

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY CALVIN MARSHALL,

Defendant-Appellant.

UNPUBLISHED

October 5, 2004

No. 247795

Macomb Circuit Court

LC No. 02-001868-FC

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

PER CURIAM.

Defendant appeals as of right his bench trial conviction for assault with intent to rob while armed, MCL 750.89, and felony-firearm, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that he was denied the effective assistance of counsel where his attorney failed to fully cross-examine a key witness with inconsistencies between her preliminary examination and trial testimony. To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

At the preliminary examination, the witness testified that she assumed that defendant intended to rob the store. She stated that if defendant had asked for money, she would probably have given it to him. She did not mention that defendant asked for the combination to the safe. During cross-examination by defendant's counsel at trial, the witness admitted that nothing was taken from the store. She testified that defendant did not ask for the numbers to the safe. Rather, he told her that was what he wanted, and she acknowledged that she did not give that information in her prior statements. Counsel brought out inconsistencies between her preliminary examination testimony and her trial testimony regarding the sequence of events. While counsel could have specifically asked more questions about the preliminary examination testimony, the witness explained the differences in her testimony, and there is no indication that more detailed cross-examination would have affected the outcome of the case. Although the trial court erred in

finding that the motion for new trial was untimely, it did not err in denying a new trial based on ineffective assistance of counsel. *Pickens, supra*.

Defendant also argues that there was insufficient evidence of his intent to rob to support the conviction. In determining whether sufficient evidence has been presented to sustain a conviction, a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Where defendant came into a store at closing time, made a purchase, then turned a gun on the employees and directed them to the back room and told one of them to give him the numbers for the safe, a reasonable finder of fact could conclude beyond a reasonable doubt that defendant intended to rob the store. *Wolfe, supra*.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood