

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEYAIN CORY TOPLIN,

Defendant-Appellant.

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UNPUBLISHED

January 10, 2008

No. 273370

Wayne Circuit Court

LC No. 06-005560-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant was found guilty at a bench trial of carjacking, MCL 750.529a, kidnapping (two counts), MCL 750.349, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 7-12 years for the carjacking, kidnapping, and assault convictions, plus 2 years' consecutive imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

On March 1, 2006, the victims met with a man to purchase Cartier sunglasses. They followed the man to two locations before going to a park where defendant came up to their car. The victims initially thought defendant was going to show them the glasses while inside the car. But once in the car, defendant pointed a gun at them and told them to give him all their money.

The victims gave defendant very little money. When defendant continued to demand money, one of the victims suggested he could get money from an automated teller machine. Defendant then pointed the gun at the other victim and directed him to drive the car first to a bank ATM, and then to a gas station ATM.

Both attempts to get money from the ATMs were unsuccessful. Thereafter, defendant instructed the victims to drive to a nearby alley. Once in the alley, defendant directed them to get out of the car, remove their clothes, and put the items on the passenger seat. With only their undergarments still on, defendant ordered the victims to run down the alley. Defendant then drove away in the car.

One victim went to a nearby aunt's house, and the other went through a yard where a stranger stopped him and gave him some clothes. The stranger flagged down a police car that was around the corner. That victim then told the police what happened. The other victim went to the police the day after the incident and reported what had happened. Approximately one

month later, the victims identified defendant from photographic lineups, which were conducted a couple days apart.

According to defendant's trial testimony, on the day of the events in question, he met the victims at the park because they wanted to purchase a pound of marijuana from him as they had done in the past. He claimed he took money from the victims that they owed for a previous drug purchase but denied committing any of the offenses for which he was charged.

At trial, defendant was questioned about an ex-girlfriend who was listed as an alibi witness, but who was not called to testify. The prosecutor asked defendant what that alibi witness was supposed to testify to. The trial court sustained defense counsel's objection to the question, stating:

[O]f course he's not going to admit here on the stand that he told somebody to lie for him so the best thing that could happen is you'll get him to say that he said one thing and then you may claim entitlement to call that person in and are you really going to want to take that – I mean, I'm going to sustain the objection.

The court found the victims' testimony to be more credible than that of defendant.

On appeal, defendant argues that he was denied a fair trial due to the prosecutor's misconduct when questioning defendant about alibi witnesses who were not called to testify. Defendant also argues that he was denied the effective assistance of counsel when his attorney did not file a motion to suppress the introduction of the photographic lineup identifications and the preliminary examination identifications, both of which defendant claims were suggestive.

Claims of prosecutorial misconduct are reviewed case by case, examining the prosecutor's comments in context, to determine whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor may be found to improperly shift the burden of proof to the defendant when the defendant does not produce testimony concerning an alibi, and the prosecutor comments on defendant's nonproduction of an alibi witness. *People v Shannon*, 88 Mich App 138, 145; 276 NW2d 546 (1979). Telling a jury of defendant's failure to produce a previously noted alibi witness "unduly denigrates defendant's case when he later chooses to present no evidence. At issue is the jury's ability to draw an impermissible inference of guilt from defendant's decision not to call an alibi witness and its relation to his involvement in the charged crime." *Id.* at 143.

Bench trials, however, do not contain the same concerns as jury trials. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

The court's explanation for its ultimate decisions of defendant's guilt made no reference to the lack of an alibi witness. Rather the court emphasized the credibility of the complainants' testimony as supported by evidence. The court noted that defendant's story had changed throughout the process of the investigation and trial.

The court's comments prior to sustaining the defense objection were an observation concerning the ineffective nature of the prosecution's questioning technique, not a finding that defendant asked others to lie for him. Defendant was not denied a fair and impartial trial based on the prosecutor's question or the court's response concerning alibi witnesses.

Defendant next argues that he was denied the effective assistance of counsel because his attorney did not move to suppress the suggestive photographic lineup and preliminary examination identification procedure. Defendant made no request for either an evidentiary hearing or a new trial. Therefore, review of his claim of ineffective assistance of counsel is limited to errors apparent in the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), lv pending.

Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *Id.*

The failure to make a futile objection does not constitute ineffective assistance of counsel. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

The record shows that use of a photographic line-up for identification purposes was not questioned at trial, but it was raised in an earlier proceeding before the court. On July 7, 2006, defense counsel told the court there was the photo lineup "[a]nd there is third party identification that was part of the case, part of the police investigation."

Given that there was third party identification of defendant, an objection by defense counsel to the photographic lineup would have been futile. Defendant has not shown a reasonable probability that the result of the trial would have been different had trial counsel objected to the photographic lineup and the preliminary examination identification process.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski