

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHIRLEY LOUISE BODELL,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 274098

Eaton Circuit Court

LC No. 06-020058-FC

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and sentenced to concurrent prison terms of 10 to 20 years each. She appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from the robbery of a Check-N-Go store in Charlotte at approximately 5:49 p.m. on January 6, 2006. The appearance of the perpetrator and the method of committing the crime were similar to robberies at two other Check-N-Go stores, one in Hastings at approximately 4:51 p.m. on January 6, 2006, and one in Kalamazoo on December 6, 2005. The only contested issue at trial was the identity of the perpetrator. Defendant presented her friend, Robert Hadaway, who testified that on January 6, 2006, she was at a restaurant in Battle Creek from 2:00 p.m. to approximately 3:05 p.m., and at a gas station at approximately 3:35 p.m. Shortly thereafter, Hadaway saw a white van that he assumed was defendant's van turn into a parking lot by Target and an ABC Warehouse store. An employee of ABC Warehouse testified that defendant was shopping at the store in the early afternoon, which to him meant between 12:00 noon until 3:30 p.m.

On appeal, defendant claims that the evidence was insufficient to establish that she was the perpetrator because in order to have committed both of the robberies on January 6, 2006, she would have had to change her clothes and drive from Battle Creek to Hastings, commit the robbery there, then drive to Charlotte and rob that store by 5:49 p.m.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The prosecution must prove the

identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967); *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). A positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999), lv den 461 Mich 919 (1999); *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is to be determined by the trier of fact. *Id.*, pp 699-700; *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988), lv den 433 Mich 906 (1989).

Although the perpetrator's face was partially obscured by a hat pulled down to the eyebrows, glasses, and a scarf around the person's neck and mouth, complainant Debra Etheridge identified defendant, a former Check-N-Go employee whom Etheridge had previously met on at least three other occasions, as the robber and stated that she was 99 percent sure. However, on cross-examination, she indicated that she could not "positively identify" defendant. Complainant Patricia Goshorn also identified defendant in court, and was "reasonably sure" that she was the perpetrator. The employees at the Hastings store also identified defendant, although they acknowledged that they were not 100 percent certain. One was 99 percent sure. In addition to the eyewitness identification, defendant was linked to the crimes by the discovery of items at her residence, including a long denim jacket that was used by the perpetrator and which had a cap, plastic bags like those used in the robberies, and a BB gun in the pocket. Another BB gun and plastic bags were found in a box in the closet. Deposits made to defendant's bank accounts in the days following the robberies were similar to the amounts taken in the robberies. In addition, the prosecution presented surveillance videotapes and still photographs depicting the incidents.

Furthermore, defendant's alibi testimony, even if believed, did not exonerate defendant. Approximately an hour and 14 minutes elapsed between the time Hadaway observed defendant in Battle Creek and the commission of the robbery in Hastings. Detective Robert King drove between the gas station in Battle Creek and the Check-N-Go store in Hastings and the drive time was only 44 minutes. Approximately 58 minutes elapsed between the robbery in Hastings and the one in Charlotte. According to King, the drive time between the Hastings store and the Charlotte store was only 42 minutes, although he had to take a bypass that may have added a few minutes. The evidence was sufficient to establish beyond a reasonable doubt that defendant was the perpetrator of the robbery in Charlotte.

Defendant next argues that she was denied the effective assistance of counsel because trial counsel failed to include two alibi witnesses in the notice of alibi, which resulted in limitations on their testimony.¹

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish

¹ Defendant acknowledges that the trial court correctly ruled that the witnesses, defendant's son and his girlfriend, could not be used as alibi witnesses for the defense. MCL 768.21.

ineffective assistance of counsel, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.*, pp 302-303 (citations and internal quotation marks omitted).

Defendant has not met her burden of establishing the factual predicate to support her claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The record suggests that the defense wanted to ask defendant's son and his girlfriend about defendant's whereabouts on the morning of December 6, 2006, the date of the robbery in Kalamazoo. The substance of the testimony is not apparent from the record. Defense counsel's vague representations about the son's testimony are inadequate. Defendant has not produced any evidence to support a conclusion that there was a reasonable probability that, but for counsel's failures, the result of the proceeding would have been different. Although defendant requests an evidentiary hearing in the event the record is deemed inadequate, she did not file a proper motion to remand in this Court and her request is not accompanied by an affidavit or offer of proof demonstrating factual support for her claims of ineffective assistance of counsel as required by MCR 7.211(C)(1)(a). Accordingly, a remand is not warranted.

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood