# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 14, 2013 |
| v | No. 311131<br>Wayne Circuit Court |
| DESHAWN MARTELL GOODMAN,<br><br>Defendant-Appellant. | LC No. 11-010960-FC |

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant Deshawn Martell Goodman appeals as of right his convictions for armed robbery, MCL 750.529; carjacking, MCL 750.529a; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(a); unauthorized driving away an automobile (UDAA), MCL 750.413; and receiving and concealing a stolen motor vehicle, MCL 750.535(7). Following a bench trial, defendant was sentenced to two years' imprisonment for his felony-firearm conviction to be served consecutively to his concurrent sentences of 85 months to 20 years' imprisonment for his armed robbery conviction, 85 months to 20 years' imprisonment for his carjacking conviction, three to five years' imprisonment for his UDAA conviction, and three to five years' imprisonment for his receiving and concealing a stolen motor vehicle conviction. For the reasons stated in this opinion, we affirm defendant's convictions, but remand for the ministerial task of correcting defendant's presentence investigation report (PSIR).

Defendant's convictions arise from his armed robbery of the victim, Craig Harris. At about 1:00 a.m., defendant approached the victim, brandished a pistol, and demanded that the victim hand over his possessions. The victim gave defendant his keys and cellular telephone. Defendant then entered the victim's vehicle and drove away. Less than 48 hours later, defendant was stopped by police officers for failure to wear a seatbelt. Defendant fled on foot, but was apprehended shortly thereafter. After defendant was arrested, it was discovered that the vehicle which defendant was driving was the vehicle stolen from the victim. Although the victim initially described his assailant as clean-shaven, the victim later identified defendant, who had a mustache, in a photographic lineup.

On appeal, defendant first argues that there was insufficient evidence to identify him as the victim's assailant and thus, defendant's convictions for carjacking, armed robbery and felony-firearm should be vacated. Defendant argues that the victim's initial description

conflicted with defendant's actual appearance and his mere possession of the stolen vehicle is not sufficient evidence to prove his identity. We review defendant's claim of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find defendant's guilt proven beyond a reasonable doubt. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008).

"Identity may be shown by direct testimony or circumstantial evidence" and must be proven beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Here, the record clearly shows that the victim identified defendant as his assailant in a photographic lineup and at trial. The victim also testified that the area where the robbery occurred was well lit, that he was able to see defendant's face, and that he had seen defendant in that neighborhood earlier that day. The victim's identification of defendant is also supported by circumstantial evidence. Specifically, 48 hours after the robbery, police officers found defendant in possession of the stolen vehicle. When the police approached defendant, he fled. Flight can be evidence of consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Moreover, "[t]he credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Davis*, 241 Mich App at 700. The trial court found the victim's testimony and identification credible, and viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude that defendant's identity was proven beyond a reasonable doubt with respect to the challenged crimes. Therefore, defendant's convictions were based on sufficient evidence. *Kanaan*, 278 Mich App at 618.

Next, defendant argues that he was denied the effective assistance of counsel by his counsel's failure to call an expert witness to testify as to the fallibility of eyewitness testimony. Whether a defendant was denied the effective assistance of counsel is generally a mixed question of fact and law which we review for clear error and de novo, respectively. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to move for a new trial or a *Ginther*[1] hearing, our review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

The right to effective assistance of counsel is guaranteed by the United States Constitution and the Michigan Constitution. US Const, Am VI; Const 1963, art 1, § 20. In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To demonstrate defense counsel was deficient, defendant must overcome the strong presumption that the alleged deficiency was trial strategy. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Further, defendant has the burden of establishing the factual predicate to support his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). When the defendant challenges defense

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

counsel's failure to call an expert witness, the defendant must offer proof that such an expert would have testified favorably if called by the defense. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The failure to call a witness only amounts to ineffective assistance of counsel if that failure deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

In this case, defendant failed to make an offer of proof regarding the testimony of the expert witness. Accordingly, defendant failed to establish the factual predicate to support this claim. *Hoag*, 460 Mich at 6; *Ackerman*, 257 Mich App at 455. Moreover, "[a]n attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). We find that defendant has failed to overcome the strong presumption that defense counsel's decision not to call an expert was sound trial strategy because it is reasonable to assume defense counsel made a strategic decision to rely on the trial court's familiarity with eyewitness testimony and the common sense notion that perception and memory are fallible. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999) (finding the defendant was not denied the effective assistance of counsel where defense counsel failed to call an expert to testify to the weaknesses of eyewitness identification because it was reasonable to assume such testimony could have been negatively received as merely stating the obvious fact that memories and perceptions are sometimes inaccurate). Finally, defendant has similarly failed to demonstrate that he was deprived of a substantial defense by defense counsel's failure to call an eyewitness testimony expert because even without the aid of expert testimony, defense counsel was able to cross-examine the victim to uncover inconsistencies in his identification of defendant. *Chapo*, 283 Mich App at 371. Accordingly, we conclude that defendant has failed to demonstrate ineffective assistance of counsel.

Next, defendant argues that the trial court erroneously scored 20 points for prior record variable (PRV) 7, MCL 777.57.

We review for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

At the outset we note that defendant waived any claim of error on appeal by his express approval of the scoring in the trial court. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, this error is waived for appellate review. *Id*. Nevertheless, we conclude that defendant's claim is without merit. Defendant argues that the trial court agreed to disregard defendant's convictions for UDAA and receiving and concealing a stolen motor vehicle when scoring PRV 7. Without addressing whether such an "agreement" was in fact made, we note that the scoring of PRVs is not a matter of discretion for the trial courts. See *People v Johnson*, 293

Mich App 79, 89 n 26; 808 NW2d 815 (2011) (("[PRV 6] does not use discretionary language. It states to "score" PRV 6 by "assigning" a number of points.").[2] The trial court was obligated to "score" PRV 7 by "assigning" a number of points as dictated by the controlling statute. MCL 777.57(1). We therefore find no error in scoring 20 points for PRV 7, which is the appropriate score where a conviction is concurrent with two or more non-felony-firearm convictions, as is the case here. MCL 777.57.[3]

Moreover, because there is no error in defendant's PRV 7 score, we reject defendant's claim of ineffective assistance of counsel, premised on defense counsel's failure to object to the scoring of PRV 7. Defense counsel is not deficient for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Finally, defendant requests that this Court remand for the ministerial task of correcting his PSIR, which erroneously indicates that his first arrest occurred at the age of 14. Defendant claims that his first arrest arose from this matter and that he was 17 years old at the time. We note that the PSIR indicates that this matter was "defendant's first contact with the criminal justice system" and that "defendant has not had any contact with the juvenile court system." Because the department of corrections relies on the accuracy of the information contained in PSIRs to make critical decisions regarding defendant's status, *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009), and it appears that the PSIR contains a mistake as to the age of defendant's first arrest, we remand for the ministerial task of correcting the PSIR. *People v Harmon*, 248 Mich App 522, 533-534; 640 NW2d 314 (2001).

We affirm, but remand for the ministerial task of correcting defendant's PSIR. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

---

[2] PRV 7 has similar mandatory language. See MCL 777.57(1) ("Score prior record variable 7 by . . . assigning the number of points attributable[.]").

[3] MCL 777.57(1)(a) provides that 20 points should be assigned to PRV 7 when "[t]he offender has 2 or more subsequent or concurrent convictions." MCL 777.57(2)(b) provides that felony firearm convictions should not be scored under PRV 7. In this case, defendant was convicted of five felonies, one of which was felony firearm. PRV 7 was properly scored at 20 points because even ignoring the felony firearm conviction, defendant was convicted of four concurrent felonies.