STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v	No. 245376 Oakland Circuit Court
COREY JAMAL TURNER, Defendant-Appellant.	LC No. 00-175450-FC

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, felonious assault, MCL 750.82,[1] and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of imprisonment of seven to twenty years for the armed robbery conviction and two to four years for the felonious assault conviction, to be served consecutively to two concurrent two-year terms for the felony-firearm convictions. We granted defendant's delayed application for leave to appeal. We affirm in part and reverse in part.

Defendant contends that the trial court erred in admitting a videotape from a casino depicting only those times when defendant was near the victim. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant argues that the videotape was "manipulated" to make it appear as though defendants stalked the victim throughout his casino visit. Defendant argues that the "best evidence rule," MRE 1002, required the full original videotapes to be introduced, and that the composite videotape was not admissible under MRE 1003 or MRE 1004. Further, defendant argues, the composite videotape would not qualify as a summary of voluminous recordings under

[1] Defendant was convicted of felonious assault as a lesser offense to an original charge of assault with intent to do great bodily harm, MCL 750.84.

MRE 1006, because it did not "accurately summarize" the original videotapes in a neutral fashion, but rather slanted the contents of the originals in the prosecutor's favor.

MRE 1002 allows the use of copies when otherwise authorized by the court rules. MRE 1003, which governs the admissibility of duplicates, was not offended because defendant did not raise a genuine question as to the authenticity of the original videotapes from which casino personnel duplicated a summary, and defendant has not shown that it was unfair under the circumstances to admit the duplicated summary in lieu of the originals. Further, contrary to defendant's argument, MRE 1006 must be read in harmony with MRE 1004 to allow the use of summaries even when original source documents have not been lost or destroyed.[2]

To support admissibility under MRE 1006, the proponent must show that: (1) the summary was of voluminous recordings, which cannot conveniently be examined in court; (2) the underlying recordings must themselves be admissible in evidence; (3) the originals or duplicates must be made available for examination or copying by other parties; and (4) the summary must be an accurate summarization of the underlying materials. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 100; 535 NW2d 529 (1995), quoting *White Industries v Cessna Aircraft Co*, 611 F Supp 1049, 1070 (WD Mo, 1985). Here, the composite videotape satisfied those conditions. There were thirty-two original videotapes, each eight hours long. Even without taking breaks, viewing the original videotapes in their entirety would have occupied at least thirty-two days of trial. These were voluminous recordings that could not conveniently be viewed in court. Defendant does not dispute the second and third elements, that the underlying videotapes would be admissible, and that the videotapes were available for examination. Finally, the composite videotape was not inaccurate. It was taken directly from the original videotapes without cropping, and the time stamps imprinted on the videotape undermine defendant's claim that the jury would be misled into underestimating the time depicted. Consequently, we are not persuaded that the videotape was inadmissible pursuant to MRE 1006.

Defendant also argues that the videotape should have been excluded pursuant to MRE 403 because there was a danger of misleading the jury, and the impact of recorded evidence is greater than the impact of oral testimony. There is no merit to this claim. The greater impact generally afforded by recorded evidence does not render it *unfairly* prejudicial. Defendant has failed to demonstrate confusion of the issues, or that the jury was misled. Again, the time stamps on the composite videotape were sufficient to prevent confusion. Further, the use of taped summaries in lieu of 256 hours of raw recordings did not create undue delay, waste the jury's time, or give rise to the needless presentation of cumulative evidence. On the contrary, the use of a composite summary eliminated delay, made better use of time, and was not needless in light of the importance of the identification issue. The alternative suggested by defendant—forcing the prosecutor to show all the tapes—would be more offensive than the procedure actually used by the prosecutor. Accordingly, the trial court did not abuse its discretion when it allowed the composite videotape into evidence. *Cain, supra* at 122.

[2] An exhibit cannot be characterized as a summary under MRE 1006 if it is merely the original document or tape. If MRE 1006 contemplated only the use of original documents as "summaries," the rule would not provide for the examination or copying of originals.

Next, defendant contends that the trial court abused its discretion in allowing the detective in charge to "repeatedly explicate evidence of the crime scene." Because defendant did not raise this objection below, he is not entitled to relief unless he can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Defendant argues that the evidence was repetitive and cumulative, and, therefore, was prejudicial without additional probative value under MRE 403. However, the presentation of cumulative evidence is discretionary with the trial court. *People v Vargo*, 139 Mich App 573, 581; 362 NW2d 840 (1984). Inasmuch as defendant is objecting to the number of times evidence was presented, rather than the fact that the evidence was presented, we are not persuaded that the cumulative presentation, if any, had any impact on the outcome of the proceedings. Moreover, it is plausible that the repeated references to the same evidence had a negative impact on the persuasiveness of the prosecutor's legal theory. Accordingly, we reject defendant's contention of error.

Next, defendant challenges the scoring of two offense variables under the sentencing guidelines. Generally, we will uphold a scoring decision for which there is any evidence in support. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

First, defendant contends that offense variable 1 (OV 1), MCL 777.31, was improperly scored at fifteen points. Fifteen points are scored for OV 1 if a "firearm was pointed at or toward a victim," MCL 777.31(1)(c), whereas only ten points are scored if the victim was merely "touched by any other type of weapon," MCL 777.31(1)(d). While defendant concedes that the victim was struck by an item, defendant contends that there was no evidence that a firearm was involved. However, the victim testified that one of the assailants poked him in the chest with what he believed was "a rifle or a shotgun." In addition, the victim's statement to the police indicated that he was "hit in the chest with what appeared to be a gun barrel." Accordingly, there was sufficient evidence supporting the trial court's scoring OV 1 at fifteen points.[3] *Hornsby, supra* at 468.

Second, defendant contends that the trial court erred in scoring fifteen points for OV 10, MCL 777.40. MCL 777.40(1)(a) provides that fifteen points should be scored if "predatory conduct was involved." The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, the evidence suggested that defendants staked out the casino and followed the victim home for nearly twenty miles for the purpose of taking his casino winnings. Accordingly, there was ample evidence supporting the trial court's scoring of this variable. *Hornsby, supra* at 468. Consequently, we reject defendant's challenges to the scoring of the offense variables.

[3] The victim's failure to unequivocally state that the item was a gun probably prevented the jury from finding that it was beyond a reasonable doubt that defendant was guilty of armed robbery. The standard for scoring variables, however, is substantially less than beyond a reasonable doubt. *Hornsby, supra* at 468.

Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel because his trial counsel failed to move for the appointment of a DNA expert. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *Id.* at 423. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424. Here, defendant merely speculates that the appointment of a DNA expert may have been helpful to trial counsel. This speculation is plainly insufficient to support a finding that the failure to request a DNA expert was outcome determinative. Consequently, we reject defendant's contention of error.

Similarly, defendant contends that the trial court abused its discretion by denying appellate counsel's motion for funds to hire a DNA expert. Defendant raised this issue in a motion for a new trial, which was denied. In his motion, defendant sought appointment of a DNA expert to help him determine whether the prosecutor's DNA expert's testimony at trial "comported with the required scientific protocols." Again, however, defendant has not identified any specific concerns about the DNA expert's testimony. Thus, there is no basis for us to conclude that the trial court's decision was an abuse of discretion.

Next, defendant contends that the trial court erred in rejecting his request for an instruction on the lesser offense of larceny over $1,000, but less than $20,000, MCL 750.356(3)(a). The trial court instructed the jury on the charged offense of armed robbery, as well as the lesser offenses of unarmed robbery, MCL 750.530, and larceny from the person, MCL 750.357. But the jury rejected these lesser options and found defendant guilty of the charged offense. Therefore, any error in declining to instruct on the requested offense was harmless. *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997).

Finally, defendant contends that his simultaneous convictions of armed robbery and felonious assault violate the double jeopardy protection against multiple punishment for the same offense. US Const, Ams V and IV; Const 1963, art 1, § 15. We review de novo a double jeopardy issue. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002).

In *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981), we recognized that our Legislature did not intend to separately punish armed robbery and felonious assault unless "it can clearly be established that the offenses occurred at separate times." Here, the prosecutor argues that the offenses occurred at different times—specifically, that defendant only began hitting the victim in the head after the money had been taken. We disagree. On cross-examination, the victim testified that someone was going through his pockets even after he was struck in the head. Thus, the evidence did not establish that the assault was committed after the robbery was completed. Accordingly, we vacate defendant's conviction of felonious assault. In light of our ruling, we must also vacate the underlying felony firearm conviction.

In sum, we affirm defendant's convictions of armed robbery and one count of felony-firearm, but vacate his convictions of felonious assault and the additional felony-firearm count.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad