STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 270117 Ottawa Circuit Court
ELVIO FLORES, III, Defendant-Appellant.	LC No. 05-028987-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to 85 to 240 months' imprisonment for his home invasion conviction and to a concurrent term of 17 to 120 months' imprisonment for his assault conviction. The trial court also ordered defendant to pay restitution in the amount of $2,944.48. We affirm.

On March 6, 2005, Areceli and Carlos Olivo were at their Holland apartment with their friends Joel and Stephanie Jimenez, Edgar Salinas, Joshua Vallejo, and Raul Guzman. At approximately 4:00 a.m., five or six men, who were carrying sticks, golf clubs, and bats, forced their way into the apartment. Two of the men attacked Carlos. One man repeatedly hit Carlos with a metal pan while the other broke glass bottles against Carlos's head. During the attack, one man told Carlos "don't be f***ing with my cousin." After the men left the apartment, Carlos was transported to the hospital where he was treated for his injuries.

Defendant first argues that the prosecutor failed to present sufficient evidence to support his convictions. Specifically, defendant argues that the prosecutor failed to prove his identity beyond a reasonable doubt and, therefore, the evidence was insufficient for a reasonable trier of fact to conclude that he committed the crimes of which he was convicted.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). We must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To state the obvious, identity is an element in every criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must identify the accused as the person who committed the offense. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime," *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000), or a defendant's identity may be proved by circumstantial evidence. "The prosecutor is not required to present direct evidence linking the defendant to the crime." *People v Saunders*, 189 Mich App 494, 495; 473 NW2d 755 (1991). "Circumstantial evidence and reasonable inferences from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted).

In this case, several witnesses identified defendant as the perpetrator of the crimes. At trial, Areceli testified that defendant entered the apartment through the front door. She identified defendant as the man who assaulted Carlos with the metal pan. Similarly, Stephanie testified that defendant entered the apartment through the front door and "basically attacked Carlos." Carlos testified at trial that defendant looked like the man who assaulted him. Joel also testified that defendant looked like the man who assaulted Carlos. Furthermore, trial testimony revealed that Areceli positively identified defendant as one of the perpetrators in a photographic lineup that was conducted before trial. This evidence was sufficient to prove that defendant committed the offenses of which he was convicted. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Davis, supra* at 700.

Furthermore, viewed in the light most favorable to the prosecution, the circumstantial evidence in this case was sufficient to prove that defendant committed the crimes of which he was convicted. The trial testimony revealed that, on the night of the incident, defendant's brother, Joselito, met Salinas, Vallejo, and Guzman at a party in Fennville. After the party, Jeri Fitts and her friend Shaunte agreed to drive Joselito, Salinas, Vallejo, and Guzman to Holland. On the way there, a fight erupted between Salinas and Joselito. Joselito exited the car. He threatened to call his brother and his cousins and have them kill Salinas and his friends, and he in fact made a telephone call at that time. Fitts drove away, leaving Joselito on the side of the road. She drove Salinas, Vallejo, and Guzman to the Olivos' apartment.

In the meantime, defendant learned about the altercation that occurred between Salinas and Joselito. He gathered a group of men, some of whom were carrying golf clubs or bats, and went to look for Salinas, Vallejo, and Guzman. He contacted Fitts on Shaunte's cellular telephone and threatened to kill her family if she did not show him where she dropped off Salinas, Vallejo, and Guzman. Fitts met defendant at a restaurant, where she agreed to show him the location. She also testified that defendant was upset, that eight or nine other individuals were with him, and that at least one man was carrying a golf club or bat. She drove defendant and the man who was carrying the golf club or bat to the Olivos' apartment complex. When they arrived, defendant instructed her to knock on doors until she found the correct apartment. She found the Olivos' apartment and, as she was leaving, she observed defendant and the other men pushing on the outside of the door, attempting to gain entry into the apartment. Vallejo testified at trial that, before the men forced their way into the apartment, they asked for "Raul" or "Edgar," the names of two of the individuals who had been involved in the altercation with Joselito. Once the men gained entry into the apartment, they assaulted the individuals inside of the apartment, with what was described as golf clubs, bats, and sticks. Based upon this evidence,

it could properly be inferred that defendant was in fact the perpetrator of the offenses. Thus, for this reason as well, the evidence was sufficient to sustain defendant's convictions.

Defendant next contends that the trial court erred in scoring offense variable ("OV") 14. Defendant preserved this issue by objecting to the scoring of OV 14 at the sentencing hearing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

In calculating a sentencing guidelines range, a trial court must assess ten points under OV 14 if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In determining whether an offender was a leader in a multiple offender situation, we must review the entire criminal transaction. MCL 777.44(2)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (citation omitted).

The record supported the trial court's finding that defendant had a leadership role in this multiple offender situation. The testimony presented at trial supports the conclusion that defendant was upset about the altercation involving Joselito, and he gathered a group of men with the intention of seeking revenge upon the other individuals who were involved in the altercation. Nothing in the record suggests that anyone, other than defendant, spoke to Fitts concerning Salinas, Vallejo, and Guzman's whereabouts on the night of the incident. Further, nothing suggests that anyone, other than defendant, orchestrated the retaliation effort against them. Areceli testified that, when defendant entered the apartment, he started hitting everyone. Stephanie testified that defendant initiated the attack against Carlos. Carlos testified that defendant looked like "the guy who actually did the whole action." Finally, Areceli testified that, after the men attacked Carlos, defendant left the apartment first and the other men followed him out the door. Thus, the record adequately supported the trial court's scoring of OV 14, and we affirm defendant's sentences. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). See also MCL 769.34(10).

Defendant next argues that defense counsel was ineffective for failing to file a motion to suppress, challenging the legality of his arrest. We disagree.

Defendant did not move the trial court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), or for a new trial based on ineffective assistance of counsel. Therefore, this issue is unpreserved. See *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *Id.* "To establish a claim of ineffective assistance of counsel, 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 Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Defendant asserts that he was subjected to an unlawful arrest because the police lured him away from his home, under false pretenses, to effect the arrest. *People v Kelly*, 231 Mich App 627, 633; 588 NW2d 480 (1998). Such an arrest would be illegal. *Id.* See also *Hayes v Florida*, 470 US 811, 815; 105 S Ct 1643; 84 L Ed 2d 705 (1985). However, even assuming

arguendo that defendant's arrest was unlawful, the fact that defendant was subjected to an unlawful arrest is not dispositive of defendant's claim of ineffective assistance of counsel. Where a defendant is subjected to an unlawful arrest, "the appropriate remedy is the suppression of evidence derived as a result of the illegal arrest under the 'fruit of the poisonous tree' doctrine." *People v Spencley,* 197 Mich App 505, 508; 495 NW2d 824 (1992), quoting *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). "It is only when an 'unlawful detention has been employed as a tool to directly procure *any* type of evidence from a detainee' that the evidence is suppressed under the exclusionary rule." *Kelly, supra* at 634, quoting *People v Mallory,* 421 Mich 229, 240-241; 243, n 8; 365 NW2d 673 (1984) (emphasis in original).

In this case, defendant failed to establish that the police procured any information or evidence as a result of the exploitation of the allegedly unlawful arrest. *Id.* at 634-635. Further, nothing in the lower court record suggests that the prosecutor introduced any evidence at trial that was procured as a result of the allegedly unlawful arrest. By failing to establish that any evidence in this case would have been subject to exclusion under the fruit of the poisonous tree doctrine, defendant failed to establish the factual predicate for his claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and failed to establish that a motion to suppress would not have been futile in this case. It is well established that defense counsel is not ineffective for failing to pursue a futile motion. *People v Mack,* 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, defendant clearly failed to establish that the alleged illegality of the arrest affected the outcome of the trial or that "but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *Knapp, supra* at 385. Accordingly, defendant is not entitled to relief on this claim of ineffective assistance of counsel.

Finally, defendant argues that defense counsel was ineffective for failing to investigate and interview witnesses, failing to adequately prepare for trial, and failing to object to the evidence submitted by the prosecution.

There are no errors apparent on the record. Defendant (1) failed to establish the identity of any of the witnesses that defense counsel allegedly failed to interview and failed to establish that their testimony would have benefited him had they been called to testify at trial; (2) failed to present any facts to support his claim that defense counsel was ineffective for failing to investigate and adequately prepare for trial; and (3) failed to specify what evidence was objectionable at trial. Thus, he failed to establish the factual predicate for his claims. *Hoag, supra* at 6. Furthermore, it is well established that, to prevail on a claim of ineffective assistance of counsel, a defendant "must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin,* 463 Mich 590, 600; 623 NW2d 884 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because defendant has not established the factual predicate for his claims, there is no basis for a finding that defendant was prejudiced by defense counsel's alleged errors. "An appellant may not merely announce his position and leave it to this

Court to discover and rationalize the basis for his claims . . . ." *Kelly*, *supra* at 640-641. Thus, defendant is not entitled to relief on these claims of ineffective assistance of counsel.[1]

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

[1] Finally, in his brief on appeal, defendant requests that this Court remand this case to the trial court for an evidentiary hearing on his claims of ineffective assistance of counsel. Defendant's request is neither timely nor procedurally appropriate given that he has not supported his request with an affidavit or offer of proof regarding the facts to be established at a hearing on remand. See MCR 7.211; *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983). Accordingly, we find that an evidentiary hearing is unwarranted, and we deny defendant's request for remand.