

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

October 6, 2009

Plaintiff-Appellee,

v

No. 286330

Oakland Circuit Court

LC No. 2007-213319-FC

DENNIS JAMES RUTHERFORD,

Defendant-Appellant.

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of armed robbery, MCL 750.529. Defendant was sentenced to 27 months to 240 months imprisonment. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At about 10:30 p.m. on December 26, 2006, Christine Wooster arrived at River's Edge Apartments in Waterford, Michigan planning to visit a friend. Wooster exited her vehicle carrying a purse and a cell phone in her hand. She took no more than three steps before a man placed a gun to her head and demanded her belongings. Wooster refused his demand. The man grabbed Wooster's purse and cell phone and fled down the exterior hallway of the apartment building, which according to Wooster was artificially lit. Wooster also testified that the parking lot where the robbery occurred was lit by streetlights as well as light coming from the apartments. Wooster ran to her friend's apartment and called the police. Police arrived and took Wooster's statement, which included a description of the robber.

At trial, Wooster testified the whole incident took between 30 seconds to a minute, and that she looked at the man's face for that time. At the preliminary examination, Wooster stated that she had black friends and had frequent contact with black people at her job as a waitress and that she had no difficulty making distinctions between black people in terms of complexion, physical features, etc.

Lieutenant Palombo met with Wooster in early January to discuss the robbery and to obtain another description of the robber. At this point, the police had no one in custody for the robbery. Palombo testified that the description of the robber Wooster gave during the meeting was consistent with her description of him at trial.

In the latter part of January 2007 or early February 2007, Palombo met again with Wooster to show her a photo lineup. The lineup did not include a photo of defendant. Wooster did not identify anyone in the lineup. A few days later, Palombo met with Wooster to show her a second photo lineup, which included a photo of defendant. Wooster immediately picked defendant's photo. Palombo asked Wooster if she was sure and she said "yes." Palombo showed Wooster a black-and-white version of the photo lineup and asked her to be careful and look closely; Wooster again selected defendant's photo and said, "Without question, that's the guy." At the preliminary examination, Wooster identified defendant as the robber and again at trial. At trial, Wooster testified that she had no doubt that defendant was the individual who had robbed her. Wooster testified that defendant's nose and eyes had a distinct appearance.

Defendant went to the police station on January 16, 2007, at Palombo's request. Defendant signed a form waiving his Miranda rights and denied any involvement in the robbery.

At trial, defendant testified that he was 5' 11", 25 years old, weighed 245 pounds, and wore do-rags "from time to time." Defendant said that he and his wife separated in September 2006, and she moved to River's Edge Apartments. Defendant testified that he was with his wife and children at his wife's apartment in the River's Edge Apartment complex at the time of the robbery, but again denied any involvement in the robbery.

During his investigation, Palombo testified that he briefly spoke with defendant's wife by phone and asked her if he could come meet with her in person. Palombo attempted unsuccessfully to meet with her on several occasions.

The Sixth Amendment of the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, §§ 17 and 20, guarantee a defendant a right to counsel in a criminal proceeding. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The right to counsel is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). A defendant has the burden of overcoming a "strong presumption that counsel used sound trial strategy." *People v Plummer*, 229 Mich App 293, 307-308; 581 NW2d 753 (1998). The fact that counsel's strategy was unsuccessful does not establish that counsel was ineffective. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). To establish a claim of ineffective assistance of counsel, a defendant must first show that his attorney's "performance fell below an objective standard of reasonableness." *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). Second, the defendant must show that "but for counsel's error there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original).¹

¹ Defendant moved in this Court to remand this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). This Court denied the motion. Therefore, our review of defendant's claim of ineffective assistance is limited to the facts contained in the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Defendant argues that he was deprived of the effective assistance of counsel when his attorney failed to present expert testimony regarding the unreliability of eyewitness identification, and as a consequence, failed to adequately raise the defense of misidentification. Defendant argues that the only effective way to undermine the credibility of an eyewitness's identification is by presenting the empirical data and analysis that, according to defendant, only an expert can provide.

An attorney's decision regarding whether to call or question witnesses is presumed to be a matter of trial strategy and should not be second-guessed with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). This is true even with respect to experts in the field of human memory and perception, *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999), despite the notoriously checkered history of eyewitness identification. See *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). An attorney's "failure to call witnesses only 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, 526-527; 465 NW2d 569 (1990). In this case, the prosecution's case depended heavily on Wooster's identification of defendant. If the jury believed that Wooster had misidentified defendant, the prosecution's case against defendant would have almost certainly crumbled given that the rest of the case rested on ambiguous circumstantial evidence. The issue before us is whether counsel sufficiently raised the defense of misidentification at trial without expert testimony. Counsel's opening statement directed the jury's attention to the issue of identification by acknowledging that Wooster was in fact robbed, but stressing that defendant was not the culprit. During his cross-examination, counsel highlighted the short amount of time that Wooster actually observed the robber, that she had never seen the robber before, that she noticed nothing distinctive about the robber's voice, that the robbery was shocking and upsetting for Wooster, and that her identification of defendant in the photo lineup was two weeks after the robbery. In closing, counsel summarized the testimony in an attempt to discredit Wooster's identification and the prosecution's case:

To the extent that the prosecutor has indicated that this is a case involving identification, I agree and I told you that in the opening statement. I don't agree that she's proven that it's my client who is involved in this. Christine Wooster obviously came in and indicated she was robbed, we never had any issue with that. The Prosecutor wants you to make a couple leaps of faith and jump from that robbery to the fact of finding guilt and that's what we have the issue with.

* * *

Nowhere, anywhere in my notes did I hear any testimony about the lighting in the area of the parking lot. I ask you to review your notes, you make the decision....Christine Wooster, she indicated that it was 10:30 p.m. at night the day after Christmas and that she got out of her car and she took a few steps and a person came up to her from her right and put a gun up near the top of her head in the temple area and the person used the words give me your shit and then there was a struggle for her purse.

* * *

Ms. Wooster, she said that she thinks it definitely happened for 30 seconds. Did I sit there and beat her up over it? No, I mean there is no doubt that any person in this position is going to be horrified, they are going to be terrified absolutely.... All of you can apply your common sense and think about the amount of time, it probably was a lot shorter, it might have seemed like three days to her when you're involved in the situation, chances are it was probably a lot shorter.

Counsel then focused on the frantic nature of the robbery, the likelihood that Wooster was eager to end her involvement when she identified defendant in the lineup, and the suggestiveness of the photo lineup itself:

[Wooster] did say she had never been held up before fortunately, but do you think she was focused on the person's face or is human nature going to be you're going to focus on the gun and then there is a struggle over the purse and then you're going to focus on the strap of the purse and holding onto that. That's most likely what occurred here. The reason I say that is, because at a point in time Dennis Rutherford became the focus of the investigation by Detective Palombo and you heard about two lineups. We heard that Christine went in on about January 4th or January 5th, so roughly nine to 10 days after the incident, was shown a line up and didn't pick anybody out. As the prosecutor said, she was shaken, she was horrified, this was a terrible situation. Absolutely, she wants someone held accountable, you can't blame her for that, but you've got to hold the right person accountable. So what happens, between January 4th or 5th and January 9th, which was the second line up, Dennis Rutherford becomes the focus of the investigation based on what occurred on January 7th.... Who created those lineups? This gentleman and where did he put—does anyone notice of any interest where he puts Dennis' picture? The top left, number one. He creates the line ups, that's the man, that's the focus of his investigation and how are we all taught when we are first taught to read, you read left to right, top to bottom. That's the first picture that she's going to look at. He's directing her in the direction that he wants her to go. He doesn't have to say anything, but it's evident that's where he wants her to go and that's why he puts Dennis in picture number one.... The bottom line is, he wanted Christine to focus on that picture, that's where he wanted her to go. That's why he puts—why else would you put that picture in picture number one when you created it?

Finally, counsel directly attacked Wooster's identification: “[Wooster] made an identification. We have issues with the credibility of her identification and I think again I'm going to ask that you consider the situation she was in and the credibility of that identification....”

In light of counsel's efforts throughout the trial to cast doubt on Wooster's identification of defendant, we find that counsel adequately raised the misidentification defense. Thus, we hold that counsel's failure to procure expert testimony on the subject of eyewitness identification did not deprive defendant of the effective assistance of counsel.

Our holding here is consistent with previous decisions of this Court. In *Cooper*, this Court rejected a similar claim of ineffective assistance of counsel based on the attorney's failure to present expert witness testimony regarding the fallibility of eyewitness identification. *Cooper*,

supra at 658. The *Cooper* Court explained that the attorney “may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate.” *Id.* In this case, counsel may have similarly feared that the jury would perceive expert testimony regarding human memory and perception as dilatory and diversionary. Also, like counsel here, the attorney in *Cooper* had highlighted various discrepancies and bases for regarding the eyewitness’s identification as questionable during cross-examination. *Id.*

Moreover, it is arguable whether the trial court would have permitted an expert to testify had counsel sought one to do so. First, the expert’s testimony must contain knowledge that is “peculiar to experts rather than to lay persons.” *Green v Jerome-Duncan Ford, Inc.*, 195 Mich App 493, 498; 491 NW2d 243 (1992). *Cooper* suggests that the proposition that human perception and memory can be inaccurate is common sense, *Cooper*, *supra* at 658. Second, defendant was indigent at the time of trial and was not entitled to the appointment of an expert at the public’s expense unless defendant could not “proceed safely to trial” without the expert. *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1997). The *Carson* Court held that the trial court did not abuse its discretion in refusing to appoint the defendant an eyewitness identification expert because defendant was able to proceed to trial safely. *Id.* Similar to the attorney in *Carson*, Lynch repeatedly stressed to the jury that defendant was not the robber and consistently questioned the reliability of Wooster’s identification. Also, in his closing remarks, counsel attempted to cast doubt on the lineup’s validity by arguing it was presented to Wooster in a suggestive manner. See also *People v Hill*, 84 Mich App 90; 269 NW2d 492 (1978) (holding that the trial court had not committed reversible error when it had refused to allow expert testimony regarding human perception when the trial court had not foreclosed the defense counsel’s opportunity to raise a misidentification defense in closing arguments). Thus, in light of counsel’s efforts at trial, defendant proceeded to trial safely, even without expert testimony.

Defendant next argues that he was deprived of the effective assistance of counsel because counsel failed to request a jury instruction that highlighted the importance of Wooster’s identification in the prosecution’s case against him. Defendant argues that CJI2d 7.8 would have placed the appropriate emphasis on the issue of identification in this case. Because defendant failed to request the instruction or object to its absence in the trial court, our review of the issue is limited to preventing manifest injustice. *People v Rice*, 235 Mich App 429, 443; 597 NW2d 843 (1999). To result in manifest injustice, the omitted instruction must pertain to a “basic and controlling issue in the case.” *People v Hall*, 77 Mich App 456, 462; 258 NW2d 517 (1977). In the case at hand, the prosecution’s case is founded on Wooster’s identification of defendant in a photo lineup and the pertinent part of CJI2d 7.8 states:

- (1) One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.
- (2) In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness’s state of mind at that time.

(3) Also, think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.

(4) You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with her identification of the defendant during trial.

(5) You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

The identification of defendant is a basic issue in this case, and CJI2d 7.8 clearly addresses it. However, no error occurs when the jury instruction actually given "fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant." *People v Federico*, 146 Mich App 776, 785; 381 NW2d 819 (1985). In this case, the trial judge instructed the jury consistent with CIJ2d 3.6, which deals with the credibility of witnesses:

As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony. In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you may have based on the race, gender, or national origin of the witness. There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions: Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness? Did the witness seem to have a good memory? Did the witness seem to make an honest effort to tell the truth or did the witness seem to evade the questions or argue with the lawyers? Does the witness's age and maturity affect how you judge his or her testimony? Does the witness have any bias, prejudice, or personal interest in how this case is decided? Have there been any promises, threats, suggestions, or other influences that affected how the witness testified? In general, does the witness have any special reason to tell the truth, or any special reason to lie? All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case? Sometimes the testimony of witnesses will not agree, When you decide which testimony to accept, you should think about whether the disagreement involves something important or not, whether you think someone is lying or simply mistaken. People see and hear things differently, and witnesses may testify honestly but simply be wrong about what they thought they saw or remembered. It is also a good idea to think about which testimony agrees best with the other evidence in the case. However, you may conclude that a witness deliberately lied about something that is important to

how you decide the case, if so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.

The trial court's instruction directed the jury's attention to various factors that influence a witness's perception and memory such as the clarity with which the witness saw or heard the event; how long they witnessed the event for; whether they were distracted during that time; the quality of their memory; and most notably, that people perceive things differently and that a person may honestly believe they witnessed something when, in fact, they did not. These factors in essence make up ¶ 2 of CJ12d 7.8. Counsel emphasized other pertinent sections of CJ12d 7.8 throughout the trial. In his opening statement and closing argument, counsel captured the gist of ¶ 1 by emphasizing that the case boiled down to one of identification and that the prosecution carried the burden of proof. Counsel also touched on ¶ 3 by stressing that Wooster identified defendant two weeks after the robbery and suggested that Wooster's eagerness to end her involvement in the case caused her to hastily pick defendant. Furthermore, parts of ¶¶ 3, 4, and 5 would have arguably hurt defendant's case. Paragraph 3 addresses the degree of confidence with which the witness made the identification; Wooster testified that she had no doubt that defendant was the individual who had robbed her. Paragraph 4 addresses whether the witness failed at any point to identify the defendant or give inconsistent descriptions of him; Wooster never failed to identify defendant and her descriptions of the robber before and during trial were consistent. Finally, ¶ 5 instructs the jury that it may convict the defendant on identification testimony alone, the very point that defendant here argues is problematic.

Because the jury instruction given by the trial court was arguably more favorable to defendant than CJ12d 7.8, we hold that no manifest injustice occurred. The instructions as given adequately addressed the issue of identification and protected defendant's rights.

Defendant next argues that the trial court erred in ordering him to pay \$1610 in restitution for the stolen cell phone and purse, which, according to Wooster, contained a ring and a necklace.

Generally, a trial court's order of restitution is reviewed for an abuse of discretion, *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003), but because defendant raises this issue for the first time on appeal, we review the claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Crime Victims Rights Act, MCL 780.751 *et seq.*, was "intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders." *People v Peters*, 449 Mich 515, 526; 537 NW2d 160 (1995). When a court imposes a sentence, it shall order that "the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction...." MCL 780.766(2). The restitution amount ordered by the court should be based upon the evidence. *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995). In determining the amount of restitution to be ordered, the court may direct the probation department to obtain information about the extent of the victim's loss and include that information in the presentence report. MCL 780.767(2). "The court is entitled to rely on the amount recommended in the presentence investigation report 'which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.'" *People v*

Gahan, 456 Mich 264, 276; 571 NW2d 503 (1997) (quoting *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997)). If the defendant disputes the amount of restitution, the prosecutor must prove the amount of the victim's loss by a preponderance of the evidence. MCL 780.767(4).

Our review of the record suggests that the trial court based the restitution sum of \$1610 on the presentence report which valued Wooster's cell phone at \$250, Wooster's purse itself at \$60, the ring at \$900, and the necklace at \$400. Because defendant did not dispute the amount of restitution in the trial court, the trial court did not commit plain error when it relied on the amount of restitution recommended in the presentence report.

Lastly, defendant argues that he was denied the effective assistance of counsel when counsel failed to challenge the restitution order. Defendant argues that counsel's failure to object was unreasonable because the police report and Wooster's testimony at trial did not mention the jewelry. However statements made by the victim are supported by the record and the trial court accordingly relied on the statements of the victim. Our examination of the record leads us to conclude that defense counsel's failure to object to the restitution information contained in the presentence investigation report did not lead to plain error. Accordingly we affirm the conviction and sentence of defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello