

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY D. BRYANT,

Defendant-Appellant.

UNPUBLISHED

September 23, 1997

No. 188734

Oakland Circuit Court

LC No. 95-138997-FC

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284. Defendant thereafter pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The court sentenced defendant to a term of imprisonment of eight to thirty years as an habitual offender. We affirm.

Defendant met the male victim and his female companion at a Pontiac gas station and offered to take them to purchase drugs. Defendant, sitting in the back seat behind the victim driver, directed the victim to a dark alley. Instead, the victim returned to the main road. With his fist and a wooden dowel, defendant beat the victim on the head. When the victim crashed the car, his female companion ran for help. Defendant left the car, opened the driver's side door, removed the keys from the ignition and attempted to pull the victim from the car while continuing to beat him. He also attempted to rip the gold chain from the victim's neck and to take his watch.

Defendant testified that he told the woman that if he could obtain a ride home, he would take her and the victim to purchase drugs. He had over \$50 in his wallet and he offered a few dollars for gas. Defendant testified that while they were in the car, he gave the woman a fifty dollar bill, which she did not return. He was then struck with a blunt instrument. The victim sped down the street. Defendant testified that he struck the victim to make him stop the car. When they stopped, defendant struggled with the victim to prevent him from fleeing.

Defendant first argues that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, defendant must prove that trial counsel's performance fell below an

objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Trial counsel is presumed competent, and defendant has the burden of proving that the criticized conduct is not sound trial strategy. *Id.* at 687. The decision to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense and would have changed the outcome. *Id.* Because defendant did not move for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant contends that counsel should have objected when he learned that a certain officer would not be testifying. Defendant asserts that the officer would have testified that defendant had said that the victim was robbing him. The passenger, however, already testified that defendant made that statement to the police. Defendant also contends that the officer would have testified that defendant merely was attempting to prevent the victim from fleeing. The record does not support this assertion. Defendant also alleges that the officer would have testified that defendant was carrying a bag of groceries at the time, which would have corroborated his testimony that he was looking for a ride home. However, the passenger testified that defendant was carrying a bag when they met at the gas station. Thus, on this record, defendant has failed to show a reasonable probability that the arresting officer's testimony would have changed the outcome. *Daniel*, *supra*. Additionally, defendant failed to provide an offer of proof or an affidavit that the officer would have so testified.

Defendant also argues that he was denied the effective assistance of counsel because counsel failed to establish that he had over \$50 in his possession when arrested and therefore had no motive to rob. We disagree. The record reveals that counsel sought to admit into evidence a jail receipt to establish the amount of money defendant had when he was arrested. The record shows, however, that defendant did not inform trial counsel of the receipt's existence until closing argument; thus, it was too late to admit the receipt. Moreover, defendant was not prejudiced by the absence of the receipt because both defendant's mother and brother testified that defendant had at least \$50 in his possession that evening.

Next, defendant alleges that he was denied a fair trial because an officer who was listed as a witness in the information did not testify. This issue was not preserved for our review. Because defendant was not prejudiced by the absence of the officer's testimony, we decline to review this issue. *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989).

Finally, we reject defendant's claim that the evidence was insufficient to support his conviction of assault with intent to rob while armed. In reviewing a challenge to the sufficiency of the evidence in a bench trial, we consider the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an

intent to rob or steal; and (3) the defendant's being armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991); MCL 750.89; MSA 28.284. Circumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the elements of the offense. *Hutner*, *supra* at 282. This Court may not interfere with the jury's resolution of credibility disputes. *Wolfe*, *supra* at 514-515; *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

The victim and the passenger testified that defendant beat the victim repeatedly with a wooden dowel when the victim drove away from the alley. The evidence showed that defendant attempted to take the victim's necklace and watch. Both the victim and the passenger testified that defendant continued to beat the victim until the police arrived. Moreover, the victim required numerous stitches in four places on his head. Police found the victim's car keys in defendant's possession. A rational trier of fact could fairly infer that defendant assaulted the victim with the intent to rob.

Although the victim's story was inconsistent at times, his overall account of the incident was consistent with the passenger's testimony. Further, the trial court stated that it considered credibility issues in finding the facts. Viewed in a light most favorable to the prosecution, the evidence was sufficient that defendant assaulted the victim with a wooden dowel, intending to rob him.

Affirmed.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman

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