

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELARNSIL ODOM, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 17, 2008

No. 275840

Wayne Circuit Court

LC No. 06-010798-01

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of bank robbery, MCL 750.531. The trial court sentenced defendant to 19 months’ to 10 years’ imprisonment. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

On August 15, 2006, a man wearing a cap and talking on a cell phone robbed a Charter One Bank in Livonia. Nicole Hixon, the bank teller, testified that the man passed her a note that read, “Give me \$25 thousand dollars, quickly. I used to work at a bank. No dye packs, and do not follow me.” Hixon gave the man approximately \$1,300 in cash, and he took the note from her. Nicole Henderson, another bank employee, observed the robbery in progress and activated the silent alarm.

The next day, the police showed Hixon a photo array that included defendant’s picture. Hixon did not identify defendant’s photograph, but positively identified him as the robber at the preliminary examination conducted on September 12, 2006, and at trial in December 2006. Henderson positively identified defendant’s photo when she viewed the array.

Police officer Dean Langley testified that he prepared the photo array after another “law enforcement agent” identified defendant as the robber, after viewing photographs made from the bank surveillance video. When the prosecutor elicited from Langley the reason that defendant’s photo appeared in the array, defense counsel observed, “This is just offered and accepted to explain [Langley’s] actions, your Honor.” The prosecutor and the trial court agreed with defense counsel’s characterization of the evidence, and defense counsel did not raise a further objection. The prosecutor’s questioning of Langley also included the following exchange:

Q. And eventually you had [defendant] arrested; is that correct?

A. That's correct.

\* \* \*

Q. Did you give him Miranda rights? Did you get a chance to interview him?

A. I did.

Q. Did he at anytime tell you that's an imposter?

A. Yes.

The trial court convicted defendant of bank robbery, finding that Henderson's certain identification of defendant sufficed to support his conviction beyond a reasonable doubt.

### I. Prosecutorial Misconduct

Defendant first contends that prosecutorial misconduct prevented him from receiving a fair trial, and cites two instances of alleged misconduct: (1) the elicitation of hearsay evidence regarding the identification of defendant by the other law enforcement agent, and (2) the introduction of defendant's statement that the person in the bank surveillance footage was "an imposter." Defendant failed to object to either statement in the trial court. This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected the defendant's substantial rights, and "will reverse only if we determine that, although [the] defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004) (internal quotation omitted).

According to defendant, Langley's testimony regarding the other law enforcement agent's identification of defendant impermissibly bolstered the eyewitness identification evidence provided by Hixon and Henderson. Contrary to defendant's argument, however, the trial court affirmatively acknowledged that it admitted the testimony only to establish the genesis of defendant's appearance in the photo array. Further, this evidence did not constitute hearsay because it was not admitted to prove the truth of the agent's representation regarding defendant's identity. MRE 801(c). Because the trial court plainly understood the proper purpose of the testimony and limited the evidence to that purpose, its introduction did not constitute error or prejudice defendant. *People v Payne*, 37 Mich App 442, 445; 194 NW2d 906 (1972).

Similarly, the prosecutor's reference to defendant's "imposter" statement did not impact the fairness or integrity of the trial. Although the "imposter" question lacked relevance, the introduction of this single statement did not result in defendant's conviction or seriously affect the fairness, integrity or public reputation of defendant's trial. Therefore, we reject defendant's prosecutorial misconduct claims.

## II. Ineffective Assistance of Counsel

Defendant next contends that his trial attorney's failure to object to the alleged instances of prosecutorial misconduct constituted the ineffective assistance of counsel. Additionally, defendant complains regarding the performance of a substitute counsel who appeared on his behalf at the sentencing hearing. According to defendant, the substitute attorney was generally unprepared, and failed to argue a motion for new trial that his original trial counsel had filed. Because defendant failed to move for a new trial or an evidentiary hearing on these bases, appellate review is "limited to mistakes apparent on the record." *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

To demonstrate the ineffectiveness of counsel, a defendant must satisfy the two-part test described by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The first part of that test mandates a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra* at 687. The effective assistance of counsel is presumed, and the defendant must overcome a heavy burden to demonstrate otherwise. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The second part of the *Strickland* test requires a showing that counsel's deficient performance prejudiced the defense. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra* at 600.

We reject defendant's claim that defense counsel was ineffective for failing to object to Langley's testimony regarding the law enforcement agent's identification of defendant, or to the "imposter" remark. Because the testimony establishing the basis for defendant's inclusion in the array was not objectionable, defense counsel was not ineffective for failing to raise a futile objection to this testimony. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). We also decline to find that trial counsel's isolated failure to raise a relevance objection to the single "imposter" remark constituted an error "so serious that counsel was not functioning as the 'counsel'" guaranteed by the Sixth Amendment. *Strickland, supra* at 687. Moreover, the failure to object occasioned no prejudice to defendant because, although the question was misleading and the answer irrelevant, this evidence did not lead to defendant's conviction.

Furthermore, our review of the record leads us to conclude that defendant's substitute counsel was not ineffective during the sentencing hearing. Substitute counsel advised the trial court of a substantial disparity between the minimum sentence range calculated by defendant's trial counsel and that included in the presentence report. Ultimately, substitute counsel persuaded the prosecutor that the appropriate minimum sentence was that advocated by the defense. Defendant correctly observes that his substitute counsel failed to mention a motion for new trial filed by his initial counsel. This motion does not appear in the trial court record, and the register of actions does not include any entry for it. Nevertheless, the trial court ruled on the motion, and found that it lacked merit.

The motion apparently contended that newly discovered evidence of defendant's innocence existed, in the form of distinctive scars and a tattoo on defendant's left hand that allegedly did not match those on the left hand of the person depicted in the bank's surveillance video. However, any marks on defendant's hand existed at the time of trial and thus do not

qualify as newly discovered evidence pursuant to MCR 2.611(A)(1)(f). Because defendant's motion for new trial on this ground lacked merit, and substitute counsel's failure to argue it did not prejudice the defense, we conclude that defendant has failed to substantiate his ineffective assistance contentions.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher