

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARVEY GALLOWAY,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 242380
Wayne Circuit Court
LC No. 01-010394

Before: Cavanagh, P.J., Gage and Zahra, JJ

PER CURIAM.

A jury convicted defendant of three counts of armed robbery, MCL 750.529. He was sentenced to eight to twenty years' imprisonment on each count, the sentences to run concurrently. Defendant appeals as of right. We affirm.

I. Motion for Mistrial

Defendant argues the trial court improperly denied his motion for a mistrial after police witnesses interjected prejudicial statements of other robberies in violation of the trial court's pretrial ruling. At trial, one officer's testimony referred to "robberies" and robbery "scenes." Another officer testified that, when defendant was arrested, the driver of the car he was riding in possessed a driver's license bearing another person's name. Last, there was testimony relating to the recovery of a purse from the search of an address where defendant was seen by police before his arrest. Defendant asserts this evidence indicated to the jury that defendant was involved in other robberies, and thus, he was more likely to have committed the instant offenses.

A. Standard of Review

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

B. Analysis

A mistrial should be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Use of bad acts as evidence of character is excluded, except as allowed

by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998).

Here, the jury could just as easily attribute the police officer's references to "robberies" and "scenes" to the three people allegedly robbed in this case. Also, we agree with the trial court that testimony regarding the recovery of the driver's license and the purse did not result in prejudice to defendant. The driver's license was found on the driver of the car stopped by the police, not on defendant. There was no evidence linking defendant to the purse, and there was no evidence that the purse was connected to any crime. Because the admission of the evidence challenged by defendant was not so prejudicial to defendant to impair his ability to get a fair trial, the trial court did not err in denying the motion for a mistrial.

II. Ineffective Assistance of Counsel

A. Standard of Review

Because defendant did not move for a new trial and no evidentiary hearing was conducted by the trial court on this issue, we will consider it only to the extent that claimed counsel mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Whether defendant was denied effective assistance of counsel presents a question of constitutional law which is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show that (1) "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578.

i. Identification Testimony

Defendant argues that he was denied the effective assistance of counsel when defense counsel failed to move to suppress testimony from complainants Latrece Cash and Shemal Rogers regarding defendant's identification. Defendant first asserts that the corporeal lineup viewed by Shemal Rogers was impermissibly suggestive, and that her later identification of defendant at trial was thereby tainted. We disagree.

A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The fairness of an identification procedure is evaluated in light of the total circumstances. *Id.* The test is whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). If counsel was present at the lineup, the defendant bears the burden of

showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Here, an attorney was present at the lineup to ensure that the lineup participants approximated the age, height, weight, appearance and complexion of defendant. Complainant Shemal Rogers was not told by the police whom to pick or that she had to pick anyone. Also, defendant points to no evidence to contradict the testimony of the officer conducting the lineup who testified that the participants in the lineup approximated the age, weight, height and complexion of the suspects. Moreover, discrepancies as to physical characteristics among the lineup participants do not necessarily render the procedure defective if the participants approximate the culprit's description. *People v Kurylczuk*, 443 Mich 312, 318; 505 NW2d 428 (1993). Rather, differences generally pertain to the weight of an identification and not to its admissibility. *Hornsby, supra*. Thus, there was no basis in the record upon which defense counsel could have moved to suppress Shemal Roger's identification of defendant at the lineup, preliminary examination or at trial. *People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001). Since an attorney is not obligated to advocate a legally meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), defendant has not shown ineffective assistance of counsel in this regard.

Defendant second contends that Cash's viewing a photograph of the corporal lineup without an attorney present and her confrontation with defendant at the preliminary examination were impermissibly suggestive, resulting in Cash's tainted in-court identification of defendant. As addressed above, there is no evidence that the corporeal lineup was unduly suggestive. Likewise, defendant has not alleged how the photograph of lineup was any more suggestive. Also without merit is defendant's assertion that the preliminary examination tainted Cash's in-court identification. The record reflects that Cash had identified defendant as the perpetrator before the preliminary examination. Moreover, defendant's claim that Cash's in-court identification was tainted merely addresses the weight to be given the identification, not its admissibility. See *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). Therefore, defendant has not shown ineffective assistance of counsel in this regard.

ii. Probable Cause

Defendant's next allegation of ineffective assistance of counsel is based on his attorney's alleged failure to challenge defendant's arrest on probable cause grounds. However, defendant has not indicated which evidence, if any, would be excluded as a result of his alleged illegal arrest. Accordingly, because there is no indication that the result of the proceeding would have been different, defendant has not proven ineffective assistance of counsel. *Carbin, supra* at 599-600.

iii. Prejudicial Evidence

Next, defendant argues counsel's performance fell below an objective standard of reasonableness when failing to move to exclude evidence addressed *supra* (i.e. driver's license found on the driver of the car defendant was riding in when he was arrested that was not in the

driver's name, and evidence of a purse turned over to the police by the residents of the Andover Street address). While the relevance of this evidence is questionable,¹ its introduction did not prejudice defendant. See *Id.* Further, the introduction into evidence of the driver's license provided defense counsel with the opportunity to cast suspicion away from defendant and onto the driver as the perpetrator of the robberies. 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 Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Because the introduction of the driver's license and purse did not prejudice defendant and, with regard to the driver's license, served a purpose regarding trial strategy, there was no showing that the introduction of the challenged evidence deprived defendant of the effective assistance of counsel.

iv. Absence of Counsel

Defendant's final assertion of ineffective assistance of counsel is based on his counsel's absence during codefendant attorney's opening statement and cross-examination of a police witness. The record reflects that defendant's jury was also absent during this time. This Court recently reiterated that:

The Sixth Amendment right to counsel provides that a criminal defendant shall enjoy the right to the assistance of counsel at "critical stages" of the proceedings. See *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). Critical stages of the proceedings are stages "where counsel's absence may harm the defendant's right to a fair trial." *People v Burhans*, 166 Mich App 758, 764; 421 NW2d 285 (1988), citing *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) [*People v James Norbert Green*, ___ Mich App ___; ___ NW2d ___ (Docket No 241615, issued 01/22/04), slip op at pp 3-4.]

Moreover, "Critical stage" is understood to mean prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel." *Id.* at 4 citing *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969). Here, defendant's claim fails because counsel was not absent during a critical stage of *his* trial. Counsel was only absent from portions of codefendant's trial in which defendant's jury was not present. Therefore, counsel's absence did not harm defendant's right to a fair trial, and defendant has not proven counsel ineffective in this regard.

III. Sufficiency of Evidence

A. Standard of Review

Defendant argues there was insufficient evidence to support his conviction for the armed robbery of Shenaya Rogers. A challenge to the sufficiency of the evidence is reviewed de novo

¹ The trial court stated on the record, outside the presence of the jury, that this evidence was irrelevant.

and in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

B. Analysis

To establish the elements of armed robbery, the prosecution must show (1) an assault; (2) a felonious taking of property from the victim's presence or person; (3) that the taking occurred while the defendant was armed with a dangerous weapon. MCL 750.529; *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). The armed robbery statute requires a showing that defendant was armed with a dangerous weapon "or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon. MCL 750.529. *People v Taylor*, 245 Mich App 293, 297; 628 NW2d 55 (2001). To establish the existence of an assault, the prosecutor must prove that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Watkins*, 247 Mich App 14, 33; 634 NW2d 370 (2001). A conviction of aiding and abetting requires proof that (1) the underlying crime was committed by either defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).

Defendant's argument is based on Shenaya Rogers' absence at trial. However, notwithstanding the absence of her testimony, there was sufficient evidence presented at trial for a rational jury to conclude beyond a reasonable doubt that defendant committed armed robbery against Shenaya Rogers. Both Shemal Rogers and Cash testified that defendant and codefendant came into the Subway restaurant. Codefendant put a gun in Shemal Rogers' side and defendant took Shenaya Roger's purse. Shemal Rogers testified both men told her that if she, Shenaya, and Cash did not do what they said to do, she would be hurt. Shemal Rogers also testified that the robbery left Shenaya hysterical, attesting to Shenaya Roger's belief in the probability of an immediate battery by virtue of the threats of defendant and codefendant. This testimony establishes an assault by codefendant, the taking of Shenaya Rogers' purse without her consent while codefendant was armed with a dangerous weapon.² This testimony also establishes defendant's guilt as an aider and abettor where he assisted codefendant by taking Shenaya Rogers purse and Cash's wallet, while codefendant held the gun on Shemal Rogers.

IV. Other Issues

Defendant argues he was denied his constitutional right to confrontation by virtue of Shenaya Rogers's absence at trial. A defendant's right of confrontation consists of four

² That only a pellet gun was found on defendant when he was arrested does not negate the requirement that it be a dangerous weapon. The armed robbery statute includes "any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.529; *Taylor, supra* at 297.

requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and, (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor. *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990); *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001). Defendant was not denied his right of confrontation. Cash and Shemal Rogers testified under oath, defendant had the opportunity to cross-examine them, and the jury had an opportunity to observe their demeanor.

Defendant also asserts, without providing argument, that he did not waive the production by the prosecution of Shenaya Rogers at trial. This matter is not set forth in the statement of questions presented, and need not be considered on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Further, this issue is unpreserved and as the evidence against defendant was overwhelming, defendant has not established a plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra