

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL HINDS,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 246015

Wayne Circuit Court

LC No. 02-000222

Before: Zahra, P.J., Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to one to ten years' imprisonment for his armed robbery conviction, to be served consecutive to two years' imprisonment for his felony-firearm conviction. We affirm.

I. Facts and Procedure

Andrew Thompson was in the parking lot of Tycoons adult nightclub when a man approached him and asked him for the time. When Thompson looked up from his watch, the man was pointing a gun at him. The parking lot was well lit, and Thompson was able to get a good look at the man's face. The man reached into Thompson's pocket and took his license and approximately \$100 in cash (composed of twenties, tens, fives, and ones), which was in his brass Marlboro cowboy money clip. The man then ran away and, as he was running, he hollered and fired a shot in the air.

Thompson called the police and gave them a description of the man who had robbed him. He described the man as being about 5'6 to 5'8 in height, approximately 150 pounds, in his early twenties, clean shaven with very bushy eyebrows, and having a medium complexion with a round baby face. The police went to Tycoons and found a shell casing in the parking lot near where Thompson said he was robbed. About one hour after the police talked to Thompson, a police officer saw defendant and another man, Craig Hinds, on the street. Because the officer believed Craig matched the description given by Thompson, he stopped the men. When the police approached defendant, he dropped a brass Marlboro cowboy money clip. When one of the officer retrieved the money clip and told another officer that it might have been taken from Thompson in the armed robbery, defendant tried to punch the officer and ran away. The officer

grabbed defendant and wrestled with him until he was subdued and taken into custody. Searching defendant, the police found \$56 (composed of one fifty, one five, and one one dollar bill) and some narcotics.

The next day, Thompson went to a police line-up. Thompson noticed that defendant was not clean shaven, as he had a small amount of hair on his chin and upper lip, but immediately identified him as the man who robbed him. Thompson testified that he identified defendant mainly from his eyes and his eyebrows.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues that the evidence presented at trial was insufficient to prove that he was the individual who committed the armed robbery. In reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, ___ Mich App ___, ___ NW2d ___ (2004) (Docket No. 229092, issued February 10, 2004), slip op at 14.

Here, defendant points out that Thompson described the robber as being clean shaven, but identified defendant, who had a small amount of facial hair, at the line-up. Furthermore, the police officer who stopped defendant and Craig on the street thought Thompson's description of the robber more closely matched Craig than defendant. Despite these facts, the evidence was sufficient to find that it was defendant who committed the robbery. Thompson testified that he thought that "clean shaven" and "fairly clean shaven" were essentially the same and that he immediately identified defendant at the line-up as the robber despite his facial hair. Although Craig was in the same line-up as defendant, Thompson did not identify Craig as the robber. The trial court found that Thompson was a credible witness and was able to correctly identify the robber. The trial court took into consideration that Thompson's description matched Craig more closely than defendant, but found that defendant was guilty of the robbery because he possessed the money clip, fought with police, and was identified in the line-up. In determining the sufficiency of the evidence, this Court must defer to the trier of fact in regard to the credibility of witnesses. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Therefore, we conclude that the evidence was sufficient to show that defendant was the individual who robbed Thompson.

B. Evidence of Defendant's Possession of Narcotics

Next, defendant argues that he was denied a fair trial by the prosecution's introduction of "bad acts" evidence. Defendant argues that the prosecution violated MRE 404(b) when it elicited irrelevant testimony concerning defendant's possession of narcotics and failed to give notice that it planned to elicit this testimony. Because defendant failed to preserve this issue for appeal, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). MRE 404(b) provides, in pertinent part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. . . .

In *People v Knox*, ___ Mich ___, ___ NW2d ___ (2004) (Docket No. 123970, decided February 4, 2004), slip op at 8-9, our Supreme Court reiterated the factors it set forth in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), that must be present for “bad acts” evidence to be admissible:

First, the prosecutor must offer the “prior bad acts” evidence under something other than a character or propensity theory. Second, “the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]” *Id.* Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.

Here, in response to the prosecution’s question regarding what the police confiscated from defendant, the police officer testified that he found money and narcotics. The prosecution does not argue that the testimony regarding defendant’s possession of narcotics was relevant to the issues in the case, or dispute defendant’s claim that it did not give defendant notice that it intended to elicit this testimony. However, even assuming that this testimony was improperly admitted, we conclude that its admission did not affect defendant’s substantial rights. The officer’s testimony that defendant was carrying narcotics was in response to the prosecutor’s open-ended question designed to elicit testimony regarding what the police found on defendant, which was relevant to the issues at trial. Following the officer’s testimony, the prosecution did not ask any questions about the narcotics, attempt to show that defendant’s possession of narcotics was relevant to the armed robbery, or use the testimony to prove that defendant acted in conformity with his character for possessing narcotics. Furthermore, defense counsel raised the issue of defendant’s narcotics possession later in the trial when he asked the officer if defendant told the officer that he had marijuana in his pocket. Defense counsel also mentioned defendant’s possession of marijuana during his closing argument. Finally, the evidence supporting defendant’s guilt was strong, and the trial court did not mention defendant’s possession of narcotics in its findings of fact as having any bearing on its finding of defendant’s guilt. A judge, unlike a juror, possesses an understanding of the law that allows him to ignore evidentiary errors and decide the case based solely on the evidence properly admitted at trial. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Therefore, we conclude that the admission of the officer’s testimony regarding defendant’s narcotics possession was not a plain error that affected defendant’s substantial rights.

C. Ineffective Assistance of Counsel

Finally, defendant argues that he was deprived of the effective assistance of counsel when his trial counsel failed to object to the officer's testimony that narcotics were found on defendant. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Sabin, supra* at 659. In the present case, defendant failed to move in the trial court for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record. *Id.*

To establish ineffective assistance of counsel, the defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In applying this test, the reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Under the first prong of the test, the alleged errors must be so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Under the prejudice prong, the defendant must demonstrate a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

For the reasons discussed in Part II(B) of this opinion, there was not a reasonable probability that the admission of the officer's testimony that defendant was carrying narcotics affected the outcome of the trial.

[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995), quoting *Strickland, supra* at 697.]

Because defendant did not suffer prejudice by the admission of the testimony at issue, he was not denied the effective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Bill Schuette