STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEY LAMONT JACKSON,

Defendant-Appellant.

UNPUBLISHED
December 22, 2005

No. 257101
Wayne Circuit Court
LC No. 04-002629-01

Before: Whitbeck C.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for armed robbery, MCL 750.529, third-degree fleeing and eluding, MCL 257.602a(3)(a), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 81 months to 16 years' imprisonment for the armed robbery conviction, one to seven and one-half years' imprisonment for the fleeing and eluding conviction, one to seven and one-half years' imprisonment for the carrying a concealed weapon conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant asserts that the evidence presented at trial was insufficient to sustain his conviction for armed robbery, and therefore, his convictions for armed robbery, carrying a concealed weapon, and felony-firearm should be reversed. We disagree. We review challenges to the sufficiency of evidence in criminal trials de novo to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime proved beyond a reasonable doubt. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). In so doing "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), quoting *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004) (citations omitted). To sustain a conviction for carrying a concealed weapon it must be proven that the defendant carried a concealed weapon and that the weapon was concealed on or about his person. *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). To sustain a felony-firearm

conviction there must be a showing that "the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant maintains that there was insufficient evidence to support his armed robbery conviction because no eyewitness testimony was presented that identified him as the assailant. We disagree. Although the victim, Willie Jackson, was unable to identify his assailants and the policemen who arrived at the robbery scene did not actually witness the robbery take place, the evidence presented was sufficient to convict defendant of the armed robbery.

Jackson testified that, as he was walking across the street to a bar, two men ran up behind him with guns. The two men told Jackson to give them his car keys, money, jacket, and wallet. Because the men were wearing masks, Jackson did not see their faces. Jackson testified, however, that one man was tall and heavyset and wore a black, hooded sweatshirt, while the other man was short and wore a blue jacket with a hood. Jackson testified that the taller man pointed a nickel-plated handgun at him and the shorter man pointed something that felt like a gun to his back, and between the two men, they took his wallet, money, car keys, and jacket.

At that point, two policemen, while conducting a routine patrol, noticed the three men congregating in a dimly lit alley. Since the men did not appear to be engaged in conversation, the policemen decided to investigate. As they proceeded to the area where the men were situated, two of the three men fled. Jackson, the only man remaining at the scene, informed the policemen that the two fleeing men had robbed him. Jackson identified the robbers by height and weight to the policemen and pointed the policemen in the direction in which the men fled. The policemen, one on foot and one in the patrol car, pursued the fleeing men. The two men, later identified as defendant and Anthony Nash, got into a car, sped away, and crashed shortly afterward. The police officers then arrested the two men. When the police searched defendant's car, they found Jackson's wallet, jacket, and car keys, and a nickel-plated handgun. Defendant was identified as the driver and owner of the vehicle that crashed.

Although defendant argues that the evidence was insufficient because no eyewitness testimony was presented establishing that he actually committed the robbery, that the evidence presented was flimsy and not enough to sustain a conviction, and that he provided a rational explanation for his involvement in the occurrence, the record does not support defendant's argument. Defendant, by his own admission, placed himself at the scene. Defendant also admitted that he fled the alley, carrying Jackson's jacket, when the policemen arrived. Jackson's car keys, wallet, and jacket were all found in defendant's vehicle when he was arrested. Based on the testimony presented, it is reasonable to infer that the taller man who robbed Jackson was defendant, and the shorter man was Nash. In the absence of direct evidence, circumstantial evidence is permitted, and "the prosecution need not negate every reasonable theory consistent with the defendant's innocence." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). When viewing the evidence in the light most favorable to the prosecution, the prosecution has proven the necessary elements to sustain a conviction for armed robbery, i.e., defendant committed an assault and a felonious taking of property from Jackson's presence or person while armed with a weapon. Furthermore, because it is reasonable to find that defendant committed the armed robbery based on the evidence presented, the elements for defendant's convictions for carrying a concealed weapon and felony-firearm have been met as well.

Defendant next asserts that he was denied the effective assistance of counsel because his trial counsel failed to contact a necessary witness. Defendant further argues that the trial court erred in refusing to grant him an evidentiary hearing pursuant to *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973), or a new trial, on the basis of his ineffective assistance claim and, therefore, his convictions should be reversed. We disagree.

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"To establish a claim of ineffective assistance of counsel a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *Walker, supra* at 545.

The decision to call or question witnesses is presumed to be a matter of trial strategy, and the failure to call or question a witness constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). A *Ginther* hearing is only warranted if the defendant is able to show a potentially meritorious ineffective assistance of counsel claim that requires further development of the record.

Defendant was not deprived of a substantial defense because, even if Nash testified on defendant's behalf, Nash's testimony would not have changed the outcome of the case. Defendant maintains that, if Nash testified, he would have corroborated his story regarding the events that transpired. However, since defendant testified that no robbery occurred and Nash pleaded guilty to armed robbery, there is a clear conflict between the versions of events. Moreover, defendant's motion for a new trial was unsupported by affidavits or sworn testimony showing how Nash would have contributed to defendant's defense had he testified at trial. When defendant moved for a new trial pursuant to *Ginther*, he did not offer any proof to support his claim. Defendant only claimed that, if Nash had testified at trial, he would have informed the Court that defendant was not involved in the robbery. The court had no basis for determining if trial counsel erred in failing to call Nash because defendant failed to present a record showing how Nash's testimony would have created reasonable doubt regarding defendant's involvement in the robbery. Therefore, defendant has failed to show that he was denied the effective

assistance of counsel, and the trial court did not commit error requiring reversal by denying defendant's motions for a new trial or an evidentiary hearing.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray