STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 4, 2010
v	No. 292902 Wayne Circuit Court
LERON JASON GIBSON, Defendant-Appellant.	LC No. 08-015821-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to a two-year prison term for the felony firearm conviction, to be followed by a five-year probationary term for the felonious assault conviction. Defendant appeals as of right. We affirm.

On the evening of Friday, February 15, 2008, James Lewis, an off-duty Wayne County Deputy, went out to his unmarked police vehicle to retrieve a flashlight because of a power outage. His house on Edmore Street in Detroit is on the corner of Edmore and Rex, and his driveway is on the side of his house facing Rex. Lewis went out the side door of his house and down his driveway toward his car, which was parked on Rex, facing north toward Edmore. He used remote entry to unlock the car, which caused the dome light and the rear tail lights of the vehicle to illuminate. The street lights were not on because of the power outage. Lewis opened the door of the car, leaned inside, and looked for his flashlight on the floor of his car. He then observed a black Dodge Charger driving southbound on Rex at a high rate of speed. There was snow and ice on the ground, and the Charger was traveling approximately 40 to 50 mph in a 25 mph zone. Lewis became paranoid and withdrew his weapon from his hip holster. The Charger came to an abrupt stop in the middle of the street approximately 20 to 25 feet south of Lewis' car. Lewis began to "really take notice" at that time and stared at the Charger. Three young black males exited the Charger and walked toward him. Defendant, who got out of the driver's side rear seat, which was the side of the Charger closest to Lewis, walked toward Lewis in a B-line. Lewis asked, "What's up?" and defendant said, "What's up" back to him. Defendant was within 10 feet of Lewis, and Lewis was staring directly at him. Lewis also came within 15 feet of Dartez Mahone, the man from the passenger side rear seat, and clearly saw his face. Lewis noticed that defendant was shorter than his height of 5'8", that he had a noticeable swagger when

he walked, and that he had a low haircut. Defendant reached inside his coat, took out a rifle, and aimed it at Lewis' head. Lewis started firing at defendant, and then took cover behind his car. When Lewis stood up from behind his car, he observed defendant running southbound on Rex. Mahone was running westbound through Lewis' neighbor's yard. The Charger drive off heading southbound on Rex. Lewis retrieved his cell phone and called police dispatch for backup. Police officers Richardson and Mack, whom Lewis did not know, arrived in less than 4 minutes.

The day after the incident, Lewis received a call from someone in the neighborhood. Based on information received during that call, Lewis went to his neighbor's house, where he observed the weapon used during the assault the night before in the neighbor's garage. Lewis had information suggesting the weapon was not initially found in the garage but rather outside in the snow.

After the incident Lewis was contacted by the Eastpointe Police Department. Another man, Nathaniel Jenkins, had confessed to participation in the incident. Lewis then went to the police station to possibly identify another man involved in the incident. Lewis was shown a photographic lineup of six black and white photocopied photos. Lewis picked out subject #6, indicating "that is the subject that attempted to rob me on 2/15/08." Within minutes of leaving the police station, Lewis called Detective Monroe, the officer-in-charge of the case, and told him that he was not sure if the man he picked out in the lineup was the man involved in the incident. Lewis also called the officer at the Eastpointe Police Department and told him the same thing. Lewis was concerned that the photos were blurry and that he could not see the height of the men in the photos.

On June 3, 2008, while on his way home from work at approximately 11:00 p.m., Lewis pulled into the parking lot of Eastland Liquor and Party Store on East 8 Mile Road in Eastpointe. As he walked toward the entrance of the store, he observed four black males exiting the store. Lewis immediately recognized two of the men as the men involved in the incident. Lewis drew his weapon, identified himself as a police officer, and ordered the four men to the ground. Two of the men – defendant and Mahone – complied with his order, and the other two men walked toward their car. Without any question being posed to him, defendant started crying and said, "I didn't try to rob anybody." Lewis asked someone to call the police, and Eastpointe police officers arrived. Lewis told the officers that he recognized two of the men from an earlier February incident. All four men were detained, and defendant and Mahone were placed under arrest. Lewis did not have any doubt about defendant's identity as the person involved in the incident.

Defendant presented an alibi defense. Javon Scott, an 18-year-old friend of defendant's, testified that he was with defendant, Mahone, and another friend named John, all evening on June 3, 2008. As they were leaving the Eastland Liquor Store, they were approached by a man with a gun who said, "Get down." The man had his gun out and was coming at them as they left the store. Scott kept asking the man if he was robbing them. The man approached defendant and Mahone and said, "These two punk mother f___s tried to rob me a couple months back." Defendant responded, "Man, I didn't try to rob nobody."

Defendant's mother, Gerree Patton, testified that she drove defendant to and from Kelwood High School on February 15, 2008. She recalled watching defendant walk in and out

of school on February 15. At 6:00 p.m. that day, she drove defendant to the home of his girlfriend, Artasia Smith, and then picked him up at 8:40 p.m. The two then went home, and defendant never left the house again that night. Patton indicated that both she and defendant went to bed at 2:00 a.m. and that she was certain that defendant never left home that night.

In rebuttal, Michelle Vanillas, the guidance counselor at Kelwood Alternative High School, testified that official school records showed that defendant was suspended from the school on January 22, 2008, for a period of 180 days. Starting February 11, 2008, his official status became "not enrolled" and this status existed until June 12, 2008.

Defendant first argues that he was denied a fair trial as the result of judicial bias. Because defendant never moved to disqualify the trial judge pursuant to MCR 2.003, this claim is reviewed for manifest injustice. *People v Paquette,* 214 Mich App 336, 340; 543 NW2d 342 (1995).

Defendant refers this Court generally to a large number of transcript page numbers, and asserts that the information found on these pages supports defendant's argument that the trial court demonstrated bias against defendant and in favor of the prosecution by sustaining 108 prosecutorial objections and by "sua sponte interjections that belittled" defense counsel. Defendant suggests that the prosecutor was treated differently than defendant – i.e., that defense objections were never sustained and that the trial court never sua sponte interjected as the prosecutor questioned witnesses. Defendant then makes a number of generic contentions, such as that "the jury got the impression that the judge knew [defendant] was guilty," that it was "evident the judge wanted the defendant was [sic] to be found guilty," that the "jury came to believe that the trial judge believed that [defendant] was guilty," and that "the jury convicted [defendant] because it saw a 'blundering lawyer'."

To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifiesin his statement of the questions involved. *DeGeorge v Warheit,* 276 Mich App 587, 596; 741 NW2d 384 (2007). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris,* 261 Mich App 44, 50; 680 NW2d 17 (2004). Defendant has abandoned this issue as he has failed to appropriately argue the merits of his argument that the trial court demonstrated bias against defendant.

Nonetheless, defendant's argument is without merit. "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Paquette,* 214 Mich App at 340. Defendant must show actual personal bias or prejudice, MCR 2.003(B)(1); *People v Wells,* 238 Mich App 383, 391; 605 NW2d 374 (1999), and must overcome the strong presumption that the judge was impartial. *Id.*

An exhaustive review of the trial transcript reveals that defendant's claim of judicial bias is misplaced. Defendant's argument is premised mainly on the assertion that the trial court sustained 108 of the prosecutor's objections. Although the trial court did sustain a number of the prosecutor's objections, the trial court also overruled a number of the prosecutor's objections. The trial court also sustained a number of defense counsel's objections. The trial court sua sponte interjected comments directed to both the prosecutor and defense counsel, on numerous

occasions. Although more comments were directed to defense counsel as defense counsel was nearly deaf, and his co-counsel did little to aid him, the trial court's comments were clearly designed to control the proceedings in the courtroom. The trial court became frustrated at times with having to shout and to repeat comments, as well as with defense counsel's refusal to adhere to directions provided by the court. However, critical comments directed to a party or to a party's attorney ordinarily do not support a finding of bias or prejudice, *People v Wells,* 238 Mich App 383, 391; 605 NW2d 374 (1999), nor do expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. *Cain v Dep't of Corrections,* 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Defendant has failed to demonstrate that the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive defendant of his right to a fair and impartial trial.

Defendant argues in the alternative that if this Court concludes that the prosecutor made valid objections and that the trial court validly sustained these objections, then "this Court must find that trial counsel had no idea on how to try any case, and has no idea of the rules of evidence." Defendant presents no further argument regarding this assertion, other than to state that

> This court should find that counsel Mr. Davis was a "blundering lawyer" who had no proper trial strategy and who indicated that his knowledge of the law and court rules was severely deficient so as to justify 108 objections then it must find that [defendant] was denied the effective assistance of counsel . . .

Again, this argument is not properly presented.

Nonetheless, a claim of ineffective assistance of counsel requires a defendant to show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). To show prejudice, the defendant must demonstrate a "reasonable probability" that the result of the proceedings would have been different absent counsel's errors. *Id.* Given the evidence of guilt, and the weakness of defendant's alibi defense, a reasonable probability does not exist that the result of the proceedings would have been different absent defense counsel's alleged errors.

Defendant next argues that a mistrial should have been granted following the midtrial disclosure of defendant's alleged verbal confession because defendant was prejudiced by the late disclosure. We review for an abuse of discretion a trial court's decision whether to grant or deny a motion for mistrial. *People v Gonzalez,* 193 Mich App 263, 266; 483 NW2d 458 (1992).

Defendant argues that the trial court should have granted a mistrial because the prosecutor failed to provide defense counsel with a report or information indicating that

defendant had verbally confessed to the incident.[1] Initially, it is questionable whether defendant's statement that "I didn't' rob anyone" can be considered a confession. Additionally, there is no dispute that no report existed regarding defendant's statement. Even assuming that a discovery order existed, and that the prosecutor violated the order, no prejudice can be shown. The statement was defendant's own statement, and defendant's own witness, Javon Scott, testified that defendant made the statement in question during his arrest. Defense counsel's assertion that was surprised by the revelation of the alleged confession during trial is not supported by the record. A defendant is not prejudiced by the failure or untimely release of his own statement during discovery, because he has independent knowledge of its existence. *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987). Defendant has failed to demonstrate that the trial court erred by denying defendant's motion for a mistrial.

Lastly, defendant avers that the prosecutor introduced insufficient evidence of his identity as the culprit of the charged assault. This Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). However, this Court should not interfere with the fact-finder's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Thus, the prosecution must present sufficient evidence to prove beyond a reasonable doubt that it was the defendant who committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Here, Lewis testified that on the night of the assault he stared directly at defendant. He observed that defendant was shorter than Lewis' height of 5'8". Lewis saw defendant a few months later at a convenience store, and immediately recognized him as the man who assaulted

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[1] In the body of his argument, defendant also makes reference to the prosecutor's failure to provide a report or information regarding Lewis' misidentification of a suspect during the photographic lineup. This alleged failure is not mentioned in the statement of the question presented as a ground for mistrial. Additionally, later in the body of the argument, defendant argues the grounds for mistrial and, again, this ground is not mentioned. Thus, this report will not address the misidentification as a ground for mistrial.

him. Lewis did not have any doubt about defendant's identity as the person who assaulted him. The testimony of a victim, including identification testimony, is sufficient to establish defendant's guilt beyond a reasonable doubt. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381; *People v Taylor*, 185 Mich App 1, 8, 460 NW2d 582 (1990).

Defendant's reliance on Lewis' mistaken identification at a photographic lineup, as well as varying descriptions of defendant contained within police reports, is misplaced. Claims of mistaken identification by a witness, as well as claims that a witness gave varying descriptions of the suspect, deal with the credibility of a witness and are generally questions to be decided by the jury. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). This Court does not review issues of credibility anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).[2]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering

[2] Defendant does not specifically contest the sufficiency of proof of the other mandatory felonious assault elements. Nonetheless, our review of the record reveals substantial proof of the requisite felonious assault elements. MCL 750.82; *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007).