

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS BRANDON ASKEW,

Defendant-Appellant.

UNPUBLISHED

December 13, 2005

No. 256366

Wayne Circuit Court

LC No. 03-008062-01

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and armed robbery, MCL 750.529. He was sentenced to concurrent terms of ten to twenty years' imprisonment for the assault conviction and three to ten years' imprisonment for the armed robbery conviction. He appeals as of right, and we affirm.

Defendant's conviction arises from the robbery and nonfatal shooting of Robert Stricklen, a retired police officer. In the early morning hours of June 5, 2003, Stricklen drove to the Elbow Lounge in Detroit. After parking his vehicle, he noticed a minivan parked in a vacant lot nearby. A man exited the minivan wearing a winter coat and hood. He had a scarf across his face and was carrying a gun. He called to Stricklen, announcing a hold up and threatening to shoot Stricklen in the face if he refused to hand over money. Stricklen gave the man his billfold, which contained at least \$87. Stricklen testified that he had at least one \$50 bill in the billfold. After Stricklen turned over his money, another man exited the minivan. This man, who Stricklen positively identified as defendant, inquired about the amount of money in the billfold. When the men began counting the money, Stricklen moved away. As he did, he heard a gunshot. Stricklen, who was carrying two weapons, returned the gunfire. He observed defendant and the other man reenter the minivan, and he shot at the side of the minivan. Defendant exited the minivan and disappeared, prompting Stricklen to look around for him. Stricklen was unsure what defendant was planning to do. While Stricklen was looking around, defendant jumped from an area near another vehicle and shot Stricklen in the abdomen. Defendant then ran away but not before being shot two times by Stricklen. Demerius Kelly, the juvenile who actually robbed defendant, was also shot and ran away. The driver of the minivan, Anthony Harris, was killed during the shootout.

Stricklen was hospitalized for several weeks and underwent two surgeries. Defendant and Kelly were also treated for their wounds. The evidence revealed that they both walked to

Riverview Hospital to obtain treatment after being shot. Defendant's clothes were confiscated by the police and included a pair of black velvet pants, a pair of shorts, a pair of boxer shorts, and a red and black shirt. Defendant had \$111.05 with him at the hospital. He also had a substance consistent with gunshot residue on the left web of his hand, but the sample removed from his hand was insufficient to render a conclusive finding.

At trial, Stricklen was positive that defendant was the man who exited the van and counted money with the robber. He was also positive that defendant was the man who later shot him in the abdomen. Stricklen testified that defendant was wearing a brown, two-piece suit at the time of the shooting.

Defendant testified that he was with Harris and Kelly, who were going to drop him off at his girlfriend's home. Instead, Harris stopped the minivan near a club and exited, stating that he would be right back. Kelly exited the minivan after Harris. Shortly thereafter, defendant exited the van and observed Kelly and Harris coming back. There was gunfire. Defendant claimed that he did not see Kelly or Harris with a gun, did not know they planned to rob anyone, and did not shoot anyone himself. He denied making certain statements to the police after the incident.

At trial, defense counsel attacked Stricklen's identification of defendant as the shooter. He pointed to the discrepancy in the clothes described by Stricklen and those confiscated from defendant at the hospital. Defense counsel also pointed out that Stricklen had misidentified defendant's height. A police report indicated that Stricklen described defendant as being both five feet, five inches tall and as being shorter than Kelly. Defendant was actually six feet tall, which was slightly taller than Kelly. Stricklen, however, testified that he did not recall telling the police that defendant was five feet, five inches in height. Moreover, he believed defendant was the shorter of the two men because that is how it appeared to him. To further discredit Stricklen's identification at trial, defendant also pointed to discrepancies between the currency recovered by the police and that identified by Stricklen as having been taken. Specifically, no \$50 bills were recovered.

Defendant first argues on appeal that the verdict is against the great weight of the evidence. He argues that Stricklen's eyewitness testimony was unreliable and was contradicted by other evidence at trial. Specifically, Stricklen misidentified defendant's height, defendant had different clothes than those described by Stricklen, and no \$50 bills were found.

Defendant's argument that the verdict is against the great weight of the evidence is without merit. "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Moreover, questions related to witness credibility are not a sufficient ground for granting a new trial. *Id.* at 643. An exception exists if a witness's testimony contradicts indisputable physical facts or law, is patently incredible, or is so inherently implausible that it could not be believed. *Id.*

While there were certainly conflicts in the evidence, the discrepancies in Stricklen's identification do not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Stricklen was unwaveringly positive in his identification of

defendant as the man who exited the van to count the money and later shot him. While Stricklen's testimony was impeached to some extent, it did not contradict indisputable physical facts or law, was not patently incredible, and was not so inherently implausible that it could not be believed. Defendant was wearing different clothes than those described by Stricklen when he arrived at the hospital, was a different height, and did not have any \$50 bills on his person. The evidence revealed, however, that he walked to the hospital, which gave him time to change his clothing or discard some of the money if he had chosen to do so. Further, Stricklen testified that he did not recall ever telling the police that defendant was five feet, five inches tall. His credibility on that fact was an issue for the jury. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Additionally, it is not uncommon for someone to be mistaken regarding the amount or denomination of money in his wallet. Also, no \$50 bills were recovered from any of the participants. Obviously, it does not follow that the robbery did not occur. Moreover, we note that defendant's credibility was tested at trial. The jury was under no obligation to believe his version of events, and the evidence did not preponderate heavily in favor of his story, given that he told different versions to different people. Thus, the verdict was not against the great weight of the evidence.

Defendant next argues that reversal is required because the trial court permitted Officer Terence Sims to provide improper, personal opinion testimony regarding what happened to the brown suit that defendant allegedly was wearing. We review claims of error involving the admission of evidence for an abuse of discretion. *People v Walker*, 265 Mich App 530, 533; 697 NW2d 159 (2005), lv gtd 472 Mich 928 (2005). An abuse of discretion occurs only when an unprejudiced person, considering the facts before the trial court, would find no justification or excuse for the ruling. *Id.*

Sims testified that multiple layers of clothing were confiscated from defendant at the hospital. The evidence revealed that defendant was wearing underwear, shorts, and pants. Sims reviewed the clothing that was confiscated. He testified that, in his experience as a member of the armed robbery unit, perpetrators are known to wear multiple layers of clothing in warmer weather so that they can shed their clothing as they commit crimes. Generally, a description of a suspect and his clothing is broadcast quickly after a crime, and perpetrators remove clothing to avoid detection. Contrary to defendant's position on appeal, Sims never mentioned the brown suit allegedly worn by defendant near the Elbow Lounge, and he never offered his opinion that the brown suit was discarded by defendant in this case. Sims's testimony was of a general nature, and it followed specific questioning about the several items of clothing taken from defendant at the hospital, not questioning about a brown suit. The defense disputed the victim's identification of defendant as the man who shot him. It relied, in part, on the fact that the victim described defendant as wearing a brown suit when no brown suit was found. Sims's testimony aided the jury in understanding that the victim's identification was not invalid simply because a brown suit was not found with defendant at the hospital. Additionally, the testimony was not unfairly prejudicial. It was not the type of testimony that would move a jury to decide the case on an improper basis, and there was no showing that the evidence was or would be given undue or preemptive weight. MRE 403.

We also reject defendant's argument that Sims's testimony was akin to improper drug profile evidence. Profile evidence is a "listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *People v*

Murray, 234 Mich App 46, 52-53; 593 NW2d 690 (1999), citing *People v Hubbard*, 209 Mich App 234, 239-240; 530 NW2d 130 (1995). Profile evidence is inadmissible as substantive evidence of guilt, because “proof” of crime based wholly or mainly on a list of innocuous characteristics could potentially convict innocent people. *Murray, supra* at 53. Expert profile testimony may be allowed, however, to aid the jury in understanding certain evidence; for example, an expert may testify that the quantity of drugs recovered and the way they were cut indicate an intent to sell those drugs. *Id.* at 54. In offering profile evidence, an expert may not move beyond an explanation of typical characteristics and opine that a defendant is guilty because he fits a specific profile. *Id.* “Such evidence is inherently prejudicial and constitutes an inappropriate use of the profile as substantive evidence of guilt.” *Id.*

In this case, Sims did not provide a list of characteristics and opine that defendant was guilty because he fit the listed characteristics. Sims never opined that defendant was or must be guilty because he wore multiple layers of clothing, and the prosecution did not argue that defendant must be guilty because of the innocuous characteristic of wearing multiple layers of clothing.

Finally, defendant argues that his counsel was ineffective for informing the trial court that he had “no problem” with the admission of improper rebuttal testimony. In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

On direct examination, defendant testified to a version of events from the night of the victim’s shooting. He claimed that he was with Kelly and Harris, that Harris parked near a club, that Harris left the vehicle after indicating that he would be right back, that Kelly later left the vehicle, that eventually he also left the vehicle, that he then saw Kelly and Harris returning, that someone else started shooting, that he was shot twice, and that he went to the hospital. On cross-examination, the prosecutor attempted to impeach defendant about this version of events. Defendant denied signing the written statement that was used to impeach him, and denied making several comments that were contained within that statement. In rebuttal, the prosecutor called Inspector Dale Collins, to whom defendant made his statement. Defense counsel had “no problem” with this procedure. Defendant now argues that his statement to Collins should have been presented in the prosecutor’s case-in-chief and that, by failing to object to Collins’s rebuttal testimony, counsel was ineffective. He claims that the prosecutor improperly elicited denials from him about his police statement on cross-examination and then sought to impeach those denials with the rebuttal testimony.

We conclude that this rebuttal evidence did not affect the outcome of the trial.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder