

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BRAGGS,

Defendant-Appellant.

UNPUBLISHED
February 10, 2009

No. 280953
Wayne Circuit Court
LC No. 07-006724-01

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530, and was sentenced as an habitual offender, fourth offense, MCL 769.12, to 5 to 20 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues on appeal that the prosecution failed to present sufficient evidence to support his unarmed robbery conviction. In reviewing the sufficiency of the evidence presented in a criminal trial, we determine whether the evidence, when viewed in the light most favorable to the prosecution, would permit a trier of fact to find that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

To support a conviction of unarmed robbery, the prosecution must prove the following elements: (1) a feloniously taking of property from another, (2) by force or violence or assault or by putting in fear, (3) while being unarmed. MCL 750.530(1); *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). An assault may consist of an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

Defendant contends that the prosecution failed to prove beyond a reasonable doubt that money was taken by force, violence, assault, or putting the complainant in fear. Defendant submits that the prosecution did not prove that the note defendant handed to the complainant, Mr. Williams, contained language indicating that he would shoot. The note found on

defendant's person at processing and introduced into trial did not contain the word "shoot" or any threat to harm another.

The evidence presented at trial established that defendant entered the Payless store and handed the store manager, Williams, a note demanding money. Williams testified at trial that the note specifically read "give me the money" and "shoot." He was adamant that the note contained the word "shoot." He even suggested that the note introduced at trial might not have been the actual note defendant handed him. Bolstering this version of events was a witness's testimony that she observed defendant fleeing from the store, tearing up a piece of paper, and throwing it in the air. In addition, Williams stated that defendant was hiding his hands under his jacket where there was a bulge, which Williams believed to be a gun, and that defendant concealed his hands from Williams the entire time he was in the store. Considered in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of unarmed robbery.

Defendant next argues that the trial court erroneously rejected his plea and sentence agreement on the second day of trial for the sole reason that it was tardy and interfered with judicial economy. We review a trial court's decision to accept or reject a plea for an abuse of discretion. *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

On the first day of trial, defendant rejected the prosecution's offer of a plea. However, upon the second day of trial, defendant informed the trial court that he wanted to accept the plea offer. The court denied defendant's request, citing docket concerns and its desire for the jury to decide defendant's guilt given that it had heard the majority of the testimony.

A trial court has discretion to reject a plea agreement based on considerations of public interest and proper administration of justice. *People v Wright*, 99 Mich App 801, 822-823; 298 NW2d 857 (1980). In addition, a trial court may consider judicial economy and docket control in determining whether to accept or reject a plea. *People v Austin*, 209 Mich App 564, 567; 531 NW2d 811 (1995), *aff'd* but remanded in part on other grounds *sub nom People v Grove*, 455 Mich 439 (1997). In this case, trial was into its second day and defendant had delayed accepting the plea agreement to that point. It is clear from the trial court's stated reasons that it refused to accept defendant's guilty plea in the interests of judicial economy and docket control. Judicial economy and docket control are proper considerations in determining whether to accept or reject a plea. *Austin, supra*. Under the circumstances presented, we conclude that rejecting defendant's plea and proceeding with trial was not an abuse of discretion.

Next, defendant argues that he was denied his rights to confrontation, compulsory process, and a fair trial when the trial court refused to order the production of a witness from the security company who would have been able to explain how the camera above the cash register worked.

Defendant failed to request that the trial court order the prosecution to produce a witness from the security company until after all of the prosecution's available witnesses had testified even though counsel knew of the witness's existence and relationship to the case well before the

commencement of trial.¹ Defendant waived any right he may have had to the production of this witness by failing to make a timely motion. See *People v Robideau*, 94 Mich App 663, 675-676; 289 NW2d 846 (1980). One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007).

Defendant's final argument is that he was denied the effective assistance of counsel by his attorney's failure to adequately interview and produce for trial a crucial witness. Because defendant failed to move for a new trial or for a *Ginther*² hearing, our review of defendant's claim is limited to errors apparent on the record. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999). To overcome this presumption, the defendant must meet a two-pronged test. The defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland, supra* at 687-688; *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland, supra* at 694; *Pickens, supra* at 303. A defendant has the burden of establishing the factual predicate of his ineffective assistance of counsel claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant assumes that, had an employee from the security company testified, the employee would have testified that additional pictures were taken and withheld. This presumably favorable testimony would have suggested that Williams had withheld photographs and, thus, would have given defendant the opportunity to impeach Williams's credibility. There is nothing but defendant's bare assertion to support the claim that Williams withheld pictures. Whether an employee from the security company would have been able to determine whether pictures were missing from the camera is completely unknown. Accordingly, defendant has failed to establish the factual predicate of his claim. *Id.*

Moreover, even had a witness from the security company testified to how the camera worked, it would not have changed the outcome of the trial, as the evidence presented at trial overwhelmingly pointed towards defendant's guilt. Thus, defendant has not established a reasonable probability that but for counsel's alleged error the result of the proceedings would have been different. *Pickens, supra*.

¹ The prosecution was under no statutory duty to produce this witness. See MCL 767.40a. The security company witness was not a res gestae witness and was not an endorsed witness. And there is no evidence that defendant filed a written request for assistance in locating this witness, as required by MCL 767.40a(5).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Joel P. Hoekstra

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra