

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEQUAN IAHSELLE BUCHANAN,

Defendant-Appellant.

UNPUBLISHED

November 19, 2009

No. 286322

Muskegon Circuit Court

LC No. 07-055336-FC

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Basic Facts

On the evening of June 20, 2007, Steven Tucker drove an acquaintance, Johna Hardy, to a public park because she had to use the bathroom. Tucker parked his truck and waited for Hardy in the truck. As he was waiting, the passenger side door opened, but when he looked over it was not Hardy, but an unmasked man in a dark shirt. The man pulled out a gun, pointed it at Tucker, and demanded money. Another unmasked male wearing a white shirt, allegedly defendant, entered the vehicle through the back passenger door and began rummaging through Tucker's things. Tucker observed that defendant had tattoos on the right inside of his forearm. After taking Tucker's belongings, including two luggage-type bags, the two men ran away on foot. As defendant was fleeing, the duffle bag he was carrying caught on a wall and ripped open. Defendant stopped to pick up the items and Tucker was able to observe defendant's face. Hardy never returned to the truck¹ and Tucker went across the street to seek help. Two days after the robbery, Tucker identified the man wearing the dark shirt in a photo lineup. Tucker was never asked to identify defendant in a photo lineup.

Defendant was apprehended and questioned. During police interviews, defendant denied being involved in the armed robbery but instead insisted that Hardy and the other man, Donovan

¹ Hardy testified at trial that she set Tucker up for the robbery because he had refused to post bond for her on an unrelated matter.

Convington, had picked him up and he had gone to the Walmart with them. Nonetheless, defendant was charged and the matter went to trial.

At trial, Hardy testified contrary to defendant's version of events. She identified defendant as being one of the two men who committed the robbery. She also testified that they had all met at a house after the robbery and had gone to the Walmart together where they bought electronics using Tucker's credit card. During Tucker's testimony, he was shown a video surveillance from Walmart, which showed two men and a woman purchasing electronics. Tucker identified the individuals on the video as Hardy, his acquaintance, and the two men as the robbers. Tucker also identified the tattoos on defendant's forearm as the same tattoos he observed during the robbery.

During trial, the prosecution elicited testimony from detectives involved in the case regarding their investigation. During re-direct examination of detective Boterenbrood, the following colloquy occurred:

Prosecutor. Based on [the evidence that you knew of] and your interview of the defendant, in your opinion was he telling the truth?

Detective. No.

Defense Counsel. Your honor, I'll have to object. Now he's getting to the bolstering of this credible witness about whether or not he can determine whether or not he can determine [sic] what's going on. I think it's inappropriate.

* * *

The Court. Sustained as it's currently phrased. You're making him essentially be a psychologist. If you rephrase it, I think we can get the answer a different way.

* * *

Prosecutor. Based on what you knew, were you satisfied with the defendant's answer that he wasn't involved?

Detective. No.

Prosecutor. In fact, I assume that's why you interviewed him for quite some time?

Detective. Yes.

Prosecutor. Did you ever get satisfied with his answers to that question?

Detective. No.

The prosecution elicited similar testimony from detective Leuker, as follows:

Prosecutor. [W]ere you able to obtain any kind of statement that [defendant] was involved?

Detective. He said that he was not involved. He said that he was picked up at his home and brought to the walmart.

Prosecutor. [W]ere you satisfied with that response?

Detective. No, I obviously believed he wasn't telling the truth.

Defendant was convicted and this appeal followed.

II. Opinion Testimony

Defendant first argues that the trial court erred by permitting the prosecution to elicit testimony from the two police detectives regarding the truthfulness of defendant. We cannot agree. We review evidentiary issues for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). And, to the extent that defendant failed to object to the testimony, this issue is unpreserved and our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury.” *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). A witness cannot be used as a “human lie detector” to provide “unwarranted reinforcement” to the truth or falsity of the allegations. See *People v Izzo*, 90 Mich App 727, 730; 282 NW2d 10 (1979). Because this issue also raises matters of prosecutorial misconduct, our analysis focuses not only on whether the questions elicited opinion testimony, but also on whether the prosecutor asked the questions in good faith. *Dobek*, *supra* at 70-71.

After reviewing the record, it is our view that the prosecution's questions, following defendant's initial objection, were proper.² The prosecution raised questions regarding whether the detectives were “satisfied” with defendant's interview, given what the detectives knew at that point in the investigation. These questions were raised only after defense counsel elicited testimony on cross-examination regarding the allegedly deceptive interview tactics the detectives used when interviewing defendant. Obviously, defense counsel's tactic was to discredit the detectives by highlighting their deceptive practices. This strategy, however, invited rehabilitation of the witnesses on re-direct examination, which the prosecution accomplished by

² We agree that the prosecution's initial question, to which defendant objected, was improper. However, there was no error warranting relief on appeal. The trial court sustained defendant's objection and, although the witness answered the question before counsel objected, counsel did not ask for a curative instruction. We simply fail to see how defendant can complain of the trial court's supposed error on appeal when he prevailed on the objection below.

asking the detectives why they proceeded with the investigation in the manner that they did. There was nothing improper about this line of questioning; it did not require the witnesses to testify regarding defendant's veracity, somehow bolster their own truthfulness, or otherwise take the question of witness credibility away from the jury. Rather, viewed in context, the testimony merely explained why the detectives proceeded with their investigation as they did.³

Further, even assuming the questions and responses were impermissible, we would conclude that reversal is not required as defendant cannot establish that he was prejudiced. Overwhelming evidence of defendant's guilt was presented at trial, including Tucker's identification of defendant and Hardy's testimony regarding defendant's participation. Thus, any error related to the complained of testimony was harmless.

III. Standard 4 Brief

Defendant next argues that defense counsel was ineffective based on multiple alleged errors. Specifically, defendant contends that counsel was ineffective for failing to conduct a pretrial investigation, for failing to interview certain witnesses, and for failing to file certain pretrial motions. We disagree. Because no evidentiary hearing was ever held on this matter, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on his claim, defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that this was so prejudicial that he was denied a fair trial, such that the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Further, defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Unger, supra* at 242.

A. Pretrial Investigation

Defendant's first point of contention is without factual support on the record. He contends that counsel failed to become familiar with the case and conducted no pretrial investigation. Defendant, however, has failed to identify any evidence on the record in support of his position, nor has he explained how this alleged conduct prejudiced his defense. Thus, we consider this portion of defendant's argument abandoned. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

B. Failure to Interview Witnesses

Defendant next asserts that counsel failed to interview the officers who took statements from defendant on the night in question. According to defendant, had their testimony been provided at trial, their accounts would have discredited Tucker's testimony. Again, defendant has not supported his assertion with evidence on the record. But, even if we were to assume

³ Moreover, we also conclude that defendant's ineffective assistance of counsel claim, as it relates to defense counsel's failure to object to the complained of line of questioning and testimony, necessarily fails. Counsel cannot be ineffective for failing to raise a meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

these allegations to be true, this argument would nonetheless fail. Had these supposed officers testified in accord with defendant's allegations, their testimonies would nonetheless fail to create a substantial defense. See *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) ("A substantial defense is one that might have made a difference in the outcome of the trial.") (citation omitted). Rather, their testimonies would have merely weakened the victim's credibility. Thus, we cannot conclude that but for this supposed error the outcome of the trial would have been different. Thus, there is no merit to this argument.

C. Pretrial Motions

Lastly, defendant states that counsel was ineffective for failing to move to suppress any post arrest statements and for failing to move to suppress Tucker's in-court identification. We disagree. With regard to the former, defendant has failed to properly brief the merits of this claim or supply any factual support and, thus, we consider the argument abandoned. *Matuszak*, *supra* at 59.

As to the latter, defendant's position is meritless because the in-court identification was proper. It is certainly true that an unduly suggestive pretrial identification procedure can taint a subsequent in-court identification such that the witness will be precluded from identifying a defendant in court absent a finding of an "independent basis." *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). However, there is no indication on the record (and defendant has not pointed to any such indication) that Tucker's in-court identification was tainted by an impermissibly suggestive pretrial identification procedure. Tucker saw two men enter his vehicle and had a chance to observe them during the robbery. Tucker observed a unique tattoo on defendant's forearm and was able to view defendant's face during the robbery and when defendant fled. The police never showed Tucker a photographic lineup including defendant, but Tucker identified defendant, along with Covington and Hardy, on the Walmart surveillance tape at trial.

We fail to see anything impermissibly suggestive about this lack of a pretrial identification process that would give rise to a substantial likelihood of misidentification. The fact that defendant did not first identify defendant in a photographic lineup does not render the in-court identification inadmissible, as defendant suggests. Rather, it only raises a credibility issue for the trier of fact to determine. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995). Thus, because no unduly suggestive identification procedure was used and the in-court identification was proper, it would have been futile for counsel to move to suppress the in-court identification. Counsel cannot be ineffective for failing to file a meritless motion. See *Goodin*, *supra* at 433.

Accordingly, counsel's action were not objectively unreasonable and defendant's claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly