STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 290553 Kalamazoo Circuit Court
JEFFREY ROBERT CHAPMAN, Defendant-Appellant.	LC No. 2008-001528-FH

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

After a jury trial, defendant Jeffrey Robert Chapman was acquitted of one count of involuntary manslaughter, MCL 750.321, and convicted of one count of unarmed robbery, MCL 750.530, arising from defendant's attempt to enter a vehicle belonging to Joseph and Jean Rizzuto[1] and take loose change located therein. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to 12 to 30 years' imprisonment for the unarmed robbery conviction, with 153 days' credit for time served. He now appeals as of right. We affirm.

Defendant's conviction for unarmed robbery arises from his attempt to steal change from the Rizzutos' vehicle as it was parked in their driveway in the middle of the night. On the night of September 7, 2008, the Rizzutos left their unlocked vehicle, a 2002 Chrysler, in the driveway. During the night, Rizzuto awoke and left the bedroom, apparently to watch television elsewhere in the house. At some point, Rizzuto heard a noise or otherwise noticed defendant, returned to the bedroom, woke Jean to tell her that someone was in the yard, retrieved his firearm, and left the bedroom. Rizzuto discovered defendant sitting in his car, left the house, walked to the car and opened the driver's side door, and confronted defendant. When Rizzuto looked over his shoulder to tell Jean to call the police, defendant got out of the car, grabbed Rizzuto and struggled with him, pushed him against the car door, and fled. Rizzuto shot defendant once in the leg, and defendant fell on the driveway. Rizzuto then walked toward defendant, told Jean that he was not feeling well, walked into the house, and collapsed just inside the doorway, having apparently suffered a heart attack. Rizzuto lost consciousness and died a few hours later.

[1] We will refer to Joseph Rizzuto as "Rizzuto" and Jean Rizzuto as "Jean" in this opinion.

Defendant claimed that he did not intend to steal the vehicle; instead, he admitted that he was searching the vehicle for loose change to steal.

On appeal, defendant argues that the prosecution failed to provide sufficient evidence to sustain his conviction for unarmed robbery. Although defendant concedes that the prosecution presented sufficient evidence to establish that a larceny occurred, he claims that the prosecution presented insufficient evidence to establish that he used force or violence in the course of committing a larceny, elevating the offense to unarmed robbery. We disagree. We review a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

When reviewing a claim that the evidence presented was insufficient to support defendant's conviction, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). As a result, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). However, to establish that the evidence presented was sufficient to support defendant's conviction, "the prosecutor need not negate every reasonable theory consistent with innocence." *Id.* "The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

MCL 750.530(1) states, "A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony . . . ." MCL 750.530(2) defines "in the course of committing a larceny" to include "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." "The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994).

Again, defendant only challenges the second element, claiming that the prosecution failed to present evidence that he committed the larceny by engaging in "force or violence or assault or putting in fear." However, the prosecution presented sufficient evidence to establish this element. Jean testified that when Rizzuto caught defendant in his vehicle stealing coins and blocked the driver's side entrance to the vehicle in order to prevent defendant from fleeing, defendant attempted to escape by exiting the car, grabbing Rizzuto, struggling with him, and "slamming" him against the car door, causing Rizzuto to fall. Defendant testified that Rizzuto grabbed him as he tried to flee and claimed that he had "momentum" when Rizzuto grabbed him and "broke free" of Rizzuto's grasp, implying that some sort of force was necessary to disengage himself from Rizzuto's grasp. Accordingly, sufficient evidence was presented to permit a reasonable juror to conclude that defendant employed force or violence in the course of committing a larceny.

In addition, Jean told an investigator that she could tell from the tone of Rizzuto's voice that he was afraid when confronting defendant; this evidence indicates that defendant's actions placed Rizzuto in fear. Further, a reasonable juror could infer that a homeowner in Rizzuto's position would be placed in fear if he saw a strange man sitting in his vehicle, in his driveway, and rifling through the vehicle's contents in the middle of the night.

Next, defendant argues that Detective Brett Pittelkow's testimony concerning Jean's statements to him constituted inadmissible hearsay. We disagree. Instead, we conclude that the trial court did not abuse its discretion in determining that the challenged testimony did not constitute hearsay and was admissible pursuant to MRE 801(d). We review evidentiary decisions for an abuse of discretion. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An evidentiary error does not merit reversal in a criminal case "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Jean's statements to Detective Pittelkow did not constitute hearsay pursuant to MRE 801(d), and the trial court did not abuse its discretion when it permitted Detective Pittelkow to testify regarding these statements at trial. MRE 801(d) states:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—
>
> (1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

Accordingly, the party offering a prior consistent statement must meet the following criteria to ensure the statement's admission:

> "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

It is undisputed that Jean testified at trial. It is also evident from the record that defendant insinuated that Jean was fabricating her in-court testimony when he asked her whether she was concerned that Rizzuto would get in some sort of trouble for shooting defendant in the back of the leg as he fled and questioned her regarding inconsistencies between her in-court testimony and statements that she made to Officer Peter Hoyt at the scene as she watched paramedics perform cardiopulmonary resuscitation (CPR) on her husband.

Further, Jean's statements to Detective Pittelkow were consistent with her testimony at trial. Both in her conversation with Detective Pittelkow and at trial, Jean related that Rizzuto woke her in the middle of the night to tell her that someone was in the yard, retrieved his firearm, and left the bedroom. Jean followed Rizzuto and, upon reaching a glass door leading outside, saw Rizzuto standing inside the open door of their car, yelling at defendant, who was seated inside. Specifically, Rizzuto told defendant not to get out of the car. Rizzuto turned toward her and told her to call the police, and at that moment, defendant got out of the car, struggled with Rizzuto, pushed him against the car door, and fled. As defendant fled, Rizzuto shot him in the back of the leg. Rizzuto then walked toward defendant, turned toward Jean and told her that he was not feeling well, walked into the house, and collapsed. Further, Detective Pittelkow listened to Jean's testimony at trial and confirmed that it was consistent with the statements that she had made to him.

Although defendant claims that Jean's trial testimony was inconsistent with her statements to Detective Pittelkow, he only identifies distinctions between her trial testimony and statements that she made to Officer Hoyt immediately after the robbery, when she was watching paramedics perform CPR on her husband. Defendant claims that Jean told Detective Pittelkow that Rizzuto told defendant to get out of the car, but she actually made this misstatement to Officer Hoyt. Detective Pittelkow confirmed that Jean told him that Rizzuto told defendant to stay in the car. Similarly, defendant incorrectly claims that Jean told Detective Pittelkow that defendant was shot during a struggle with Rizzuto, yet Detective Pittelkow confirmed that Jean had told him that defendant was shot as he fled. The confusion regarding whether defendant had been shot during the struggle with Rizzuto or after defendant fled arose from Jean's statements to Officer Hoyt. Also, defendant claims that an inconsistency exists because Jean told Detective Pittelkow that her husband was scared when confronting defendant, yet testified at trial that defendant was "frantic" and "in panic." However, the fact that a homeowner like Rizzuto might experience fear when defending his property from an intruder does not preclude an intruder, such as defendant, from experiencing panic when caught committing a misdeed. Further, Jean's testimony at trial that Rizzuto had no reason to attack defendant because Rizzuto had a firearm and simply wanted to use the firearm to hold defendant until the police arrived is not inconsistent with her statement to Detective Pittelkow that Rizzuto was scared during the confrontation. A homeowner is not automatically precluded from experiencing feelings of fear simply because he is trying to detain an intruder by pointing a firearm at him; instead, the uncertainty of such a scenario would likely instill fear in the homeowner.

Finally, the determination that Jean's statements to Detective Pittelkow occurred before she had a motive to falsify does not constitute an abuse of discretion. Defendant argues in his brief that Jean would have been concerned that Rizzuto might have been subject to civil or criminal liability because he shot defendant from behind as defendant fled. However, in her purportedly fabricated statements (to Detective Pittelkow and at trial), Jean consistently admitted that Rizzuto shot defendant as he fled. Further, Rizzuto had died by the time Jean talked to Detective Pittelkow, so Jean had no reason to lie to protect Rizzuto from being charged with a criminal offense. Further, defendant provided no evidence that Jean was aware that he might attempt to file a civil cause of action against her husband's estate when she spoke to Detective Pittelkow, nor is there any evidence that he actually did so. Jean also stated that it "wasn't even in [her] mind" when she talked to investigators that Rizzuto might get in trouble for shooting defendant in the back of the leg.

The prosecution met the criteria for admitting Detective Pittelkow's testimony regarding Jean's prior consistent statements to him pursuant to MRE 801(d) to rebut defendant's insinuations that Jean had fabricated her testimony. Accordingly, the trial court did not abuse its discretion in admitting this testimony.

Finally, defendant claims that his trial counsel was ineffective for failing to request instructions regarding the lesser-included offense of larceny from a person. We disagree. Instead, we conclude that defense counsel's failure to request the proposed instruction was a matter of trial strategy and does not warrant reversal for a new trial.[2] Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.*

Criminal defendants are entitled to effective representation at every critical stage of proceedings against them. *People v Abernathy*, 153 Mich App 567, 568-569; 396 NW2d 436 (1985). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel is not ineffective merely because the outcome is not optimal. *People v Davidovich*, 463 Mich 446, 453 n 7; 618 NW2d 579 (2000). Instead, counsel is ineffective if it has "sunk to a level at which it is a problem of constitutional dimension." *Id.*

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley* (*After Remand*), 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must establish that his attorney's representation "fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant correctly establishes that larceny from the person, MCL 750.357, is a lesser-included offense of unarmed robbery, MCL 750.530. In *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005), this Court explained:

[2] A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). The trial court considered and denied defendant's motion for a new trial.

> The elements of larceny from a person are (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence. CJI2d 23.3; *People v Wallace*, 173 Mich App 420, 426; 434 NW[2d] 422 (1988). Clearly, the offense of larceny from a person does not involve an element of "the use, attempted use, or threatened use of physical force against the person or property of another." Indeed, the lack of force or violence distinguishes larceny from a person from the offense of robbery. See *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000), *People v Adams*, 128 Mich App 25, 30; 339 NW2d 687 (1983), and cases cited in those opinions. Nevertheless, the offense of larceny from a person is separated from other larceny offenses because it is committed in the immediate presence of another person. *Adams*, [128 Mich App] at 32.

However, defense counsel was not ineffective for failing to request this instruction. At the hearing regarding defendant's motion for a new trial, defense counsel explained that larceny from a person was "a D level, 10 year felony."[3] Defendant admitted at trial that he committed a larceny, and it is otherwise undisputed that defendant was attempting to permanently deprive Rizzuto of a small amount of money, without his consent and in his immediate presence, and that he attempted to flee with the money in his hand.

Defense counsel explained that his theory of the case was that defendant should not have been convicted of unarmed robbery because he did not engage in force or violence against Rizzuto. By not requesting an instruction on the lesser-included offense, defense counsel could focus his argument on the assertion that the prosecution had failed to establish that defendant had engaged in force or violence toward Rizzuto, assuring that defendant would be acquitted of all charges if the jury determined that the prosecution had not established this element. If the jury were permitted to consider the lesser-included offense, the evidence presented at trial would have easily permitted the jury to convict defendant of larceny from a person, even if the jury determined that defendant had not engaged in force or violence toward Rizzuto. Further, as defense counsel explained, he and defendant wanted to avoid a situation in which the jury could compromise and find defendant guilty of a lesser offense; by presenting the charges as an "all or nothing type of situation," without other options, defendant would have a better chance at outright acquittal. Defense counsel made a strategic decision, based on reasonable professional judgment, not to request an instruction for the lesser-included offense of larceny from a person because this would give defendant a better chance at receiving an outright acquittal. Defense counsel was not ineffective, and reversal of defendant's conviction and remand for a new trial is not warranted on this ground.

[3] By comparison, the charge that defense counsel believed should have been brought against defendant, larceny from a motor vehicle, MCL 750.356a(1), is a class G felony with a statutory maximum of five years' imprisonment. MCL 777.16r.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot