STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v	No. 287184 Oakland Circuit Court
WILLIAM CLAYTON POWELL, Defendant-Appellant.	LC No. 2007-218045-FC

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of five to twenty years for the armed robbery conviction and two years for the felony-firearm conviction. He appeals as of right. Because defendant's convictions are supported by sufficient evidence, defendant was not denied effective assistance of counsel, and the prosecutor did not commit misconduct, we affirm.

Defendant was convicted of aiding and abetting Bryant Anthony Brown and Brandon Cortez Morris in their robbery, at gunpoint, of John Goulette and Micah Giralte during a drug transaction at Casey Boeling's house. Defendant drove Brown and Morris to Boeling's house, and remained in the vehicle while Brown and Morris committed the armed robbery. According to Brown, the robbery was defendant's idea, explaining that when the three men arrived at Boeling's house, defendant told him and Morris to go inside and get the money.

I. ISSUE RAISED IN DEFENDANT'S BRIEF ON APPEAL

Defendant argues that defense counsel was ineffective for failing to call him to testify at trial. We disagree. Defendant raised the issue in a motion for an evidentiary hearing, but because the trial court did not hold a *Ginther*[1] hearing, our review is limited to errors apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000)

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

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standards of reasonableness. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). He must overcome the presumption that counsel's action was sound trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Defendant must further show that he was prejudiced by counsel's deficient performance. *Pickens*, 446 Mich at 312, 314. To establish prejudice, defendant must show that there is a reasonable probability that counsel's error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The failure to call a witness at trial only constitutes ineffective assistance if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In this case, the decision whether to have defendant testify was a matter of trial strategy. We disagree with defendant's argument that, because Brown's testimony was unrebutted, there was no sound reason not to have him testify. The record reflects that defense counsel's strategy was to attack Brown's credibility, and to argue to the jury that Brown was not credible because he was shifting blame to obtain a lesser sentence. The success of that strategy was not dependent on defendant testifying. Further, defendant's posttrial affidavit includes several allegations that either defy common sense or are inconsistent with the evidence presented at trial. It would have been reasonable for defense counsel to expect that defendant's credibility would have been viewed negatively if defendant had testified in a manner consistent with the allegations in his affidavit. Thus, defendant has failed to overcome the presumption of sound strategy, nor has he demonstrated that his failure to testify deprived him of a substantial defense. In addition, he has not shown that there is a reasonable probability that the outcome of his trial would have been different had he testified. Defense counsel was not ineffective for failing to call defendant to testify.

II. ISSUES RAISED IN DEFENDANT'S STANDARD 4 BRIEF

In a separate pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that insufficient evidence was presented at the preliminary examination to bind him over for trial, the prosecutor committed misconduct by implying in her closing argument that defendant participated in the actual robbery, and manifest injustice necessitated a mistrial. Defendant also raises corresponding claims of ineffective assistance of counsel.

A. SUFFICIENCY OF THE EVIDENCE AT THE PRELIMINARY EXAMINATION

Defendant argues that the evidence at the preliminary examination was insufficient to bind him over for trial because the evidence did not satisfy the elements of armed robbery and felony firearm. For example, defendant claims that the prosecutor presented no evidence that he possessed a gun or that he used force or violence while committing a larceny.

"If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004); see also *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002) "([A] magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict."). Thus, the pertinent issue is whether sufficient evidence was presented at trial to support defendant's convictions.

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To convict a defendant as an aider and abettor, the prosecution must show that (1) the charged crime was committed by the defendant or another person, (2) the defendant gave acts or encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principle intended its commission at the time the defendant gave aid or encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). "An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *Carines*, 460 Mich at 757-758 (quotation omitted).

There is no dispute that Brown and Morris robbed Goulette and Giralte at gunpoint. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant gave acts or encouragement that assisted the armed robbery, which was committed with a firearm, and that defendant intended for the commission of the armed robbery. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Defendant, along with Boeling, arranged for the drug transaction. He drove Brown and Morris to Boeling's house, and on the way he stopped at a Detroit house where a man handed Morris a gun. When the three men arrived at Boeling's house, defendant told Brown and Morris to rob the men inside. Brown and Morris, while still in defendant's presence, agreed on a signal regarding when Brown would pull out the gun. The two men robbed Goulette and Giralte, but not Boeling, who had earlier told defendant that he was broke. Defendant drove the getaway car, and items stolen from Goulette and Giralte were found on the passenger seat, the dashboard, and the center console. Defendant's convictions for armed robbery and felony firearm on an aiding and abetting theory are supported by sufficient evidence. Therefore, defendant has no appeal regarding the sufficiency of the evidence at the preliminary examination. *Wilson*, 469 Mich at 1018.

B. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct by insinuating in her closing argument that defendant not only planned the robbery and drove the getaway car, but also possessed a weapon and participated in the actual robbery. We disagree.

Claims of prosecutorial misconduct are generally reviewed on a case-by-case basis, and the prosecutor's 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, 267 n 7; 531 NW2d 659 (1995). However, defendant did not object to the prosecutor's challenged remarks. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

A prosecutor may not refer to facts not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to comment on the evidence, to draw all reasonable inferences from the evidence, and to argue how the evidence relates to the prosecution's theory of the case. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009); *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Viewing the challenged remarks in context, it is evident that the prosecutor was commenting on the specific actions by Brown and Morris upon which she was relying to establish defendant's guilt as an aider and abettor. The term "they" was used to refer to the codefendants, not to defendant. Contrary to what defendant argues, the prosecutor never implied that defendant physically possessed the gun, entered the house, or participated in the actual robbery. The prosecutor's argument that defendant planned the robbery and was responsible for the actions of Brown and Morris as an aider and abettor was based on the evidence and reasonable inferences drawn from the evidence. There was no misconduct.

C. MANIFEST INJUSTICE

Defendant also argues that a mistrial should have been granted because he was improperly charged at the preliminary examination, the prosecutor committed misconduct during closing arguments, and the prosecutor failed to prove the elements of the charged crimes beyond a reasonable doubt. We disagree.

A mistrial may be granted on the basis of manifest necessity. *People v Rutherford*, 208 Mich App 198, 201-202; 526 NW2d 620 (1994). Manifest necessity "refer[s] to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *Id.* at 202. It is not an abuse of discretion for a court to declare a mistrial if it concludes that a fair trial cannot be reached, or concludes that a conviction would have to be reversed on appeal on the basis of some obvious procedural error. *Id.*

Defendant repeats the same arguments previously addressed in this opinion in support of his claim that a mistrial should have been granted. For the reasons previously discussed, defendant has failed to show that there were compelling circumstances that deprived him of a fair trial or that require reversal of his convictions. There was no basis for a mistrial.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to move for dismissal on the ground that the evidence at the preliminary examination was insufficient to support a bindover. He also argues that defense counsel was ineffective for not objecting to the prosecutor's conduct discussed in part II.B of this opinion and for not moving for a mistrial for the reasons discussed in part II.C.

As explained in part II.A, defendant's convictions were supported by sufficient evidence at trial. Consequently, defendant cannot establish that he was prejudiced by the bindover.

Wilson, 469 Mich at 1018. Further, we concluded in part II.B that the prosecutor's conduct was not improper, and we concluded in part II.C that there were no grounds for a mistrial. Defense counsel was not ineffective for failing to make a futile objection or motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002); *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto