STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2004
v	No. 247128 Wayne Circuit Court
ALEXANDER HAYES, JR, Defendant-Appellant.	LC No. 02-011187-01

Before: Markey, PJ, and Wilder and Meter, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, and felony firearm, MCL 750.227b. After a jury trial, defendant was convicted as charged. He now appeals by right asserting that the evidence presented at trial was insufficient to sustain his conviction and that counsel was constitutionally deficient for failing to more effectively impeach the complainant. We affirm, deciding this appeal without oral argument pursuant to MCR 7.214(E).

A claim that the evidence at trial was insufficient to support a conviction presents an issue of law reviewed de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Our review must be with deference to the factfinder by drawing all reasonable inferences and resolving credibility conflicts in favor of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000)*; People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Further, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002); *Nowack, supra.*

In the case at bar, the complainant testified that sometime around 12:55 a.m. on Saturday, August 24, 2002, while visiting a friend in the city of Detroit she was robbed at gunpoint. She testified that although the robber wore a hood and a dark cap, his face was not covered, and there was sufficient light for her to see the robber's face. The complainant described the robber's face: "I wouldn't say big scars but like little spots." She recognized him as someone she had seen before at a church she attended. On Sunday morning, August 25, she saw defendant at

church and notified Detroit police officer Andre Harrell who also attended the same church. At trial, the complainant identified defendant as the robber. Defense counsel impeached the complainant's testimony with alleged inconsistencies in her testimony at the preliminary examination and the omission of facts in her statement as reported by the initially responding police officers.

Harrell testified that the complainant approached him at church obviously upset and teary-eyed. The complainant informed Harrell she had been robbed a few days prior and the man was in the church, pointing out defendant. Harrell telephoned 911 and then engaged defendant in conversation until other officers arrived to arrest defendant.

Defendant denied that he committed the offense and testified that he was home watching television at the time. Defendant acknowledged he attended the same church that the complainant attended and claimed that she had been stalking him. Defendant testified the marks on his face were the result of being bitten by a dog as a boy.

Defendant's mother testified that defendant was home with her watching Gospel videos at the time the crime was alleged to have occurred.

On appeal, defendant argues that the complainant's testimony was insufficient to sustained his conviction because eyewitness testimony is suspect, citing *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973). Defendant also relies upon: *Neil v Biggers***,** 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972); *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998); and *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 (1993). Defendant's reliance is misplaced. Each case concerns whether the police used pretrial identification procedure so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *Anderson, supra* at 169. But no impermissibly suggestive pretrial identification procedure occurred in the instant case. Absent compelling circumstances, not present here, the credibility of witnesses is for the jury to determine. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The complainant's testimony alone was sufficient to prove all of the elements of each offense beyond a reasonable doubt. See, e.g., *McFall*, *supra* at 412. Because we must view the evidence in the light most favorable to the prosecution, *Wolfe, supra* at 515, and must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict, *Nowack, supra* at 400, defendant's sufficiency argument must fail.

Next, defendant argues that he was denied the effective assistance of counsel because counsel did not present as witnesses the friend the complainant was visiting at the time of the robbery (to impeach the complainant regarding lighting conditions) and also did not call the initial responding police officers (to impeach the complainant regarding alleged omissions in her statement to them). We disagree. Defendant failed to preserve this claim by filing a motion for new trial or by otherwise creating a record in the trial court. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Thus, our review is limited to the existing record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to overcome the presumption, defendant must first show that counsel's performance was deficient

as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Rodgers, supra* at 714. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *Id.*

Here, defendant claims counsel erred by failing to present witnesses to impeach the complainant's testimony. But, "what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The complainant acknowledged that the initial responding officer's report did not contain a complete recitation of what she told them. Had counsel called the officers to testify they may well have corroborated the complainant rather than impeach her. Likewise, the complainant's friend, if called to testify, may well have confirmed that lighting conditions were sufficient for the complainant to identify defendant as the robber. Consequently, defendant has failed to overcome the presumption that counsel's actions were strategic. Moreover, defendant has failed to establish a reasonable probability exists that but for counsel's alleged unprofessional errors the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter