STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 2, 2010
v	No. 291087 Washtenaw Circuit Court
ROBERT ANTHONY STONE, Defendant-Appellant.	LC No. 08-000605-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Defendant was convicted of two counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.157(a), one count of resisting or obstructing a police officer, MCL 750.81(d)(1), and one count of assault with a dangerous weapon, MCL 750.82. He was sentenced to concurrent prison terms of 180 months to 30 years on the first three counts. He was sentenced to concurrent sentences of 16 to 24 months on the count of resisting or obstructing a police officer. And, he was sentenced to 16 months to four years on the count of assault with a dangerous weapon. He now appeals and we affirm.

Two men robbed a restaurant. They were dressed in dark clothes and wore masks covering their faces except for the eyes. One was described as thin and the other as fat. There were several people in the restaurant at the time who witnessed the robbery, including a manager and several employees. One of the employees also had her baby with her at the restaurant. The two men stole over $5,000 in cash, and other items, including a cell phone. After they were done, the two men put everyone in the cooler, and tried to barricade the door with a shelving unit.

The witnesses called 911 as soon as they were able to get out of the cooler. A responding officer saw two men matching the description of the robbers in the nearby apartment complex. She called for reinforcements. All the officers who were present when the two men were apprehended described them as sweating with steam rising from their heads. The defendant and the other man were wearing dark colored clothes. Someone called the cell phone that had been stolen, and a cell phone started ringing in the other suspect's pockets. When the cell phone started ringing, the men ran in opposite directions, but were soon apprehended. Near where the suspects were apprehended, the police found a bag containing the items that had been stolen from the restaurant.

Only one of the witnesses went to a line-up. The witness correctly identified the other suspect as the fat robber, but the witness could not identify defendant. But, at the preliminary examination, the witness correctly identified defendant as the skinny robber. At trial, a restaurant manager testified that defendant had been employed at the restaurant a few months before the robbery, but that he had been fired for being a poor employee.

Defendant claims that he was denied his Sixth Amendment right to effective counsel. The threshold to prove inadequate representation is high. Defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would be different. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Nickson*, 120 Mich App 681, 684; 327 NW2d 333 (1982). Counsel is held to the standard of a lawyer with ordinary skill and training. See *Bell v Cone*, 535 US 685, 698; 122 S Ct 1843; 152 L Ed 2d 929 (2002); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), cert den 532 US 962; 121 S Ct 1496; 149 L Ed 2d 382 (2001); *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Deference is given to counsel's strategic decisions, but strategic decisions must be made after reasonable investigations. *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

Defendant claims that trial counsel was ineffective because he did not impeach a witness on credibility. The witness was not able to identify defendant in the line-up, but he did identify defendant in a preliminary hearing where defendant was dressed in a prisoner's uniform. In *Nickson*, 120 Mich App 681, this Court found that while a difference in trial strategy does not amount to inadequate representation, the trial counsel did not show any strategic advantage for failing to investigate a witness's prior criminal record and then failing to impeach that witness. *Nickson*, 120 Mich App at 685. But, the facts here are different. Unlike the trial counsel in *Nickson*, defendant's trial counsel knew of the discrepancies in the witness's testimonies, and trial counsel did address those discrepancies. Trial counsel asked the witness on cross-examination why he failed to identify defendant at the line-up, and, on re-cross-examination, trial counsel asked how the witness could tell defendant was the robber just by his eyes. Trial counsel also talked about the discrepancies in his closing arguments. In *People v McFadden*, 159 Mich App 796; 407 NW2d 78 (1987), this Court found that it was unnecessary to impeach a witness on all contradictions.

Defendant also argues that trial counsel failed to object to the prosecutor's statements during her closing arguments. The prosecutor connected the fact that defendant had been employed at the restaurant to the idea that he could have known that the door would have been open early in the morning, and that the money would be there. Defendant relies on *People v Ellison*, 133 Mich App 814; 350 NW2d 812 (1984), to show that the prosecutor's statements were improper and should not have been admitted. But, *Ellison* is distinguishable from these facts because here the prosecutor was referring to comments a witness had made on the stand. In *Ellison*, the prosecutor referred to comments from a witness who never took the stand. Here, defendant's trial counsel countered the prosecutor's statements in his own closing argument by stating that there was no evidence to prove that defendant would have known that the money would be present that morning. Defendant's trial counsel did not object to the prosecutor's statements, but he did address the statements in his own closing argument. This can be interpreted as a trial strategy.

The standard for showing ineffective counsel is not whether a defendant is more or less prejudiced; the standard is whether the defendant would have been acquitted had the mistake not been made. *Nickson*, 120 Mich App at 684. The defendant has not shown that he would have been acquitted had trial counsel used a different trial strategy.

Defendant argues that his sentence was scored incorrectly. The sentencing court gave defendant an Offense Variable 8 (OV 8) score of 15 points. OV 8 is governed by MCL 777.28 which states that 15 points are awarded when "a victim was asported to a place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Defendant argues that he did not hold the victims captive longer than was necessary to complete the crime because flight is included in the crime of armed robbery. MCL 750.529; MCL 750.530(2). The sentencing court analyzed the whole statute when determining how to score defendant's sentence. The sentencing court considered moving all of the employees, including a baby, into a cooler, and trying to prevent their escape by blocking the door with a storage unit, enough evidence to support the "held captive beyond the time necessary" element. MCL 777.38. If a scoring is supported by the evidence, it will be upheld. MCL 777.21; *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006), vacated 549 US 1197; 127 S Ct 1247; 167 L Ed 2d 62 (2006), on rem 479 Mich 672; 739 NW2d 563 (2006). The sentencing court sentenced defendant properly.

Defendant argues that the presentence investigation report incorrectly only gave the guidelines for one charge: armed robbery. Defendant argues the guidelines should have been scored for all three of the class A felonies: both charges of armed robbery and the charge of conspiracy to commit an armed robbery. But, after 2007, MCL 777.21(2) cross-references § 14 of chapter XI, MCL 777.14(2)(3), which only requires the probation department to score the highest crime class offense where there are concurrent sentences. So, the sentencing court only has to score the highest crime class offense. *People v Getscher*, 478 Mich 887, 888; 731 NW2d 768 (2007) (MARKMAN, J., dissenting). Here, defendant was properly scored for one of the highest crime class offenses.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad