STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2007
v	No. 270606 Oakland Circuit Court
TYRELL LADON RICHARDSON, Defendant-Appellant.	LC No. 2005-204126-FC

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, three counts of carjacking, MCL 750.529a, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 21 to 48 months' imprisonment for the assault conviction, 40 to 60 months' imprisonment for the CCW conviction, 210 months' to 40 years' imprisonment for each carjacking conviction, and 24 months' imprisonment for each felony-firearm conviction. We affirm.

Defendant's convictions arose from three carjacking incidents that occurred near Farmington Hills, Michigan on August 13, 2005. On the night of the carjackings, defendant pulled into a gas station parking lot in a dark-colored Buick and approached Oleksiy Bolyukh, who was driving a silver gray BMW with an Illinois license plate. While Bolyukh was pumping gas, defendant approached him, held a gun to his head, took his car keys and wallet, and drove away in the BMW. Defendant's friend followed in the dark car. A few minutes later, police officers recognized two vehicles matching the dispatcher's description at a nearby intersection. The police followed the cars. Defendant turned onto a dead-end road, exited the BMW, and ran toward Middlebelt Road. He then approached a car stopped at the intersection of Middlebelt Road and Nine Mile Road. He pounded on the car window with his gun, demanding that the driver, Katherine Goddard, unlock the door. When Goddard refused to do so and the light turned green, Goddard floored her accelerator and defendant ran away. He then approached Cheryl and Terry Bias, who were walking near the same intersection stepping out of a hamburger restaurant. Defendant pointed his gun at Cheryl and demanded that she give him her car. When she refused and headed toward the restaurant to summon the police, defendant ran across the street toward a coin laundry. Defendant finally approached Tosh Louk, whose house was located near the coin laundry. Louk was not wearing a shirt and had a tattoo across his stomach that read "outlaw." Holding his semi-automatic chrome-plated gun, defendant informed Louk that he had "carjacked

someone" and asked for Louk's help. Fearful that he would be shot or his parents' car would be stolen, Louk agreed to help defendant escape. With Louk's assistance, police arrested defendant the following day.

I.

Defendant first argues on appeal that the trial court erred by allowing testimony from Ali Majed that on August 12, 2005, two African-Americans stole his dark-colored Buick and threw him off of a bridge. Defendant argues that Majed's testimony constituted inadmissible bad-acts evidence under MRE 404(b). We need not address whether the testimony was admissible, however, because we hold that defendant waived this issue for appellate review.

Immediately after Majed's testimony, defense counsel asked the prosecutor to stipulate that Majed was unable to identify the people who stole his Buick. The prosecutor agreed. Later, the prosecutor read the following stipulation to the jury: "First, that Mr. Majed cannot identify the person or persons that took the car from him on the 12th. And, second, that the offense of—that occurred in Wayne County to Mr. Majed is not an allegation for this jury to consider." Defense counsel withdrew his motion to strike Majed's testimony about being thrown from a bridge, apparently to avoid highlighting that portion of the testimony for the jury. Given the prosecutor's stipulation and defense counsel's decision to withdraw the motion to strike, defendant waived any objection to the challenged testimony. It is well settled that a party cannot request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). By intentionally relinquishing a known right, defendant waived the issue on appeal and any error was extinguished. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

II.

Defendant next argues on appeal that the prosecution presented insufficient evidence to support two of his carjacking convictions. We disagree. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

A.

First, defendant argues that the evidence presented at trial was insufficient to prove that he "took" Goddard and Cheryl's cars considering that the cars were never out of their possession. We note, however, that defendant's argument mistakenly relies on an outdated version of MCL 750.529a, which required a person to rob, steal, or take a motor vehicle from another person to be guilty of carjacking. The version of the statute that was in effect at the time of the charged offenses, MCL 750.529a, as amended by 2004 PA 128, effective July 1, 2004, simply requires that, to be guilty of carjacking, a person must use force or violence, use the threat of force or violence, or put fear in another person "in the course of committing a larceny of a motor vehicle." MCL 750.529a(1). The statute defines "course of committing a larceny of a motor vehicle" as "acts that occur in an attempt to commit the larceny, or during commission of the

larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle." MCL 750.529a(2). There is no requirement, under the current version of the statute, that the perpetrator actually retain possession of the vehicle. In this case, defendant pounded on Goddard's car window with his gun and demanded that Goddard unlock the car door. Next, he approached Cheryl, pointed his gun at her, and demanded that she give him her car. Defendant only ran away from Goddard and Cheryl when they refused to cooperate with his demands. Viewed in the light most favorable to the prosecution, this evidence was sufficient for the jury to find that defendant used the threat of violence in an attempt to retain possession of Goddard and Cheryl's cars.

B.

Second, defendant argues that the evidence presented at trial was insufficient to establish his identity as the person who carjacked Cheryl. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecutor must prove defendant's identity as the perpetrator beyond a reasonable doubt, *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime, including identity. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Kimberly Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

We believe that the evidence presented at trial, viewed in the light most favorable to the prosecution, was more than sufficient to establish defendant's identity as the person who carjacked Cheryl. According to Bolyukh, defendant pulled out of the gas station parking lot in the BMW at approximately 10:30 p.m. The gas station is located near the intersection of Middlebelt Road and 12 Mile Road. Shortly thereafter, police officers observed the BMW within a few miles of the gas station, near the intersection of Middlebelt Road and 9 Mile Road. The carjackings involving Goddard and Cheryl, as well as Louk's interaction with defendant, occurred within a block of the same intersection between 10:30 and 10:45 p.m. Although mere presence at the scene of the crime, at the time the crime occurred, is insufficient to establish commission of the crime, evidence of opportunity and presence at the crime scene may contribute to a finding of guilt. *People v Barrera*, 451 Mich 261, 295; 547 NW2d 280 (1996); *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002). Moreover, while Cheryl and Terry could not unequivocally identify defendant as the carjacker, Bolyukh, Goddard, Cheryl, and Terry all described the perpetrator as a tall, young, African-American male carrying a silver gun. Bolyukh and Goddard definitively identified defendant in a photographic lineup and at trial, and Louk assisted the police in arresting defendant. Further, police found a silver handgun in defendant's pocket upon his arrest. We find that this evidence was more than sufficient to support defendant's identity as the perpetrator.

Reversal is not warranted on the grounds of insufficient evidence.

III.

Defendant finally argues on appeal that the cumulative effect of his trial counsel's errors amounted to ineffective assistance of counsel. We disagree. Because the trial court was not presented with and did not rule on defendant's claim of ineffective assistance of counsel, we are

left to our own review of the record in evaluating his assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Defendant first argues that his trial counsel was ineffective for failing to object more strenuously to Majed's testimony about two African-Americans stealing his car and for withdrawing the motion to strike the testimony. We disagree. As discussed *infra*, defense counsel immediately objected to the challenged testimony and, upon defense counsel's request, the prosecutor stipulated that Majed could not identify the people who stole his car and that the incident involving Majed's car should not be considered by the jury in this case. Further, it is apparent from the record that defense counsel withdrew his motion to strike to avoid highlighting for the jury Majed's reference to being thrown from a bridge. Thus, defense counsel's decision to withdraw the motion was apparently a matter of trial strategy, and we will not second-guess counsel regarding matters of trial strategy. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

Next, defendant argues that his trial counsel was ineffective for failing to move for a directed verdict on the carjacking charges involving Goddard and Cheryl. Because there was more than sufficient evidence presented at trial establishing defendant's carjacking charges, as discussed *infra*, a motion for directed verdict would have been futile. Defense counsel is not ineffective for failing to argue frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant further argues that his trial counsel was ineffective for failing to object to the introduction of identification evidence from a photographic lineup. We recognize that as a general rule, a physical lineup is the preferred method of allowing a witness to identify a suspect. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). Here, however, a police officer testified that a proper physical lineup was not possible due to the lack of available juveniles to place in the lineup. Under such circumstances, a photographic lineup was a permissible substitute for a physical lineup. *Id.* at 187 n 22. Moreover, considering the overwhelming amount of identity evidence properly admitted at trial, defendant cannot establish that defense counsel's failure to object to the photographic lineup was outcome determinative.

Defendant finally argues that his trial counsel was ineffective for conceding guilt on certain offenses. Counsel does not render ineffective assistance by conceding certain points at trial, and doing so may be an effective trial strategy. See *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). "An attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Mark Schultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978). Here, defense counsel's concessions regarding defendant's carjacking charges were consistent with his theory that

defendant was guilty of the lesser offense of felonious assault. As to conceding that defendant was guilty of CCW, we find that this was a reasonable trial strategy in light of the evidence presented on that charge. Conceding the obvious is a permissible trial tactic. *Wise, supra* at 98. Accordingly, we find that defendant has failed to overcome the presumption of sound trial strategy.

On appeal, defendant asks for a remand for further fact finding, but he did not comply with MCR 7.211, which provides a means for requesting a hearing in the trial court to develop evidence. Even on appeal, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Thus, we decline to order a remand.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane E. Beckering