

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELGIN RICHARD MARION,

Defendant-Appellant.

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UNPUBLISHED

November 22, 2005

No. 254769

Oakland Circuit Court

LC Nos. 2003-192377-FC

2003-192378-FC

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of armed robbery as a result of allegations that he robbed different CVS Pharmacy stores on March 3, 2003 and April 27, 2003. The trial court allowed the prosecutor to present evidence, pursuant to MRE 404(b), to establish defendant's identity as the perpetrator of the robberies. Two witnesses testified that defendant entered another CVS Pharmacy on August 24, 2003, displayed a gun, and grabbed an employee. A witness testified that defendant drove away from the store in a burgundy Ford Expedition. Defense counsel objected to the introduction of a security videotape on which defendant could be seen in the store on August 24, 2003; the parties agreed that the videotape would not be shown to the jury. Defense counsel stipulated that the person shown on the videotape was defendant.

During closing argument, defense counsel acknowledged that defendant was apprehended attempting to commit a robbery at the CVS store on August 24, 2003, but contended that defendant did not commit the two robberies with which he was charged at trial. The jury found defendant guilty as charged in both cases.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must

show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant argues that trial counsel rendered ineffective assistance by admitting that he perpetrated the August 24, 2003 robbery, and thereby effectively admitting that he committed the two robberies with which he was charged. We disagree. Defendant did not seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). The trial court ruled that evidence of defendant's involvement in the August 24, 2003 robbery was admissible pursuant to MRE 404(b).<sup>1</sup> Two witnesses identified defendant as the perpetrator of that incident. Trial counsel's decision to stipulate that defendant was visible on the videotape showing the August 24, 2003 incident, rather than agreeing to allow the jury to view the videotape, and subsequently to admit that defendant was apprehended after attempting to perpetrate that robbery, was an attempt by trial counsel to minimize the effect of damaging evidence against defendant. Trial counsel's decision may be considered trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Contrary to defendant's assertion, trial counsel did not concede his guilt of the charged offenses.<sup>2</sup> Trial counsel argued that defendant did not perpetrate the charged offenses; however, the evidence against defendant was overwhelming. Store employees present on March 3, 2003 and April 27, 2003 identified defendant as the perpetrator of the robberies. A distinctive fur coat worn by the perpetrator of the March 3, 2003 robbery was found to match the fur coat stored by defendant at a local facility. When defendant was arrested following the August 24, 2003 incident, he was driving a Ford Expedition. When defendant purchased the Expedition he traded in a vehicle that resembled one seen leaving the scene of the March 3, 2003 robbery. Trial counsel's strategy was to admit that defendant attempted to rob the CVS store on August 24, 2003, but to deny that he robbed CVS stores on March 3, 2003, or April 27, 2003. Trial counsel cannot be said to have rendered ineffective assistance simply because his trial strategy was not successful. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Defendant has not demonstrated prejudice in that he has not shown that but for a mistake by counsel, it is reasonably probable that the outcome of the trial would have been different. *Carbin, supra*.

Affirmed.

/s/ Hilda R. Gage  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray

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<sup>1</sup> Defendant does not challenge this ruling on appeal.

<sup>2</sup> A complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).