STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED PATRICK GRABDA,

Defendant-Appellant.

UNPUBLISHED
November 20, 1998

No. 197757
Grand Traverse Circuit Court
LC No. 95-006938 FH

Before: Wahls, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of uttering and publishing, MCL 750.249; MSA 28.446. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a term of ten to twenty years' imprisonment. We affirm.

In November 1995, a briefcase was taken from a van being driven by John Walker as the van was parked outside of a gas station and convenience store. Inside of the briefcase was Walker's personal checkbook. Later that same day, a check drawn on the Walker account was cashed at the Fife Lake branch of the Forest Area Credit Union. Defendant was subsequently arrested and charged with one count of uttering and publishing, MCL 750.249; MSA 28.446.

I. SUFFICENY OF THE EVIDENCE

Defendant argues that the trial court erred in denying his motion for a new trial, maintaining that the verdict was not supported by sufficient evidence. Defendant argues that the sole evidence connecting him to the crime was the positive identification offered at trial by the head teller at the Fife Lake branch of the Forest Area Credit Union. Defendant argues that this identification was suspect because in a pretrial lineup the teller had identified another man (defendant's brother) as having been the person who cashed the stolen check.

"When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt." *People v Dukes*, 189 Mich App 262,

264-265; 471 NW2d 651 (1991). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

After reviewing the totality of the evidence in the record, we conclude that there was sufficient evidence to convict defendant. We first note that, contrary to defendant's contention, the in-court identification of defendant by the head teller was not the sole evidence linking defendant to this crime. For example, there was evidence placing defendant's car at the gas station/convenience store at the time when the checks were stolen. Further, the detective investigating the burglary testified that when he questioned defendant about the stolen checks, defendant responded "that he had not broken into any van." This response came before anyone involved in the investigation had mentioned to defendant that the checks had been stolen from a van.

As for the head teller's identification, when identifying defendant at trial as the man that cashed the forged check, she recalled specific details, including that he was wearing a cap, a jacket, and had a mustache. The record also shows that before defendant's arrest, she had identified defendant in a photographic lineup of suspects. She also identified him at his preliminary examination. The fact that the teller initially misidentified defendant's brother as the man who passed the forged check in a corporeal lineup is not dispositive. As we just observed, defendant's conviction did not rest solely on the teller's identification evidence. Further, the teller testified that when she identified defendant in a second corporeal lineup, she was more confident with that choice.

Defendant also raises in his question presented on this issue the question of whether the verdict was against the great weight of the evidence. Because defendant does not discuss this question in his brief on appeal, we consider it to have been abandoned. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecution improperly shifted the burden of proof to him when it stated in its closing arguments that defendant had failed to provide credible evidence of his alibi. We disagree. "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980). However, "a prosecutor may not suggest in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence as this argument tends to shift the burden of proof." *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved on other grounds, *People v Fields*, 450 Mich 94, 115, n 24; 538 NW2d 356 (1995).

In *Fields*, the Michigan Supreme Court observed that "where a defendant testifies at trial or advances . . . an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of [proof] . . . . Thus, . . . the prosecutor may comment on the weakness of defendant's alibi." *Fields, supra* at 115. We believe

that the argument cited by defendant as improper was actually legitimate commentary on the weakness of defendant's alibi defense. Therefore, reversal on this ground is unwarranted.

III. NARRATION OF VIDEOTAPE

Defendant argues that commentary offered by a police officer at trial during the playing of the credit union surveillance videotape was hearsay, and thus should not have been admitted into evidence. Because defendant failed to raise an objection at trial to the comments at issue, appellate review is precluded "unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal automatic." *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996). Accord *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

The erroneous admission into evidence of the challenged commentary does not fall into the category of errors where prejudice is presumed. Accordingly, our analysis need only focus on whether the alleged error was outcome determinative. We are convinced after reviewing the record that the challenged commentary was not decisive of the outcome. As previously discussed, the evidence properly admitted at trial was sufficient to convict. One piece of this properly admitted evidence was the teller's identification of defendant, which placed him inside the credit union at the time the surveillance tape was made. Given these circumstances, we decline defendant's invitation to consider for the first time on appeal this unpreserved issue. *Grant, supra* at 553.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was the denied effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must first show that trial counsel's performance was objectively deficient to an extent "'that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment.'" *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 164. When attempting to establish prejudice, defendant must show that "there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

A. Motion to Suppress Corporeal Lineup Identification

Defendant first claims that his counsel was ineffective for failing to move to suppress evidence regarding the bank teller's corporeal lineup identification. At the evidentiary hearing held on defendant's motion for a new trial, defense counsel testified that it was defendant's overwhelming desire to participate in a corporeal lineup with his brother. Counsel testified that defendant hoped to either implicate his brother, or at least to raise the spectre of reasonable doubt. Counsel also testified that after the lineup, defendant agreed that instead of filing a motion to suppress, defendant would "play upon the confusion in the identification . . . in an effort to show that the Prosecutor had failed" to sustain his burden of proof. Conversely, defendant testified that it was defense counsel who suggested the

corporeal lineup, and that defendant had agreed to the procedure because he was relying on counsel's superior knowledge of the law.

We conclude that defendant has failed to show that counsel's performance was ineffective on this matter. Defendant has failed to establish that the lineups were in any way unduly suggestive. *People v McElhaney*, 215 Mich App 269, 286: 545 NW2d 18 (1996). Although defendant asserts that the teller's lineup identification was inadmissible because the two had been in court together at defendant's preliminary examination, defendant fails to show or even argue how that circumstance tainted the lineup identification. We are not faced with a situation where a prior tentative identification of defendant was transformed into a later positive identification by the intervening use of suggestive law enforcement procedures. See *People v Gray*, 457 Mich 107, 112-113; 577 NW2d 92 (1998). A claim of ineffective assistance cannot be predicated on the failure to raise a meritless motion to suppress. *People v Darden*, 230 Mich App 597, 605; ___ NW2d ___ (1998). Further, defendant has failed to overcome the presumption that the decision not to bring a motion to suppress was sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that counsel's strategy did not succeed does not mean that the decision to follow that strategy evidences ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. Teller's In-Court Identification

Second, defendant claims that his counsel was ineffective for failing to object to the teller's in-court identification on the grounds that there was no independent basis for the identification. However, because defendant has failed to show that improper pretrial identification procedures were used, there was no need to establish an independent basis for the in-court identification. See *Gray, supra* at 114-115. In any event, after reviewing the record we are convinced that the teller had an independent basis for her in-court identification. *Id.* at 116 (listing the eight factors to be used when analyzing whether there exists "a sufficiently independent basis to identify the defendant in court").

C. Narration of Videotape

Third, defendant asserts that counsel's ineffective assistance is evidenced by his failure to object to the comments made by a police officer during the playing of the credit union's surveillance videotape. We disagree. Defendant has failed to establish that he was prejudiced by counsel's inaction. *Mitchell, supra* at 164. Further, given that counsel's failure to object was a matter of trial strategy,[1] *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989), we will not second-guess that decision. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

D. Prosecutorial Misconduct

Fourth, defendant asserts that counsel's ineffective assistance was evidenced by his failure to object to those comments made during closing arguments that defeat claims shifted the burden

of proof. As we have already concluded that the comments were proper, see *supra* part II, pp 2-3, we reject the contention that the failure to raise a frivolous objection to those comments was error. *Darden, supra* at 605.

V. DEFENDANT'S SENTENCE

Defendant also raises a three prong attack to the sentence imposed by the trial court. "In reviewing sentences imposed for habitual offenders, the reviewing court must determine whether there has been an abuse of discretion." *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). Under MCL 769.12(1)(a); MSA 28.1084(1)(a), a person convicted of a "felony . . . punishable upon a first conviction by imprisonment for a maximum term of five years or more or for life, the court [may be sentenced] . . . upon conviction of the fourth or subsequent offense to imprisonment for life or for a lesser term." Uttering and publishing is such a felony. MCL 750.249; MSA 28.446 (stating that conviction for uttering and publishing is "punishable by imprisonment in the state prison not more than 14 years").

First, defendant asserts that his ten to twenty year prison sentence is disproportionate. Defendant argues that the circumstances surrounding both the offense and the offender do not justify the harsh sentence imposed. We disagree. The Court in *Hansford* stated "that a trial court does not abuse its discretion in giving a sentence within the statutory limits . . . when an habitual offender's underlying felony, in context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Hansford, supra* at 326. In the case at hand, the trial court concluded that defendant's criminal history, as well as his own perjury and his involvement in presenting perjurious testimony of others, evidenced a poor potential for reform. After reviewing the record, we can find no error in the soundness of this reasoning. Accordingly, we are convinced that the trial court did not abuse its discretion in sentencing defendant to ten to twenty years in prison.

Second, defendant argues that his sentence amounts to both cruel *and* unusual punishment, and cruel *or* unusual punishment, and is therefore unconstitutional under both the federal[2] and state[3] constitutions. Again, we disagree. Defendant's constitutional challenge is based upon his assertion that the sentence is "grossly excessive." As we have already concluded that given the circumstances of this case the trial court did not abuse its discretion when imposing sentence, we further conclude that it does not violate either constitutional standard. *Harmelin v Michigan*, 501 US 957, 1001, 1010; 11 S Ct 2680; 115 L Ed 2d 836 (1991) (opinions of Kennedy & White, JJ.); *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992).

Finally, defendant argues that the trial court abused its sentencing discretion when it improperly considered defendant's refusal to admit guilt and his insistence on a jury trial. After reviewing the sections of the sentencing hearing cited by defendant, we conclude that his assertion is baseless. In context, it is clear that the trial court addressed defendant's refusal to admit his guilt as it bore upon defendant's potential for rehabilitation. *People v Stewart (On Remand)*, 219 Mich App 38, 44-45; 555 NW2d 715 (1996). Further, the comments came as the court was discussing defendant's perjury and subornation of perjury. These are proper areas to consider when imposing sentence. *Id.*; *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995).

Affirmed.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] At the evidentiary hearing, defense counsel claimed that he and defendant discussed the issue and that they believed the jury had sufficient intelligence to determine that the videotape was of such poor quality, that the police officer's references to defendant would be seen as overreaching.

[2] US Const, Am VIII reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[3] Const 1963, art 1, § 16 reads in pertinent part: "cruel or unusual punishment shall not be inflicted . . . ."