STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2004
v	No. 248198 Muskegon Circuit Court
ALPHONSO SONES, SR., Defendant-Appellant.	LC No. 02-047859-FC

Before: Fort Hood, P.J., Donofrio and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529. Defendant was sentenced as an habitual offender third, to twenty-two to thirty-six years' imprisonment. Defendant argues trial court abused its discretion when it denied defendant's motion for the trial court to take judicial notice of, and provide a special jury instruction regarding, the unreliability of eyewitness identification and that he was denied the effective assistance of counsel at trial. Because the record does not support defendant's arguments, we affirm.

On August 26, 2002, Quianna Carter and Leeandrew Devette were working at a Shell Gas Station located on West Muskegon Avenue in Muskegon. At 3:29 a.m., a man later identified as defendant entered the store and asked for a carton of Basic Menthol 100 cigarettes. While Carter and Devette counted out ten packs of cigarettes, defendant pulled a "butcher-like type knife" from his waistband and ran around the counter holding the knife. Defendant told Devette to back up and said "give me the money." Carter and Devette handed defendant the cash-drawer containing about $390. Defendant left the store and Carter called the police. A few days later both witnesses picked defendant out of a line-up. During police questioning, defendant denied committing the robbery.

Defendant first argues on appeal that the trial court abused its discretion when it denied defendant's motion for the trial court to take judicial notice of, and provide a special jury instruction regarding, the unreliability of eyewitness identification. This Court reviews issues on jury instructions de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Instructional issues are reviewed in their entirety to judge if reversal is required. Reversal is not required where the jury instructions, judged as a whole, sufficiently protect defendant's rights. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

Defendant contends he was prejudiced at trial when the trial court refused to provide a special jury instruction he requested because the eyewitness identifications of Carter and Devette was the only evidence linking him to the robbery. Defendant relies singularly on the holding in *People v Anderson*, 389 Mich 155, 205 NW2d 461 (1973) for his proposition. This Court has previously considered and rejected the claim raised here in *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999) stating explicitly that "*Anderson* does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." We decline to address this issue anew and find no error.

Defendant also claims he was denied the effective assistance of counsel at trial because defense counsel failed to object to certain statements made by the prosecutor during closing arguments. Appellate review of an ineffective assistance of counsel claim involves a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error and constitutional questions de novo. *Id*. Because this issue was not preserved, appellate review is limited to "mistakes apparent on the record." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

In order to establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice, i.e., that his counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant objects to a statement made by the prosecutor during closing arguments. The prosecutor stated:

> Sure you would, because your mind has taken a photograph of this individual, just as it took a photograph of the individual who had a knife that day and robbed Quiana. And she remembers that because it was an extremely traumatic even, and that memory is impressed in her mind, and those photographs are impressed in her mind.
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> Ever been in a car accident and had your life pass in slow motion and still remember those photographs? Think that would happen to you in an armed robbery? Think you'd be sure what happened?

Defendant asserts in his brief on appeal that defense counsel should have objected to the statement and requested an appropriate curative instruction because the prosecutor inappropriately asserted a "knowingly false claim that being in a stressful situation increased the likelihood of accurate identification." Because the issue is unpreserved, we will review for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 382; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). "To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: 1) error occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights." *Jones, supra*.

After reading the statement in context, we do not find the statement at issue contained a knowingly false claim concerning witness reliability inappropriately asserted by the prosecutor. Instead, we find that the prosecutor's comment was merely an statement to the jury on the strength of the identifications Importantly, in any event, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, specifically stating, "[y]ou should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Since we find no error, defendant has not established plain error affecting his substantial rights. *Jones, supra*, 468 Mich 382; *Carines, supra*, 460 Mich 761-762. As such, defendant has not established deficient performance or prejudice, and we do not find that he was denied the ineffective assistance of counsel at trial. *Strickland, supra*, 466 US 687; *Toma, supra,* 462 Mich 302-303.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello