

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRENT ANTHONY BELLAMY,

Defendant-Appellant.

UNPUBLISHED

November 29, 2007

No. 268462

Macomb Circuit Court

LC Nos. 2005-001709-FC;
2005-001648-FC;
2005-001929-FC;
2005-003550-FC;
2005-003551-FC;
2005-003552-FC;
2005-001704-FC;
2005-001710-FC;
2005-001700-FC

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant was charged with a series of separate robberies that were joined for trial. Following a jury trial, defendant was convicted of a total of ten counts of armed robbery, MCL 750.529, eight counts of possession of a firearm during the commission of a felony, MCL 750.227b, assault with intent to rob while armed, MCL 750.89, assault with intent to commit murder, MCL 750.83, and second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(e) (sexual contact while the actor is armed with a weapon). He was sentenced to 210 months to 80 years' imprisonment for five of the armed robbery convictions, and 225 months to 80 years' imprisonment for the remaining five armed robbery convictions, 285 months to 80 years' imprisonment for each of the assault convictions, 100 months to 15 years' imprisonment for the CSC conviction, and two years' imprisonment for each of the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arose out of a series of armed robberies and related offenses that occurred in Macomb County between January 30, 2005 and April 7, 2005. During each of the incidents, an African-American male wearing a mask entered a business establishment and demanded money. Witnesses described the mask as a surgical mask or the type of mask worn when painting or working with drywall. In addition, the perpetrator was either armed or appeared to be armed with a gun. After his arrest, defendant confessed to all nine incidents with specificity. At trial, however, defendant maintained his innocence and testified that his confessions were the result of police coercion and threats.

I.

Defendant first argues that he was denied the effective assistance of counsel. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, the defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, *supra* at 75-76. The defendant must also overcome the strong presumption that counsel’s actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant contends that defense counsel was ineffective for failing to thoroughly investigate his initial interview with the police and to impeach Detective William Furno with evidence that he threatened defendant during the interview. Defendant argues that had defense counsel listened to the audio recording of his police interview, counsel would have heard Detective Furno threaten to cut off defendant’s Medicaid payments, throw his mother out of her home, and “tear that house to living shreds” if he did not cooperate. Defense counsel testified at a *Ginther*¹ hearing that he attempted to listen to the recording, but that it was of such poor quality that he was unable to hear anything on the audiotape. The prosecutor concedes that defense counsel should have made efforts to obtain a clearer recording. Nonetheless, we find that defendant cannot show prejudice resulting from counsel’s failure to impeach Detective Furno considering the overwhelming evidence presented at trial establishing defendant’s identity as the perpetrator.

During each of the incidents giving rise to the charges against defendant, the perpetrator entered the business, announced the robbery, and demanded money, oftentimes asking that the money be placed in a bag. The perpetrator frequently required persons present to enter a room near the back of the establishment, lie down on the floor, and count to a specified number before coming out. Additionally, he often asked if there was a safe on the premises. Although most of the victims were unable to identify the perpetrator after the incidents, three persons identified defendant as the perpetrator at trial. In addition, the witnesses consistently described the perpetrator as a tall African-American male with a slim build, soft spoken, and wearing either a dark hooded sweatshirt or a denim jacket, gloves, a surgical or dust mask, blue jeans or navy blue work pants, and either tennis shoes or work boots.

At the time of his arrest, shortly after the robberies at Tubby’s Submarine Shop and Aloha Tanning Salon, defendant was wearing a denim jacket and blue jeans. Defendant’s

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

vehicle matched the description given from witnesses at Aloha Tanning Salon and police officers found several items in the vehicle, including two dust masks, a pair of gloves, a black knit hat, a large amount of money, a pair of tennis shoes, a pair of boots, and the yellow envelope the perpetrator took from Tubby's Submarine Shop. Further, when defendant confessed to the robberies, he claimed that the dust mask was his trademark and provided details of the incidents that he would not have otherwise known. See *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002) (holding that knowledge of the details of a crime may serve as incriminating evidence). Considering the overwhelming evidence against defendant, it is not reasonably probable that defense counsel's failure to listen to the audiotape of defendant's interview and impeach Detective Furno affected the outcome of the case. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Defendant next contends that counsel was ineffective for failing to investigate and present an alibi defense. Defendant maintains that because counsel did not provide him with a complete discovery package until trial began, he was unable to assist in preparing his defense and was unaware until the first day of trial that his girlfriend, Alicia Buzdygan, could testify as an alibi witness regarding the armed robbery at Card 23 Party Mart. We find, however, that the record belies defendant's assertion.

At the *Ginther* hearing, defense counsel testified that he provided some discovery materials to defendant while he was in jail and that they discussed the possibility of Buzdygan testifying as an alibi witness before trial. According to counsel, he did not file a notice of alibi because he did not have a sufficient basis to believe that an alibi defense could be presented successfully. Counsel maintained that although he had several discussions with defendant regarding the prospect of Buzdygan testifying, defendant did not inform him until the day before Buzdygan attempted to testify that he wanted her to do so. Counsel further testified that Buzdygan was not absolutely certain that defendant was with her on the day of the Card 23 robbery until the time of her testimony. Accordingly, we find that counsel's failure to provide defendant with all of the discovery materials before trial had no bearing on whether defendant presented an alibi defense. Thus, counsel was not ineffective for failing to file a notice of alibi and to present such a defense.

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's motion for joinder of the charges. We find, however, for the reasons discussed *infra*, that the trial court properly granted the prosecutor's motion. Moreover, counsel's decision not to oppose the motion was a matter of trial strategy and we do not substitute our judgment for that of counsel in matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). Counsel testified that after reviewing the police reports and witness statements, his strategy was to highlight the differences in the offenses and establish that the same person could not have committed all of them. Counsel expressed concern that even if the offenses were tried separately, the prosecutor may have prevailed on an MRE 404(b) motion to admit evidence of the other incidents, and opined that it was preferable for the jury to focus on all of the incidents at a single trial. Based on the record before us, we find that counsel exercised sound trial strategy in determining whether to oppose the prosecutor's motion for joinder. *Toma, supra* at 302. The fact that counsel's strategy ultimately failed does not render his representation ineffective. *Kevorkian, supra* at 414-415.

Defendant further contends that counsel was ineffective for failing to move to withdraw during trial because of a conflict of interest. Defendant contends that there was a breakdown of the attorney-client relationship, resulting in his filing of a grievance against trial counsel. This Court has rejected the notion that the filing of a grievance necessarily creates good cause for substituting counsel. See *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Moreover, although defendant expressed dissatisfaction with his attorney at times, counsel testified that defendant seemed satisfied with his representation at other times. Counsel became aware of defendant's grievance against him only after the jurors began their deliberations. By the time counsel was able to discuss the matter with the trial court and opposing counsel, the jury had already reached a verdict. Although there was some discussion about defendant retaining a different attorney to represent him at sentencing, defendant apparently did not do so. Counsel testified that he did not withdraw as counsel because he felt that he could adequately represent defendant and he did not believe that a conflict of interest existed. Counsel further testified that he vigorously represented defendant at sentencing and did the best that he could. Because defendant failed to prove any deficiency in counsel's performance, he cannot establish that he was prejudiced by counsel's failure to move to withdraw. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Reversal is not warranted on the grounds of ineffective assistance of counsel.

II.

Defendant next argues that the trial court erred by granting the prosecutor's motion to consolidate the charges. Because defendant failed to preserve this issue by objecting to the prosecutor's motion, our review of this issue is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

At the time of trial, MCR 6.120² provided:

(A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.

² Effective January 1, 2006, MCR 6.120 was amended. Subrule (B) now relates to permissive joinder or severance and subrule (C) now relates to mandatory severance on a defendant's motion. Although defendant relies on the current version of the court rule, the former version of MCR 6.120 applied to the trial court's determination to consolidate the cases. We therefore analyze his claim of error under the former version of the court rule.

(B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

(C) Other Joinder or Severance. On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

Defendant argues that the trial court erred by consolidating the offenses because they were unrelated. We disagree. In reaching this conclusion, we acknowledge that defendant's argument may have had merit had he asserted his right to sever the offenses under MCR 6.120(B). But, because defendant failed to assert this right, the trial court was not required to sever the charges. The trial court had discretion whether to join the charges under MCR 6.120(A) and (C).

Defendant contends that the sheer number of charges reduced the presumption of innocence, but it is likely that evidence of all of the charges would have been admitted under MRE 404(b) even if they were each tried separately. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Defendant's system in committing the robberies and the clothing and mask he wore during each of the incidents tended to establish his identity as the perpetrator. Establishing identity is a permissible purpose for admitting other-acts evidence under MRE 404(b). See *People v Crawford*, 458 Mich App 376, 383; 582 NW2d 785 (1998). Further, defendant's reliance on *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690 (1992), mod in part 441 Mich 867 (1992), is misplaced. In that case, the prosecutor moved for consolidation of the charges, arguing that evidence of the defendant's other crimes would have been admissible under MRE 404(b). *Id.* at 510. The trial court granted the motion over the defendant's objection. *Id.* at 508. On appeal, this Court found that the joinder was inappropriate. *Id.* Here, however, defendant did not object to the prosecutor's motion. As discussed *infra*, defense counsel's decision not to oppose the motion was a matter of trial strategy. Moreover, because it is likely that evidence of all of the offenses would have been admitted even if the charges were tried separately, little or no prejudice resulted from combining the charges into one trial.

Considering that consolidating the charges resulted in little or no prejudice to defendant, and that it conserved the parties' resources and served the convenience of the witnesses to do so,

defendant has failed to establish that the trial court committed plain error affecting his substantial rights.

III.

Finally, defendant contends that the trial court erred in refusing to allow Buzdygan's alibi testimony. We disagree. We review for an abuse of discretion a trial court's decision whether to allow the late endorsement of a witness. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

If a defendant intends to present an alibi defense at trial, he must notify the prosecution of his intent within 15 days after his arraignment, "but not less than 10 days before the trial of the case, or at such other time as the court directs." MCL 768.20(1). A trial court may exclude alibi evidence if the defendant fails to provide such notice. *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995). In determining whether to allow the testimony of an unnoticed alibi witness, a trial court should consider:

(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case. [*People v Travis*, 443 Mich 668, 682; 505 NW2d 563 (1993), quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

Applying the above factors in the instant case, the trial court did not abuse its discretion in excluding Buzdygan's testimony. The prosecutor was unaware that Buzdygan would be testifying until approximately 15 minutes before her testimony. Further, until Buzdygan began testifying, the prosecutor was unaware that defendant would present an alibi defense. In fact, it appears from the record that even defense counsel was unaware that Buzdygan would offer alibi evidence until that morning. No events mitigated the harm of the nondisclosure and, as previously discussed, the weight of the properly admitted evidence establishing defendant's guilt was overwhelming. As such, the trial court did not abuse its discretion in denying defendant's request to present alibi testimony.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering