STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2009
v	No. 285560 Muskegon Circuit Court
CEDRIC DEWONG ALLEN, JR., Defendant-Appellant.	LC No. 07-0555641-FC

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529; two counts of possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. Because defendant did not suffer ineffective assistance of counsel at trial, the trial court did not commit evidentiary error, sufficient evidence supported defendant's convictions, there was no double jeopardy violation, and defendant's constitutional right to a jury trial was not violated, we affirm.

An armed robbery occurred at approximately 6:25 a.m. on October 23, 2007, at the Mobil Mart on Peck Street in Muskegon Heights, Michigan. Defendant's residence is near the store. Shortly after the store opened, the clerk went to the back of the store to switch on the security cameras when she heard someone enter the store. When the clerk returned to the front counter the assailant pointed a gun at the clerk and told her "give me the money." The clerk gave the assailant the money and he left the store. The store's surveillance camera equipment captured the incident on videotape, and also recorded defendant patronizing the store the night before wearing similar clothing. The store clerk identified defendant as the perpetrator of the crimes based on his physical stature and the two surveillance videotapes. Both videotapes showed a man wearing a dark blue hooded sweatshirt, sweatpants, and black Nike tennis shoes in both videos, although the man's face was covered with a hairnet during the robbery. Police found the hairnet, tennis shoes, gun, and hooded sweatshirt in defendant's room at his residence. Police arrested defendant, and he was charged and convicted. Defendant now appeals as of right.

Defendant first argues that his trial counsel was ineffective. Defendant moved for a new trial on this basis, and the trial court denied his motion. A defendant's right to counsel, guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, includes the right to the effective assistance of counsel. *Strickland v Washington,* 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must establish that trial

counsel's performance was deficient and that this resulted in prejudice to him, i.e., there is a reasonable probability that the result would have been different absent trial counsel's errors. *People v Hoag,* 460 Mich 1, 5-6; 594 NW2d 57 (1999).

Defendant asserts that his trial counsel should have obtained an expert footwear impression witness to testify that the footprints found outside on a path near the store were made by a commonly worn type of shoe, i.e., Nike tennis shoes. This Court defers to trial counsel's judgment regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming the strong presumption. *Id.*; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The decision to call an expert witness is also a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "[T]he failure to call a witness constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant failed to establish that his trial counsel's performance was defective. Our review of the record reflects that defense counsel was aware of the fact that there are expert witnesses who testify regarding footprint evidence, but defense counsel never requested an expert witness to testify on behalf of the defense, and never gave any indication that he wanted one. The prosecutor did not present an expert footprint witness or testimony that the footprint impressions matched defendant's shoes. It is evident from the record that defense counsel's strategy was to point out the flaws in the prosecution's case in order to create reasonable doubt. Defense counsel argued in closing that no scientific evidence linked the footprints to defendant's own Nike shoes; even if Nike shoes made the footprints, such shoes are popular and commonly worn; the footpath was commonly traversed; and because defendant frequented the store, he could have made the footprints the previous night. Defense counsel's decisions are presumed to constitute reasonable trial strategy, and the record does not support that this strategy was either unreasonable or deficient. *Davis, supra* at 368. Moreover, whether the shoes were commonly worn appears to be a matter the jury could decide for itself without expert testimony. See *People v Smith,* 425 Mich 98, 106; 387 NW2d 814 (1986). In any event, defendant has failed to provide this Court with an offer of proof or an affidavit to substantiate his claim that an expert would have testified as defendant purports, and defendant bears the burden of proving the factual predicate for his claim. *Hoag, supra* at 6.

Defendant has also failed to establish that he suffered any prejudice. Defense counsel clearly presented the defense that Nikes were a popular type of shoe to the jury, even if no expert testimony was presented. Defendant was not deprived of a substantial defense. *Dixon, supra* at 398; *Kelly, supra* at 526. The fact that a chosen strategy failed to work does not render defense counsel's performance deficient. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Additionally, considering the other evidence that linked defendant to the commission of the robbery, defendant failed to establish a reasonable probability that the result would have been different if defense counsel had presented expert witness testimony. *Hoag, supra* at 6. We additionally conclude that the trial court did not abuse its discretion, *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008), in denying defendant's request for an evidentiary hearing where he cannot demonstrate that further factual development was necessary to properly consider the issue.

Next, defendant argues that Detective Joe Gasper's testimony improperly invaded the province of the jury when he testified about his observations of defendant's verbal and nonverbal responses during his videotaped interview of defendant. Defendant failed to object during this challenged testimony, although he objected to Gasper's testimony regarding his expertise in body language, such as having a bowed head, an open or closed posture, and eye contact. However, this objection was sustained and that evidence was excluded, and "an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Bulmer (After Remand),* 256 Mich App 33, 35; 662 NW2d 117 (2003), citing *People v Asevedo,* 217 Mich App 393, 398; 551 NW2d 478 (1996). We therefore review this issue for plain error. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"MRE 701 provides that opinion testimony by a lay witness is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or a fact in issue." *People v Smith,* 152 Mich App 756, 764; 394 NW2d 94 (1986). Under MRE 701, "any witness is qualified to testify as to his or her physical observations and opinions formed as a result of these observations." *People v Grisham,* 125 Mich App 280, 286; 335 NW2d 680 (1983). In general, police officers may provide lay opinions about matters that are not overly dependent on scientific, technical, or specialized knowledge. *People v Oliver,* 170 Mich App 38, 49-50; 427 NW2d 898 (1988), mod and remanded on other gds 433 Mich 862 (1989).

Defendant essentially contends that Gasper's testimony was unnecessary because the jury was "as capable as anyone else of reaching a conclusion on certain facts," and his testimony therefore "invade[d] the province of the jury." *People v Drossart,* 99 Mich App 66, 80; 297 NW2d 863 (1980). After reviewing Gasper's testimony, we conclude that Gasper did not tell the jury how to decide the case, and he did not testify regarding his opinion of what law was applicable in defendant's case. See *People v Schumacher,* 276 Mich App 165, 179; 740 NW2d 534 (2007). He also did not express a personal opinion regarding the ultimate issue of the case, i.e., defendant's guilt. *People v Parks,* 57 Mich App 738, 750; 226 NW2d 710 (1975). Rather, the record reflects that Gasper's testimony regarding defendant's reactions and responses to interview questions were rationally based on Gasper's perception of defendant's physical movements and verbal responses as Gasper asked questions and observed defendant during the interview. MRE 701. This testimony was similar to the testimony of the police officer in *Smith, supra* at 764, who expressed an opinion as a lay witness about what he physically observed and reasonable inferences from those observations, i.e., that the defendant stood against the house in an effort to conceal himself. Further, Gasper's observations of defendant nodding his head "yes" or "no" or shrugging his shoulders is not a matter that is "overly dependent on scientific, technical, or specialized knowledge." *Oliver, supra* at 49-50. Gasper merely explained to the jury his observations of defendant's responses to his particular questions. This may have been helpful to the jury because, as Gasper indicated, defendant's responses were "somewhat subtle" and not dramatic, and at times non-existent. MRE 701. Moreover, a police officer is permitted to testify about, and the prosecutor is allowed to comment on, a "defendant's nonverbal conduct and silence" during an interrogation in such circumstances. *People v Rice (On Remand),* 235 Mich App 429, 437; 597 NW2d 843 (1999) (Permitting the police officer's testimony that the defendant looked down, nodded, and cried). See also *People v McReavy,* 436 Mich 197, 205-207, 214; 462 NW2d 1 (1990) ("Defendant's holding of his head in his hands is nonassertive conduct which in itself might not indicate his consciousness of guilt, but which in relation to his

other answers is relevant to the jury's understanding of what defendant in fact said.") Based on this record, defendant has failed to demonstrate that a plain error occurred. *Carines*, *supra* at 763-764.

On appeal, defendant also challenges the sufficiency of the evidence supporting his convictions for armed robbery and felony-firearm, arguing that there was insufficient evidence of his identity as the perpetrator. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987). Identity is always an essential element in a criminal case. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). "Identity may be shown by either direct testimony or circumstantial evidence which gives the jury an abiding conviction to a moral certainty that the accused was the perpetrator of the offense." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). In assessing a witness's identification of a defendant, this Court considers such factors as the witness's opportunity to view the incident, the accuracy of the description, "the nature of the offense and the victim's age, intelligence, and psychological state[,]" and "any idiosyncratic or special features of the defendant." *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000). "[The] positive identification by witnesses may be sufficient to support a conviction of a crime." *Id.*, citing *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992).

We conclude that there was sufficient circumstantial evidence to establish defendant's identity as the robber. *Kern*, *supra* at 409. Viewing the evidence in the light most favorable to the prosecution, *Patterson*, *supra* at 524-525, the record evidence demonstrates that the victim identified defendant by his clothing, stature, and idiosyncratic physical features. She observed during the robbery that defendant was a heavy-set African American male, had "[b]ig, fat" fingers, a double chin, wore a dark blue hooded sweatshirt, pants, and black shoes. At trial she identified the hooded sweatshirt defendant wore during the robbery, the gun police found underneath defendant's mattress, and the hairnet used to cover defendant's face that police found in defendant's bedroom. The victim also identified defendant at trial as the same person in the surveillance video from the night before the robbery, "wearing the same clothes and everything." Defendant admitted that he stored the gun under his mattress and had it for about a month before his November 6, 2007, interview with the police. Police also found two pairs of black Nike tennis shoes in defendant's bedroom. Gasper and another detective viewed the surveillance videos from the robbery and the night before the robbery, and both testified that the individuals in both videos were wearing similar clothing, and Gasper testified that the individuals had the same physical stature. Gasper's interview, viewed favorably to the prosecution, confirmed defendant's identity as the perpetrator. Further, defendant lived near the store, and the police found freshly made footprints along the path between the store and the neighborhood. This identification evidence was sufficient to support defendant's convictions. *Kern*, *supra* at 409. This Court defers to the jury's credibility decisions regarding witness identification testimony. *People v Watson*, 52 Mich App 211, 214; 217 NW2d 121 (1974), remanded on other gds 396 Mich 870 (1976).

Defendant next argues that his convictions for felony-firearm and felon in possession of a firearm violate his constitutional protection against double jeopardy. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); US Const, Am V; Const 1963, art 1, § 15. We conclude that no

double jeopardy violation resulted from defendant's conviction for felony-firearm predicated on his conviction for felon in possession of a firearm. The Michigan Supreme Court and this Court have previously held that the plain language of the felony-firearm statute, MCL 750.227b, does not specifically exempt the offense of felon in possession of a firearm as a predicate felony for a felony-firearm offense, and that the Legislature clearly indicated that it intended that the offense of felon in possession of a firearm may serve as a predicate felony for felony-firearm. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). Defendant argues that Justice Kelly's concurrence in *Calloway*, *supra* at 453-457, should control. However, this Court is bound, under the doctrine of stare decisis, by the majority's decision in *Calloway* and other Supreme Court precedent reaching the same conclusion such as *People v Mitchell*, 456 Mich 693, 697-698; 575 NW2d 283 (1998), unless and until the Supreme Court decides to overrule itself. *People v Tims*, 202 Mich App 335, 340; 508 NW2d 175 (1993), rev'd on other gds 449 Mich 83 (1995). In addition, this Court is also bound by its own decision in *Dillard, supra*. MCR 7.215(C)(2) and MCR 7.215(J)(1).

In defendant's final claim of error on appeal, he argues that his Sixth Amendment right to a jury trial was violated because the trial court based his sentence on facts not determined by a jury beyond a reasonable doubt. US Const, Am VI. Defendant concedes that the Michigan Supreme Court held in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), was not applicable to Michigan's indeterminate sentencing scheme, and he raises this issue on appeal only to preserve the federal issue. The trial court sentenced defendant within the recommended minimum sentence range of the legislative guidelines, and this sentencing issue is meritless under current Michigan Supreme Court precedent. *Drohan*, *supra* at 164 ("As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict.") This Court is bound by stare decisis to follow the Supreme Court precedent set forth in *Drohan*. *Tims*, *supra* at 340.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens