STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2008
v	No. 278833 Jackson Circuit Court
JERRY MORTON, Defendant-Appellant.	LC No. 06-004717-FC

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was sentenced as a third habitual offender, MCL 769.11, to 20 to 30 years in prison. Defendant appeals as of right. We vacate that portion of the judgment of sentence requiring defendant to pay the county $472 for the cost of his appointed counsel, and remand this matter to the trial court for consideration of defendant's present and future ability to reimburse the county for the cost of representation. We affirm defendant's conviction and sentence in all other respects.

Defendant was convicted of robbing a convenience store/gas station known as Buddy's. The cashier positively identified him shortly after the crime. After his arrest, he was searched, and money was found in his pocket that was arranged as if it had been taken from a cash drawer. Also, two others who drove with defendant to the store testified that he was the robber.

Defendant first argues that he was denied the effective assistance of counsel. He did not raise this issue below and his motions to remand for an evidentiary hearing have been denied. Thus, review is limited to the existing record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

> The right to counsel is guaranteed by the United States Constitution and the Michigan Constitution. 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. Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of

> trial strategy. We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. [*People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).]

Defendant argues that his preliminary examination attorney had a conflict of interest because he had previously prosecuted defendant. As a result, defendant argues, he received ineffective assistance counsel at this stage of the proceedings. However, the record does not support the assertion that this attorney had previously prosecuted defendant. A claim of ineffective assistance based on a conflict of interest must involve an actual conflict adversely affecting the attorney's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 SCt 1708, 64 L Ed 2d 3333 (1980). The record shows that defendant was displeased with his attorney, but does not establish a conflict of interest.

Defendant also faults counsel for not moving to suppress statements made to the police while defendant was intoxicated. Advanced intoxication from drugs or alcohol can result in an ineffective waiver of rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). However, intoxication alone is not dispositive, as the voluntariness of the confession depends on all of the attendant circumstances. *Id.*; *People v Lumley*, 154 Mich App 618, 620, 624; 398 NW2d 474 (1986). The police officer in issue testified that defendant appeared intoxicated but looked as if he understood his rights. Thus, a motion to suppress would likely have been futile. *Id.*; *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). Also, it might have provided the officer an opportunity to elaborate on why he thought defendant was sufficiently sober to waive his rights. The tactical decision to forego such a risk would not violate any objective standard of reasonableness.

Defendant further claims that counsel should have objected to evidence of the cashier's on-scene identification because he did not have counsel at that time. However, the right to counsel for corporeal identifications does not attach until adversarial judicial proceedings have been initiated. *People v Hickman*, 470 Mich 602, 611; 684 NW2d 267 (2004). Adversarial proceedings had not commenced at the time the cashier was brought to identify defendant. Thus, defendant had no right to counsel at this point.

Finally, defendant claims counsel should have objected to the in-court identifications of defendant by the cashier and her sister (who was cleaning the store when the robbery occurred), because they were unduly suggestive. To deny a defendant's right of due process, an identification procedure must be so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004); *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). Relevant factors to consider are the opportunity to view the criminal during the crime, the witness's degree of attention, the accuracy of a prior description, the witness's level of certainty, and the length of time between the crime and the confrontation. *Id.*

The cashier established that she was in close proximity to defendant during the robbery. Within approximately two hours of the crime, she identified defendant, stating that she "knew for a fact that was him." Indeed, the cashier said she was "a hundred percent sure" she had correctly identified him at the scene and in court. Counsel sought to discredit the initial identification,

establishing it took place while defendant, the only black man present at the scene, was handcuffed inside a police car. Although these facts may have raised a question regarding the identification, they do not establish that the identification was unduly suggestive, that there was a substantial likelihood of misidentification based on the totality of the circumstances, or that an attempt to challenge or suppress the identification would have been fruitful. The failure to object therefore did not constitute ineffective assistance. *Ish*, *supra* at 118.

At the preliminary examination, the cashier's sister testified that she saw defendant's face, and she pointed to and identified him. On cross-examination, defense counsel established that she was seven to eight feet from defendant at the time of the robbery, that she could not see some of the robber's face because of his hood, and that she had observed him for only a few seconds. Further, defense counsel established that at the preliminary examination, defendant was the only black man present in court and was wearing an orange jumpsuit. At trial, the cashier's sister unequivocally identified defendant as the robber. She testified that the store was well lit and that she got a good look at his face. On cross-examination, she admitted that she was not focused on defendant's face for all of the few seconds she had observed him, and acknowledged that she never had to pick defendant out of a photographic or live lineup. She also believed defendant was wearing gray sweatpants, whereas her sister had testified they were a different color.

While the opportunity of the cashier's sister to view defendant during the crime was brief, and despite the interval between the crime and the preliminary examination, the totality of the circumstances do not tend to establish undue suggestion or a substantial likelihood of misidentification. She denied that defendant's appearance in court influenced her identification. As for the time lapse between the crime and the preliminary examination, it was not long enough to presume that the victim of a crime would forget significant details, like the identity of the perpetrator. Moreover, it appears that the witness's attention was focused during the observation. Notably, her identification was decisive. Accordingly, attempts to challenge admission of this evidence would not have been successful. Thus, counsel provided effective assistance. *Ish*, *supra* at 118.

Defendant next challenges the sufficiency of the evidence, arguing that a rock is not "a dangerous weapon" under MCL 750.529. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Norris*, 236 Mich App 411, 413-414; 600 NW2d 658 (1999). The trier of fact is in a better position to assess the credibility of witnesses and the weight of the evidence, so we give its factual conclusions deference. *People v Wolf*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Under MCL 750.529, the elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with "a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon." MCL 750.529; *People v Ford*, 262 Mich App 433, 458; 687 NW2d 119 (2004); *Norris*, *supra.* In *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938), the Court observed that:

> Some weapons carry their dangerous character because so designed and are, when employed, *per se*, deadly, while other instrumentalities are not dangerous weapons unless turned to such purpose. The test as to the latter is whether the instrumentality was used as a weapon and, when so employed in an assault, dangerous. The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault. When the purpose is evidenced by act, and the instrumentality is adapted to accomplishment of the assault and capable of inflicting serious injury, then it is, when so employed, a dangerous weapon.

Thus, a dangerous weapon within the meaning of MCL 750.529 includes any article, otherwise harmless in itself, which is used or fashioned in a manner to induce the reasonable belief that it is a dangerous weapon. *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997), quoting *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). See also *People v Barkey*, 151 Mich App 234, 238; 390 NW2d 705 (1986) (stating that "[a] dangerous weapon can also be an instrumentality which, although not designed to be a dangerous weapon, is used as a weapon and, when so employed, is dangerous"). Whether an object is a dangerous weapon depends on the nature of the object itself and on how it is used, and thus, whether an object is a dangerous weapon under the circumstances of a case is a question of fact for the factfinder. *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993); *Norris*, *supra* at 415.

In the instant case, there was testimony that defendant threatened to hit the cashier with the rock and to use the rock to "smash [the cashier's] head in" or to "smash [her] face in," if she did not comply with his request that she open the cash register. Viewed in a light most favorable to the prosecution, this testimony was sufficient to allow a rationale trier of fact to find beyond a reasonable doubt that defendant used the rock in a manner so as to render it a dangerous weapon within the meaning of MCL 750.529. See, *People v McCadney*, 111 Mich App 545, 548-549; 315 NW2d 175 (1981) (a stick can constitute a dangerous weapon); *People v Winfield*, 39 Mich App 281; 197 NW2d 541 (1972) (a bottle can constitute a dangerous weapon); *People v Knapp*, 34 Mich App 325, 334; 191 NW2d 155 (1971) (a broomstick can constitute a dangerous weapon). Accordingly, there was sufficient evidence to permit the jury to find that defendant guilty of armed robbery.

Defendant also asserts that the jury could have found that defendant was not armed at the time of the robbery, and that he was therefore entitled to an instruction on the lesser-included offense of unarmed robbery.[1] However, an instruction on a lesser-included offense is only 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." *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007), quoting *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). The element distinguishing unarmed robbery from armed

[1] Defendant implies that his right to a jury instruction on a lesser-included offense poses a federal constitutional question. But see *Campbell v Coyle*, 260 F3d 531, 541 (CA 6, 2001), citing *Bagby v Sowders*, 894 F2d 792, 795-797 (CA 6, 1990) (en banc), holding that the federal Constitution does not require a lesser-included offense instruction in non-capital cases.

robbery is the use of a weapon or an article used as a weapon during the course of the robbery. *People v Reese*, 466 Mich 440, 447; 647 NW2d 498 (2002). Here, there was no dispute that the robber was carrying a rock and that he threatened to harm the cashier with the rock to facilitate the robbery. At no time did defense counsel assert that the robber was not armed, and surveillance video confirmed that robber was carrying the rock as he entered Buddy's. Instead, defendant testified, and defense counsel argued, that defendant was not the perpetrator. Thus, the only rational view of the evidence was that the robber, whether defendant or someone else, committed an armed robbery. Accordingly, the trial court did not err in refusing to give a lesser-included offense instruction. *Reese*, *supra* at 448.

Defendant next argues that only the cashier was placed in physical danger and therefore that offense variable (OV) 9 was improperly scored based on the erroneous conclusion that two or more victims were placed in physical danger. Defendant did not preserve this issue and thus MCL 769.34(10) precludes him from raising it on appeal. Defendant asserts that review could nonetheless be based on grounds of ineffective assistance of counsel. However, such an issue is not suggested by the question presented. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2002). Regardless, there was no error in counting the cashier's sister as a victim placed in danger, especially considering her proximity to defendant during the robbery. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008); see also *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988) (holding that all the people in the room during a bank robbery were to be counted as victims under the judicial sentencing guidelines).

Next, defendant argues that the trial court made various errors at sentencing. As previously mentioned, defendant was sentenced to a term of 20 to 30 years in prison. The minimum range under the sentencing guidelines was 180 to 270 months, or 9 to 22½ years. Accordingly, defendant's minimum sentence was within the guidelines range. Because the sentence was within the guidelines range, defendant cannot challenge the scoring of the sentencing guidelines or the accuracy of information relied upon in determining his sentence, MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004), except with respect to a constitutional challenge. Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that the trial court relied on facts not established by the jury's verdict or admitted by defendant. Even if true, this does not pose a constitutional problem in Michigan. See *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). Defendant also asserts that the trial court failed to address proportionality and that his sentence was cruel and unusual. However, a minimum sentence within the guidelines range is presumed to be proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995), and the record does not undermine this presumption. The trial court noted that this was defendant's fifth felony, that he had previous armed robberies, that armed robbery was "one of the most serious offenses that come before the Court," and that he was considering punishment, deterrence, rehabilitation and protection of society. There is no apparent proportionality problem. Moreover, a proportionate sentence does not constitute cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002); *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

We also reject defendant's argument that various witnesses committed perjury and his suggestion that this warrants a new trial. A discovery that trial testimony was perjured may be grounds for a new trial based on newly discovered evidence. However, "to merit a new trial on

the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence." *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Defendant has not presented any newly discovered evidence. Rather, he has combed the transcripts to highlight inconsistencies in the testimony of various witnesses, and to hypothesize as to why they might have fabricated their testimony. Inconsistencies alone are not evidence of perjury. In a new trial, these witnesses would not be barred from testifying because of inconsistent statements. Rather, they would simply be subject to impeachment based on the inconsistencies, as they were at the first trial. Thus, defendant is not entitled to a new trial. See *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993) ("[n]ewly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes").

Additionally, defendant argues that the cumulative effect of errors deprived him of a fair and impartial trial. Since we find no error, relief is not warranted on this basis. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001); *People v Cooper*, 236 Mich App 643, 655-656; 601 NW2d 409 (1999).

Finally, defendant argues that the trial court violated his constitutional right to due process by ordering him to reimburse the county for his court-appointed attorney costs without considering his present or future ability to pay. We agree.

Defendant failed to object to the order requiring him to pay attorney fees; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As we explained most recently in *People v Trapp*, ___ Mich App ___; ___ NW2d ___ (2008), citing *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004):

> A person who was afforded appointed counsel might be ordered to reimburse the county for the costs of that representation, if such reimbursement can be made without substantial hardship. A court need not make specific findings on the record regarding the defendant's ability to pay, but must provide some indication that it considered the defendant's financial situation prior to ordering reimbursement. The amount to be reimbursed must be related to the defendant's present and future ability to pay. A court must afford the defendant notice and an opportunity to be heard prior to ordering repayment for appointed counsel expenses. [Slip op, 1.]

The trial court's discretion to impose costs of court-appointed counsel is codified in MCL 769.1k, which became effective on January 1, 2006.[2] However, this codification "does not

[2] MCL 769.1k provides in pertinent part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(continued…)

eliminate the requirement, set forth in *Dunbar*, *supra*, that the trial court consider a defendant's ability to pay prior to ordering reimbursement of appointed counsel costs." *Trapp*, *supra*. Our review of the sentencing transcript shows that the trial court gave no indication that it considered defendant's ability to pay prior to ordering reimbursement. Therefore, a remand for further proceedings is necessary. *Dunbar*, *supra* at 251-255.

The trial court may rely on an updated report from the probation department on remand; an evidentiary hearing is not required. *Trapp*, *supra*; *Dunbar*, *supra* at 255 n 14. Here, as in *Trapp*, "[i]f the trial court concludes that the reimbursement requirement should be eliminated or modified, it should enter an amended judgment of sentence to that effect."

We vacate that portion of the judgment of sentence requiring defendant to pay the county $472 for the cost of his appointed counsel, and remand this matter to the trial court for consideration of defendant's present and future ability to reimburse the county for the cost of representation. We affirm defendant's conviction and sentence in all other respects. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

(…continued)

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(i) Any fine.

(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

(iii) The expenses of providing legal assistance to the defendant.

(iv) Any assessment authorized by law.

(v) Reimbursement under section 1f of this chapter.