STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GREGORY E. BROWN,

Defendant-Appellant.

UNPUBLISHED
December 18, 2001

No. 222151
Wayne Circuit Court
LC No. 98-014109

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for armed robbery, MCL 750.529. Defendant was sentenced to three to twelve years in prison. We affirm.

At about 5:00 p.m. on December 8, 1998, the victim was studying in the Polish Study Room in Manoogian Hall on the Wayne State University campus. There were about fifteen other people studying in the room with the victim at the time. Defendant, who was sitting at the same table as the victim, leaned across the table and put the barrel of what looked like a gun on the victim's chest. With his other hand, defendant took the victim's book bag and telephone. The book bag contained six $20 bills, all folded with the fronts facing in. Defendant then walked out of the room, and the victim called the police.

Soon after, police saw defendant, who matched the description the victim had given, and followed him to a residence about four blocks away from Manoogian Hall. When the police ordered defendant to leave the porch and come talk to them, defendant jumped off the porch and fled. After police caught defendant, they searched him and found six $20 bills, all folded with the fronts facing in. When the police walked back to Manoogian Hall from where they had first seen defendant, they found a black plastic toy gun by a softball diamond in the Matthei Athletic Complex.[1] At a lineup the next day, the victim and a witness from the Polish Study Room both identified defendant.

On appeal, defendant first argues that he was deprived of his rights to due process and a fair trial by allowing the jury to rehear portions of the testimony. We find that defendant waived

[1] The softball diamond is located about two blocks from Manoogian Hall.

this issue for appeal. In order to preserve an issue for appeal, a party must place an objection on the record. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). "Counsel may not harbor error as an appellate parachute." *Id.* Waiver is "the 'intentional relinquishment or abandonment of a known right.' " *Id.* at 215, quoting *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter, supra* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

In the instant case, defense counsel agreed that the jury could have the requested testimony played back to them. In both *Carter, supra* at 208-214, and *People v Fetterley*, 229 Mich App 511, 518-519; 583 NW2d 199 (1998), the attorneys for the defendants agreed that transcripts of the testimony would not be given to the juries during deliberations, despite the juries' requests. Both the Supreme Court and this Court found that the defendants had waived this issue for appeal by agreeing with the trial courts' refusals to furnish the juries with the transcripts. *Carter, supra* at 214-220; *Fetterley, supra* at 518-520. We find that the instant case is similar to both *Carter* and *Fetterley* and that defendant waived this issue for appeal by agreeing to have portions of the testimony replayed for the jury. Therefore, there is no error for this Court to review.

Next, defendant argues that he was denied his rights to due process and a fair trial by the trial court's failure to instruct the jury on the defense of alibi. We find that defendant also waived this issue for appeal. Defense counsel specifically stated on the record that he was not requesting an alibi instruction. Both before and after the jury instructions were given, defense counsel stated that he was satisfied with the instructions. Defense counsel then stated that both attorneys were "in absolute agreement on every instruction in there." A defense attorney's express approval of jury instructions, as opposed to his mere failure to object, constitutes a waiver that extinguishes any error. *Carter, supra* at 216. When the trial court asks a party if there are any objections for the record after the court has read the jury instructions and the party responds in the negative, that party has waived the jury instruction issue. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).[2] Therefore, we find that defendant waived this instructional issue for appeal by expressly approving the jury instructions. Accordingly, there is no error for this Court to review.

Next, defendant argues that he was denied his rights to due process and a fair trial by the trial court's failure to instruct the jury on unarmed robbery, MCL 750.530, or larceny from a person, MCL 750.357. Once again, defendant waived this issue. Defense counsel stated on the record that he was not requesting any instructions for lesser offenses. As discussed, defense counsel stated that he was satisfied with the instructions. Therefore, by expressly approving the jury instructions, defendant waived this instructional issue for appeal. Accordingly, there is no error for this Court to review. *Carter, supra* at 216; *Tate, supra* at 559.

---

[2] In *Tate, supra* at 559, this Court stated: "Pursuant to *Carter, supra*, [462 Mich 206], we conclude that any error in . . . the instruction . . . was extinguished by counsel's repeated waiver, either in the form of express approval or (which amounts to the same thing) by responding 'No' when specifically queried by the court whether there was anything further for the record."

Next, defendant argues that the trial court's admission of the toy gun into evidence was plain error because it was not relevant to the issues in the case. Defendant did not preserve this issue for appeal by placing an objection on the record. See MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). This Court reviews unpreserved, nonconstitutional error for plain error affecting the defendant's substantial rights. *Carines, supra* at 763-764, 774; *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Hawkins, supra* at 449. Evidence is relevant if it is material and has probative force. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). To be material, evidence need not be directed at an element of the crime or an applicable defense, but only must be a fact that is "in issue" in the sense that it is within the range of litigated matters in dispute. *Id.* A defendant's general denial of a charge places all the elements of the charge at issue. *Id.* at 60.

The toy gun at issue was admitted into evidence as the weapon that defendant used to commit the robbery. The victim identified the gun as the object that defendant had pointed at her chest when he took her belongings. She testified that the gun used to rob her had tape on it, and the prosecutor pointed out that the toy gun admitted into evidence also had tape on it. The prosecution argued that it was this toy gun, rather than a real gun, that defendant used to commit the crime. Defense counsel argued that there was no evidence connecting defendant to the toy gun, but the jury believed the prosecution and convicted defendant.

We find that the toy gun was relevant evidence because it was alleged to be the object defendant used to commit the robbery. One of the elements of armed robbery is that the defendant used "a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.529. The gun was found about two blocks from Manoogian Hall on the route defendant would have taken from the scene of the robbery. Therefore, the toy gun admitted into evidence may have been the object defendant used in the robbery, and was relevant because it related to one of the elements of the crime and was of consequence to the determination of the action. Moreover, the toy gun had a tendency to prove the existence of the fact that defendant used an object that the victim could have reasonably believed was a dangerous weapon.

Defendant also argues that even if the toy gun was relevant evidence, it should not have been admitted because its probative value was outweighed by the danger of unfair prejudice. We disagree. Even when evidence is relevant, it may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Sabin, supra* at 58. "Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury." *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999).

Defendant argues that the probative value of the toy gun was outweighed by the danger of unfair prejudice, but does not argue why the admission of the toy gun was unfairly prejudicial to him. The toy gun was probative evidence because it was used to show what object defendant used to rob the victim. Unfair prejudice means more than simply damage to the opponent's case.

People v Vasher, 449 Mich 494, 501; 537 NW2d 168 (1995). "A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *Id.* Unfair prejudice is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id.* Defendant points to no reason, and we can find no reason why the admission of the toy gun was unfairly prejudicial. Therefore, we conclude that the probative value of the toy gun was not substantially outweighed by the danger of unfair prejudice. Consequently, the admission of the toy gun was not a plain error that affected defendant's substantial rights.

Next, defendant argues that his trial counsel was ineffective for several reasons. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Sabin (On Second Remand)*, *supra* at 659. In the instant case, there is no indication that defendant moved in the trial court for an evidentiary hearing or a new trial. Therefore, this Court's review is limited to the facts on the existing record. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In applying this test, the reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Toma, supra* at 302. Under the first prong of the test, the alleged errors must be so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Mitchell*, *supra* at 164-165. Under the prejudice prong, the defendant "must demonstrate 'a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different . . . .'" *Toma*, *supra* at 302-303, quoting *Mitchell, supra* at 167. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*People v Reed*, 449 Mich 375, 400-401 (Boyle, J.); 535 NW2d 496 (1995), quoting *Strickland*, *supra* at 697.]

First, defendant argues that his trial counsel was ineffective for conceding to the jury that the victim had been robbed at gunpoint. We disagree. Only a defense counsel's complete

concession of the defendant's guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). In his closing argument, counsel conceded that an armed robbery had occurred, but argued that defendant was not the person who committed the robbery. It was counsel's strategy to focus on the argument that defendant did not commit the crime, not on whether an armed robbery had occurred. The evidence showed that an object that looked like a gun was pointed at the victim's chest while she was robbed. There was no evidence contradicting the evidence that the victim was robbed with something that looked like a gun. It would have been difficult for defense counsel to argue that the victim's belief that the toy gun used in the robbery was a real gun was unreasonable. Therefore, it was sound trial strategy for defense counsel not to dispute the victim's claim that she was robbed at gunpoint and to instead focus on the identity of the perpetrator. Additionally, defendant was not prejudiced by defense counsel's concession that the victim was robbed at gunpoint because the evidence showed that the victim believed that the toy gun was a real gun and there was no indication that this belief was unreasonable in any way. Therefore, even if defense counsel would not have conceded that the victim was robbed at gunpoint, there is no indication that the jury would have found that it was unreasonable for the victim to believe that the toy gun was a real gun or that the jury would have found defendant not guilty of armed robbery. Thus, we find that defense counsel's concession did not render his assistance ineffective.

Second, defendant argues that his trial counsel was ineffective for failing to request an alibi jury instruction. We disagree. In *People v McMillan*, 213 Mich App 134, 140-141; 539 NW2d 553 (1995), this Court held that the defense attorney was not ineffective for failing to file a notice of alibi because the alibi witness' grand jury testimony showed that she could not testify in regard to where the defendant was at the time the crime was committed. Similarly, in the instant case, the alibi witness testified that defendant was elsewhere about an hour before the armed robbery, but could not testify in regard to where defendant was when the armed robbery took place. Because the alibi witness did not provide an effective alibi for defendant, defense counsel's performance was not objectively unreasonable for failing to request an alibi instruction. Furthermore, defendant was not prejudiced by defense counsel's failure to request this instruction. Therefore, counsel for defendant was not ineffective for failing to request an alibi instruction.

Third, defendant argues that his trial counsel was ineffective for failing to request jury instructions for unarmed robbery and larceny from a person. Again, we disagree. Defense counsel's decision not to request instructions on the lesser included offenses in the instant case was a matter of trial strategy. Defendant's defense at trial was that he was not the person who robbed the victim. Defense counsel's failure to request instructions on the lesser offenses was a matter of trial strategy because a request for the instructions may have reduced defendant's chance of acquittal. In effect, by not requesting such instructions, defense counsel may have attempted to force the jury into an "all or nothing" decision. Furthermore, defendant was not prejudiced by defense counsel's failure to request these instructions because the evidence overwhelmingly showed that defendant was guilty of armed robbery, rather than unarmed robbery or larceny from a person. Therefore, we conclude that defendant was not deprived of his constitutional right to the effective assistance of counsel.

Fourth, defendant argues that his trial counsel was ineffective for failing to object to the admission of the toy gun into evidence. Once again, we disagree. As discussed, *supra*, the toy gun was admissible evidence. "A trial attorney need not register a meritless objection to act effectively." *Hawkins, supra* at 457. Furthermore, defendant was not prejudiced by the admission of the toy gun into evidence. Even if the toy gun had not been admitted, the victim testified that defendant had robbed her at gunpoint. A police officer testified that he found a black plastic toy gun as he walked back toward the scene of the crime from where he had first seen defendant. Even without the admission of the actual physical toy gun into evidence, the jury heard uncontroverted testimony that defendant had robbed the victim at gunpoint and that a toy gun had been found on his route away from the crime scene. Even if defense counsel would have objected to the admission of the toy gun, defendant was not prejudiced by the admission of this evidence. Therefore, defendant was not deprived of his constitutional right to the effective assistance of counsel.

We affirm.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey