STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2010
v	No. 285028 Wayne Circuit Court
JEFFREY A. BAKER II, Defendant-Appellant.	LC No. 07-014286-FC

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f(2), carrying a concealed weapon ("CCW"), MCL 750.227(2), third-degree fleeing or eluding a police officer, MCL 750.479a(3), and possession of a firearm during the commission of a felony (second offense), MCL 750.227b(1). He was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of 315 to 720 months for each armed robbery conviction, and five to ten years each for the felon in possession, CCW, and fleeing or eluding convictions, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the robbery of a Family Dollar store in Detroit, and a subsequent police chase that ended when the vehicle defendant was driving crashed into a house.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to establish his identity as the person who robbed the Family Dollar store. We disagree.

The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime charged proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The elements of a crime may be satisfied by circumstantial evidence and reasonable inferences arising from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as the perpetrator beyond a reasonable doubt. Two store employees identified defendant as the robber. The jury resolved the issue of the reliability of the testimony in favor of the prosecution despite the fact that defendant attempted to conceal his identity by wearing a bandana to cover portions of his face. *Vaughn, supra*. The evidence indicated that the robber wore a blue and white striped railroad-type jumpsuit. When a police officer observed defendant fleeing from his car, he was carrying the same kind of jumpsuit. The store robber was also armed with a gun and a similar type gun was found inside defendant's vehicle. The victims testified that the robber also wore a black or navy blue knit hat, black gloves, and a blue and white bandana on his face. A pair of brown work gloves, a blue knit hat, and a blue and white bandana, folded like a mask, were found on the floorboard of defendant's car. The robber took three Family Dollar bags containing cash. When defendant fled from his car, he was carrying three Family Dollar bags that each contained cash. After leaving the store, the robber proceeded south on Woodingham Drive in a black Trailblazer. Shortly after the robbery, the police spotted a black Trailblazer heading south on Woodingham Drive, which defendant was driving. Further, defendant fled from the police, and then fled from his vehicle after it crashed into a house, which was evidence of his consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Defendant argues that the evidence could not support a finding that he was the robber because it would not have been possible to remove the jumpsuit while driving. Whether it would have been possible to remove the jumpsuit inside the vehicle was a factual question for the jury to resolve. Further, the jury could have found that defendant had time to remove the jumpsuit before entering the vehicle.

II. Eyewitness Identification

Next, defendant argues that the victims' identifications of him at the preliminary examination were the result of an unduly suggestive procedure, and there was no independent basis for their identifications to permit their identification testimony at trial. We disagree.

Due process protects an accused from "the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). An identification procedure violates a defendant's right to due process "when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); see also *People v Winters*, 225 Mich App 718, 725; 571 NW2d 764 (1997). If an identification procedure is found to be impermissibly suggestive, a subsequent in-court identification by the same witness is inadmissible unless the prosecutor can show, by clear and convincing evidence, that the witness's in-court identification "had an independent basis."[1] *Gray, supra* at 114-115.

[1] "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the 'totality of the circumstances.'" *Gray, supra* at 115 (citation omitted).

Unfortunately, the three identification line-ups scheduled prior to the preliminary examination did not occur apparently due to the unavailability of counsel on two occasions and the unavailability of a witness on one occasion. Therefore, we do not have record evidence to determine whether there was an independent basis for the identification. Nonetheless, this identification issue does not provide defendant with appellate relief. As discussed previously, there was overwhelming circumstantial evidence linking defendant to the robbery, independent from the victims' identifications. Defendant was apprehended shortly after the offense while driving the same type of vehicle used by the robber, and the store's money bags and clothing matching the description of that worn by the robber was found in his possession. In addition, because defendant was charged as an aider and abettor, it is immaterial whether he acted as the getaway driver or the robber who entered the store. Thus, even if the preliminary examination identifications could be considered unduly suggestive, any error was harmless because, considering the other overwhelming evidence linking defendant to the robbery, there is no indication that the outcome of trial would have been different even if neither victim had been able to identify defendant. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

III. Double Jeopardy

Next, defendant argues that his convictions and sentences for two counts of armed robbery violate his double jeopardy protections because the offense involved the robbery of a single store. We disagree.

Whether double jeopardy applies is a question of law that is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). Because defendant did not raise this double jeopardy issue below, it is unpreserved. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The appropriate unit of prosecution for robbery is the person assaulted and robbed. *People v Rodgers*, 248 Mich App 702, 712; 645 NW2d 294 (2001). The evidence showed that defendant threatened two different store employees with a gun, and that he took one bag of money from one employee and two bags of money from the other employee. Both employees had a superior right to possession of the money than defendant. See *id*. at 707, 712. Under these circumstances, defendant was appropriately convicted of two counts of armed robbery. *People v Wakeford*, 418 Mich 95, 110-114; 341 NW2d 68 (1983). There was no double jeopardy violation. *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253 (2002).

IV. Defendant's Standard 4 Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. The 14-Day Rule

Defendant first argues that the trial court erred when it denied, on the first day of trial, his motion to dismiss the charges because his preliminary examination was not held within 14 days of his arraignment, contrary to MCL 766.4. We disagree.

Questions of statutory interpretation are reviewed de novo. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008). Whether there has been a waiver of a nonconstitutional statutory right is a mixed question of law and fact. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). "The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact." *Id*.

MCL 766.4 provides that a preliminary examination must be scheduled no more than 14 days after a defendant is arraigned. However, MCL 766.7 provides that a preliminary examination may be adjourned for good cause shown. In this case, defendant was arraigned on July 13, 2007, and his preliminary examination was timely scheduled for July 25, 2007. On that date, however, defense counsel asked the court to adjourn the preliminary examination so that a lineup could be arranged. The prosecutor opposed defendant's request, expressing that she was ready to proceed and that her case did not depend on an eyewitness identification. Without objection by defendant, the district court granted defense counsel's request and specifically stated, "There will be a waiver of the 14 days."

There is no constitutional right to a preliminary examination. *People v Jones*, 195 Mich App 65, 66; 489 NW2d 106 (1992). Therefore, defendant's waiver need only be voluntary, not knowing and intelligent. *People v Jones (After Remand)*, 197 Mich App 76, 80; 495 NW2d 159 (1992). Here, the record shows a voluntary waiver of the 14-day rule to accommodate defense counsel's request for a lineup. Further, because defendant failed to raise the 14-day issue before his preliminary examination was held, dismissal on this basis is precluded. *People v Crawford*, 429 Mich 151, 157; 414 NW2d 360 (1987).

B. Prosecutorial Misconduct

Defendant next argues that misconduct by the prosecutor denied him a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and any challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Unpreserved claims of misconduct are reviewed for plain error affecting a defendant's substantial rights. *Carines*, *supra* at 763-764.

1. Exculpatory Materials

Defendant first argues that the prosecutor committed misconduct and violated his right to due process by failing to produce the store surveillance video or tapes of 911 calls, and by allowing the seized jumpsuit to be destroyed. We disagree.

Under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), "[a] criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). "This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt." *Id*. at 281. "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the

evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Id*. at 281-282. Further, failure to preserve exculpatory material does not constitute a denial of due process unless the defendant can show that the police acted in bad faith. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

In this case, the record discloses that the prosecution never possessed the store surveillance video. Instead, only still photos were provided by the store, copies of which were provided to defendant. Thus, the prosecution did not withhold evidence in its possession. Further, there is no basis for concluding that any surveillance video would have been favorable to defendant. The record also does not disclose what efforts, if any, defendant made to obtain a copy of the surveillance video from the store. Defendant has not shown that he could not have obtained the video himself though reasonable diligence through a subpoena or court order directed at the store. For these reasons, defendant has failed to show any misconduct by the prosecution, or that his due process rights were violated.

The record indicates that a request for the 911 tapes was timely made to the city, but no response was ever received and the tapes were later destroyed after 90 days when the police failed to follow up on the initial request. The trial court found that the tapes were not destroyed in bad faith. The court held that, because the prosecution never possessed the tapes, there was nothing for it to disclose. Thus, there was no misconduct. Further, there is no basis for concluding that the tapes would have been favorable to defendant, let alone exculpatory. On appeal, defendant has submitted transcripts that he received pursuant to a Freedom of Information Act request after his trial. A review of those documents indicates that they are transcripts of police communications made in response to the 911 calls. The information reported in the transcripts is consistent with the testimony at trial, and provides no basis for concluding that the 911 tapes would have been exculpatory. Accordingly, there was no due process violation.

Lastly, testimony at trial indicated that the jumpsuit found in defendant's possession when he was apprehended was seized by the police, but was later destroyed when a property officer inadvertently included it on a list of property to be destroyed. However, a photograph of the jumpsuit was taken and was introduced into evidence at trial. Defendant has failed to show that the jumpsuit was exculpatory, or was destroyed in bad faith. The fact that a photograph of the jumpsuit was taken and preserved negates any inference of bad faith. Further, while defendant claims that the jumpsuit was too small for him, the jury was able to view a photograph of the jumpsuit to assist it in making that determination. In addition, even if defendant was not the robber who wore the jumpsuit, the jury was instructed on an aiding and abetting theory, thereby enabling it to find defendant guilty even if he acted only as a getaway driver. Thus, once again, defendant has not established either misconduct by the prosecutor or a due process violation.

2. Perjured Testimony

Defendant next argues that the prosecutor committed misconduct by presenting perjured testimony concerning the 911 tapes, and by presenting the victims' testimony that they were able

to recognize defendant by his eyes. Defendant also argues that Officers Kopp and Townsend lied when they claimed that there was no dashboard camera in their squad car.

A prosecutor may not knowingly use false testimony, and must report and correct perjury committed by a government witness when it occurs. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *Lester*, *supra* at 277. However, the fact that certain testimony may be contradicted by other witnesses does not compel the prosecutor to disbelieve her own witnesses and correct their testimony. *Lester*, *supra* at 278-279.

In this case, defendant has not presented any basis for concluding that the police investigator lied when he stated that he timely requested the 911 tapes and neglected to follow up when he did not receive a response. Further, the booking photographs that defendant has submitted with his brief on appeal clearly show that, contrary to defendant's representations in his brief, he had a mustache and a goatee at the time of his arrest. In addition, the officers' testimony that their police vehicle was not equipped with a camera is supported by a vehicle inventory sheet, which was produced at defendant's request. Thus, defendant has not established that any witness provided false testimony, let alone that it was knowingly presented by the prosecutor.[2]

3. Closing Argument

We find no merit to defendant's unpreserved argument that the prosecutor committed misconduct by stating during closing argument that defendant's flight demonstrated his consciousness of guilt. The remarks were supported by the evidence at trial and accurately reflected the law. *Unger*, *supra*. Thus, there was no plain error. Further, the trial court protected defendant's substantial rights when it instructed the jury on the limited role of flight evidence.

C. Ineffective Assistance of Counsel

In his last three issues, defendant argues that his three defense attorneys were ineffective. We disagree.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she

[2] Defendant also alleged that the police officers did not observe his commission of a traffic offense. The credibility of the officers' testimony was resolved by the jury. *Vaughn*, *supra*. In any event, the police bulletin advising officers of the commission of a felony with a description of the vehicle and the escape route provided a sufficient basis for the stop. See *People v Coward*, 111 Mich App 55, 61; 315 NW2d 144 (1981).

was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

1. Identification

Defendant argues that his attorneys (Larry Polk and Brian Gagniuk) were ineffective for failing to move to suppress the victims' identifications of him at the preliminary examination. As previously discussed, defendant's claim that the identifications were unduly suggestive is without merit. An attorney is not ineffective for failing to file a meritless motion. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Further, defendant was not prejudiced by this alleged deficiency because there was ample other evidence linking defendant to the charged crimes independent of the victims' identifications.

2. 180-Day Rule

Defendant argues that the trial court abused its discretion in allowing Polk to withdraw, which the court found resulted in a waiver of the 180-day rule. Defendant also argues that Polk was ineffective for withdrawing from the case, thereby causing a violation of the 180-day rule.

The record discloses that Polk moved to withdraw due to a breakdown in communications with defendant after defendant filed a grievance against him. The trial court found that withdrawal was appropriate "because of defendant's conduct," which thereby tolled the 180-day rule. Defendant cannot now complain that it was improper to allow Polk to withdraw, which by necessity required trial to be delayed to enable a new attorney to be appointed and prepare for trial, when it was his own conduct that caused the withdrawal. A party cannot be allowed "to harbor error as an appellate parachute," *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991), and reversal may not be premised on an "error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Therefore, we reject this claim of error.

3. Motion for Substitution of Counsel

Defendant argues that the trial court abused its discretion in not allowing him to replace his third attorney, Gagniuk. We disagree.

"Appointment of substitute counsel is warranted only upon a showing of good cause and where the substitution will not unreasonably disrupt the judicial process." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id*.

In this case, the trial court denied defendant's motions for substitute counsel because Gagniuk, like defendant's prior attorneys, refused to file a plethora of frivolous motions.[3] A refusal to file frivolous motions or meaningless discovery requests does "not demonstrate good cause because matters of general legal expertise and strategy fall within the sphere of the professional judgment of counsel." *People v Russell*, 254 Mich App 11, 14; 656 NW2d 817 (2002), rev'd on other grounds 471 Mich 182 (2004). Therefore, the trial court did not err in denying defendant's motion for substitute counsel.

4. Failure to Investigate

Defendant argues that Gagniuk was ineffective for failing to investigate and for failing to present evidence to either contradict the prosecution's evidence or to create a reasonable doubt concerning defendant's guilt.

Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, a defense attorney is not required to pursue a meritless defense. See *People v Lloyd*, 459 Mich 433, 447-451; 590 NW2d 738 (1999). Also, an attorney is not ineffective for failing to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Failure to call witnesses or present evidence can constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense, i.e., one that might have changed the outcome. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Defendant's arguments regarding the allegedly exculpatory materials there were not presented at trial are discussed in section IV(B)(1). As discussed in that section, there is no basis for concluding that any of these would have been exculpatory. Further defendant fails to identify any additional defense that Gagniuk reasonably could have pursued, or any evidence that Gagniuk could have introduced but did not that reasonably could have changed the outcome of his trial. Accordingly, defendant has failed to establish that defense counsel was ineffective.

Affirmed.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

[3] We note that defendant was permitted to file his requested motions acting in propria persona, and all but one were denied. Defendant was granted a curative instruction concerning the failure to preserve the 911 tapes.