STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2008
v	No. 278238 Kent Circuit Court
CHARLES ANTHONY BLAKES, Defendant-Appellant.	LC No. 06-006375-FH

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to five to twenty years' imprisonment. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Early in the morning on June 13, 2006, defendant approached the victim, who was in his wheelchair counting his money, and asked the victim if he wanted to buy drugs. When the victim answered in the negative, a second man pulled his arm back while defendant held a small pocketknife to the side of the victim's neck and demanded the money. Defendant grabbed some of the money and rode away on his bike. The victim immediately called the police on his cellular telephone.

A few minutes after and a short distance from the robbery, Officer Adam Ickes noticed a man – defendant – riding a bicycle who fit the description of the robber. When defendant saw the officer, he jumped off his bike and started walking away from it. Suspicious, Officer Ickes stopped defendant and searched him. Officer Ickes found five one-dollar bills and some change on defendant, but no knife. Some of the money had blood on it and one of the bills was ripped in half. Officer Ickes handcuffed defendant, who had a swollen left eye with a small cut, and an injured thumb, and placed him in the back of his squad car. The police searched for a knife in the area around where defendant was arrested, but did not find one.

Defendant first argues on appeal that the trial court erroneously instructed the jury on unarmed robbery as a lesser-included offense of armed robbery.

We consider claims of instructional error de novo. *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Under de novo review, this Court gives no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

MCL 768.32(1) directs whether a trial court may instruct the jury on an uncharged lesser offense. *People v Cornell*, 466 Mich 335, 353-357; 646 NW2d 127 (2002). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id*. at 357. Defendant disputes that there was evidence to support that he robbed the victim while *unarmed*; therefore, he claims a rational view of the evidence did not support the unarmed robbery instruction.

As the trial court noted in ruling on the request for the unarmed robbery instruction, some evidence suggested that defendant was not armed. Defense counsel, through her statements in opening and closing arguments and her questioning of the victim and the arresting officer, put before the jury the factual question regarding whether defendant was armed by noting that (1) during the preliminary examination the victim initially failed to mention the knife, (2) the victim suffered no cuts even though he claimed defendant held the knife to his neck while they struggled over the money, and (3) the police never found a knife on defendant's person or in the area where he was stopped on his bicycle.

It is the jury's role to determine the credibility of witnesses and weigh the evidence. *People v Dewald***,** 267 Mich App 365, 371; 705 NW2d 167 (2005), abrogated in part on other grounds in *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006). Whether a weapon was used in the robbery was a disputed factual element, and a rational view of the evidence supported the instruction for unarmed robbery. Accordingly, the trial court did not err in instructing the jury on unarmed robbery.

Defendant next argues that the trial court erred in allowing testimony, over defense counsel's objection, that defendant falsely claimed that Officer Ickes assaulted him. Specifically, defendant submits that the evidence was not relevant. Officer Ickes testified that defendant, when asked about his injuries, told the jail nurse that the officer punched him in the eye. According to Officer Ickes, defendant then recanted and stated that it happened before his contact with Officer Ickes.

"The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). The abuse of discretion standard recognizes that there may be no single, correct outcome in certain situations. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Instead, there may be more than one reasonable and principled outcome. *Id*.

> When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*Id*.]

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." MRE 401; see also *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). Evidence that is not relevant is not admissible. MRE 402; *Fletcher, supra* at 553.

The origin of defendant's injuries was relevant to his theory of the case that a robbery did not occur and that, instead, the victim injured defendant during a failed drug deal. Defendant's willingness to accuse Officer Ickes of assaulting him showed a consciousness of guilt. A jury may infer consciousness of guilt from evidence of lying or deception. See *People v Unger*, 278 Mich App 210, 225-226; 749 NW2d 272 (2008).

Officer Ickes' testimony that defendant falsely claimed the officer assaulted him weakened defendant's credibility and is relevant in that it had the tendency to make the existence of defendant's injuries due to a robbery more probable than it would be without the evidence. The trial court did not err in allowing Officer Ickes' testimony on this issue.

Defendant also raises several claims of ineffective assistance of counsel. Defendant first submits that he was denied the effective assistance of counsel when counsel failed to interview and/or call certain witnesses who would have allegedly testified that the victim lied to the arresting officer about being attacked and that the victim perjured himself on the stand.

Defendant failed to move for a new trial or an evidentiary hearing on either of his claims of ineffective assistance of counsel; therefore, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and review its legal determinations de novo. *Id*. A finding is clearly erroneous when, after review, this Court is left with a definite and firm conviction that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Under de novo review, this Court gives no deference to the trial court. *Howard*, *supra* at 54.

Michigan has adopted the ineffective assistance of counsel standard established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Effective assistance is strongly presumed, and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id*.; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, (2) that this performance likely affected the outcome of the trial, and (3) that the proceedings were fundamentally unfair or unreliable. *Grant*, *supra* at 485-486; *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

A defendant must overcome the presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302. "'[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,' which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As noted, defendant alleges that defense counsel failed to adequately interview and call certain witnesses. Defendant attached to his brief a letter from defense counsel acknowledging defendant's concerns regarding the witness list. In her letter, defense counsel asserts that she has interviewed or will interview the witnesses specified by defendant. Defendant presented no record evidence that defense counsel failed to interview any witnesses. Whether to call specific witnesses is a matter of trial strategy, and it is assumed from the lack of testimony from the additional witnesses that their testimony would not have been helpful to defendant's case. See *Dixon, supra* at 398. Further, defendant has failed to indicate the substance of the testimony the additional witnesses would have provided. No mistakes are apparent on the record, and defendant has not shown that he was denied the effective assistance of counsel or that a remand is warranted.

Finally, defendant submits he was denied the effective assistance of counsel when defense counsel failed to object to Officer Ickes' testimony that defendant referred to the victim as the "crackhead in the wheelchair" while being transported to the jail.[1] Defendant alleges that the in-car recording of the ride to the jail, which was played for the jury, did not contain this statement.

Generally, conflicting testimony or a question as to the credibility of a witness is an insufficient basis for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). However, under certain circumstances, such as when the testimony contradicts indisputable physical facts or law or is patently incredible, a court may grant a new trial if there is a real concern that an innocent person might have been convicted. *Id*. at 643-644. If the evidence is nearly balanced or is such that different minds would naturally and fairly arrive at different conclusions, the court may not disturb the jury's verdict. *Id*. at 644. "The veracity of a witness is a matter for the trier of fact to discern." *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). Counsel cannot object simply because he thinks a witness is lying. *Id*. A lawyer is not deemed ineffective for failing to make a futile objection. See *id*.

Officer Ickes included in his police report that, during defendant's transport to jail, defendant stated, "I'll get my day in court, I'll see you and that crackhead in the wheelchair in court." However, this statement was not clearly audible on the recording that was played before the jury. On cross-examination of Officer Ickes, defense counsel asked him why she could not hear this statement on the in-car recording. Officer Ickes explained that the recorder picked up the loudest noise in the car and, at the time of the contested statement, the car radio was likely louder than defendant.

Whether or not defendant made the contested statement was an issue of fact for the jury to determine. Defense counsel raised before the jury the possibility that Officer Ickes lied about whether defendant made the "crackhead in the wheelchair" comment. The jury heard argument in support of both views of the evidence and it was for them to determine Officers Ickes'

[1] That testimony was relevant because Officer Ickes had not revealed to defendant that the victim was in a wheelchair.

credibility. Any objection would have been futile. See *id.* Therefore, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto