

In light of the foregoing, we conclude that defendant has failed to establish that trial counsel was ineffective.

### III

Defendant contends that the conduct of the prosecutor and the investigating officer denied him a fair trial. Although defendant again complains that the investigating officer gave "misleading" testimony about his interview with defendant, as discussed previously, our review

of the videotaped interview fails to disclose factual support for this claim. Thus, this unpreserved issue does not warrant appellate relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Bahoda*, *supra* at 282; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Also, we are not persuaded that defendant's substantial rights were affected by the officer's fleeting reference to defendant's criminal history or his interjection of his belief in defendant's guilt. Indeed, the record reveals that defense counsel deliberately chose not to object to these matters, reflecting counsel's determination that defendant was not unduly prejudiced. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995).

#### IV

We reject defendant's argument that the cumulative effect of several errors deprived him of a fair trial. *Knapp*, *supra* at 361, 387-388.

#### V

Defendant maintains that he was denied his right to due process because the trial court refused to allow him to call Alisha Vezina as a witness at the *Ginther* hearing. We disagree. Despite being given repeated opportunities to do so, defendant failed to present an offer of proof as to the relevancy of Vezina's testimony at the *Ginther* hearing. The trial court's decision was not an abuse of discretion. MRE 403.

#### VI

Defendant argues that the trial court erred in failing to award him twenty-four days of "good time" credits, pursuant to MCL 51.282(2), for time spent in jail awaiting trial. Because defendant did not preserve this issue by raising it below, appellate relief is foreclosed absent a plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Defendant has failed to establish plain error. MCL 51.281 authorizes a county sheriff to establish rules and regulations for the conduct of prisoners in his custody. MCL 51.282(2) provides that every prisoner who has not violated the rules and regulations is entitled to a sentence reduction of one day for every six days of the sentence. The term "good time" refers to a graduated reduction from sentences being served by inmates as a reward for their good behavior. Cf. OAG, 1955, No 2,141, p 396 (August 1, 1955). Because a prisoner serving a sentence is entitled to a reduction of his sentence for every six days served if he has not violated the rules and regulations, a court cannot circumvent the statute by setting a jail term with a specific release date. *People v Cannon*, 206 Mich App 653, 656-657; 522 NW2d 716 (1994). Because the statute requires that the sheriff award good time credit against a sentence being served by a prisoner in the county jail, and because defendant here was not serving a sentence while awaiting trial, we conclude that defendant was not entitled to good time credit. Thus, plain error has not been shown.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell