STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2006
v	No. 256983 Berrien Circuit Court
CHARLES STEPHEN LEBLANC, Defendant-Appellant.	LC No. 2003-406255-FC

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first argues that there was insufficient evidence to convict him of felony-firearm because there was no evidence that the weapon used met the definition of "firearm" as set out in MCL 8.3t[1]. We disagree. We review de novo claims of insufficient evidence in a light most favorable to the prosecution to 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Here, the store attendant testified, without any doubt, that during the robbery, defendant pointed a shiny and metallic gun at her from a distance of three to four feet. Additionally, a police officer testified that defendant confessed to carrying a gun during the robbery, which he had received from his accomplice. Another officer testified that when defendant was asked to give a written statement regarding the robbery, defendant wrote a poem stating that this was the first time he was armed. Additionally, the officer testified that defendant told him that the gun was a shiny revolver and that he was scared when first presented with the weapon by his accomplice. The fact that the weapon was never found and was not presented at trial does not

[1] "The word 'firearm,' except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air." MCL 8.3t.

diminish the ample evidence that defendant used a weapon. Viewing the evidence in a light most favorable to the prosecution, sufficient evidence existed from which a rational trier of fact could conclude that defendant was carrying a firearm as defined in MCL 8.3t; therefore, defendant is not entitled to relief on this issue.

Defendant next argues that the trial court erred in making comments to the jury regarding how they would be identified; in failing to define the term "firearm" and in stating that a pistol constituted a firearm. Because defendant failed to object to any of the claimed allegations of error, our review is for plain error. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

Defendant argues that the trial court erroneously informed the members of the jury that they would be referred to by their juror numbers rather than their names for their security and protection. Defendant argues that the trial court's comment was prejudicial and unnecessary because it implied that he was a dangerous person or a gang member. The trial court informed the jury that use of juror numbers was a general practice, used in both criminal and civil trials, that was initiated to ensure the safety and comfort of the jurors. The trial court did not relate the number use to defendant or this particular trial; therefore, no error occurred.

Defendant also argues that the trial court erred in failing to define the term "firearm," and in instructing the jury that a pistol is necessarily a firearm. However, defense counsel expressed satisfaction with the trial court's instructions; that "constitute[d] a waiver of any instructional error." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defense counsel's decision in this regard was warranted because there was no trial issue regarding defendant's gun being a "firearm." See *People v Hunt*, 120 Mich App 736, 742; 327 NW2d 547 (1982).

Defendant next argues that the trial court erred in admitting the statements of his accomplice, because they were prejudicial hearsay and violated his right to confrontation and his right to procedural due process. We review for an abuse of discretion a trial court's decision to admit evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, we review de novo a decision involving a preliminary question of law, such as whether a rule of evidence precludes admissibility. *Id*.

Trial evidence initially pointed to defendant's accomplice as the perpetrator. To explain to the jury why the investigation's focus shifted from the accomplice to defendant, it was necessary for one of the officers to testify that during the interview with defendant's accomplice, he was given defendant's name as someone who "might" have been involved in the robbery. Defendant's hearsay objection to the testimony at trial was overruled.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Here, the disputed testimony was not offered to prove the truth of the matter asserted, i.e., it was not offered to show that defendant was involved in the armed robbery. It was only admitted to show what led the officers to continue their investigation by seeking out defendant. The substantive evidence of defendant's guilt resulted from that investigation, and this detail about why that investigation was initiated did nothing to prove the prosecutor's case. Because the evidence was not hearsay, the trial court did not abuse its discretion by admitting the evidence. Also, statements not offered to prove the truth of the matter asserted do not implicate

the Confrontation Clause. *Dutton v Evans*, 400 US 74, 88; 91 S Ct 210; 27 L Ed 2d 213 (1970). Additionally, defendant's due process rights were not violated because he was given the opportunity to cross-examine the officer regarding those statements.

Defendant also argues that it was error for the trial court to allow an officer to testify regarding defendant's account of his accomplice's statements because it violated his right to confront witnesses. Defendant failed to object to that testimony at trial; therefore, we review it for plain error, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), and find none. The Confrontation Clause is not implicated because the accomplice's statements to defendant were not "testimonial." *People v Bauder*, 2005 WL 3357917; ___ Mich App ___; ___ NW2d ___ (2005). Defendant's statements were not hearsay, because they are admissions by a party-opponent. MRE 801(d)(2). Defendant was given the opportunity to cross-examine the officer making the statements; therefore, his right to due process was protected, and no plain error resulted.

Defendant also argues that the probative value of the testimony previously mentioned was outweighed by its prejudicial impact and that it therefore should have been excluded under MRE 403. However, an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). The evidence was highly probative because it linked defendant to the crime. Moreover, unfair prejudice results only if the evidence is likely to be given undue weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod on other grounds 450 Mich 1212; 539 NW2d 504 (1995). In light of the other evidence implicating defendant, we conclude that its admission did not result in undue prejudice, and no error occurred.

Defendant next argues that prosecutorial misconduct denied him a fair trial. We disagree. We review for plain error unpreserved claims of prosecutorial misconduct. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant first takes issue with the prosecutor's comment during opening statements that a police officer would testify that defendant's accomplice gave defendant's name as someone who "might" have been involved in the robbery, and his subsequent elicitation during trial of that testimony, as well as testimony that defendant was apprised of that information. However, as discussed above, the evidence was properly admitted; therefore, the prosecutor's reference to and elicitation of such testimony did not constitute misconduct.

Defendant also takes issue with the prosecutor's elicitation of a police officer's opinion that, based on the security videotape, the perpetrator knew precisely where to find the money. However, opinion testimony by a lay witness is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of a fact in issue. MRE 701; *People v Daniel*, 207 Mich App 47, 57-58; 523 NW2d 830 (1994); therefore, the prosecutor's elicitation of the testimony did not constitute misconduct.

Defendant also takes issue with the prosecutor's elicitation of a police officer's testimony that defendant's explanation for the robbery was that he needed money because his girlfriend was pregnant. However, the prosecution may use a defendant's need for money to establish a motive for a theft offense, *People v Jackson*, 77 Mich App 392, 400; 258 NW2d 89 (1977); therefore, the prosecutor's elicitation of the testimony did not constitute misconduct.

Defendant also takes issue with the prosecutor's elicitation of a police officer's testimony that money was found at the house of defendant's accomplice. However, defendant fails to develop this assertion of error; therefore, we consider it abandoned. *People v Green*, 260 Mich App 392, 410; 677 NW2d 363 (2004).

Defendant also argues that the prosecutor improperly appealed to the jury's sympathies by telling the jury how the victim had been affected by the crime during voir dire and by later asking the victim how the robbery had affected her. While appeals to the jury to sympathize with the victim constitute improper argument, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), the prosecutor preventatively advised the jury regarding what evidence might cause them to feel sympathetic and cautioned that they were not allowed to let such feelings affect their deliberations; therefore, the prosecutor's comment and elicitation of such testimony did not constitute misconduct.

Defendant also argues that the prosecutor improperly referred to sentencing options during voir dire. While a prosecutor may not refer to a defendant's disposition until after the verdict has been entered, *People v Secorski*, 37 Mich App 486, 489; 195 NW2d 8 (1972), the prosecutor merely told the jury that the sentencing decision belongs to the trial judge; therefore, the prosecutor's comment did not constitute misconduct.

Defendant received a fair and impartial trial. Because none of the allegations of error constituted prosecutorial misconduct, defendant's claim of cumulative error fails. *Watson*, *supra* at 594.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. Defendant failed to move for a new trial or evidentiary hearing on this claim; therefore, our review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Effective assistance of counsel is presumed and it is defendant's burden to overcome the presumption that counsel's performance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that counsel was ineffective for failing to object to the rulings and comments by the trial court and the alleged instances of prosecutorial misconduct that were discussed above. However, because defendant's allegations of error are meritless, any objection would have been futile and counsel is not ineffective for failing to make futile objections. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Defendant next argues that counsel was ineffective for failing to request a lineup before the preliminary examination. However, defense counsel's decision not to move for a lineup is presumed to be sound trial strategy. *Stanaway*, *supra* at 687. Defendant confessed to the robbery, told police where to find the clothing he had worn during the crime, provided a diagram of the store layout, and gave the police some of the money he had stolen. Indeed, had the victim identified defendant at a lineup, it would only have added to the substantial evidence against him and would have further diminished the viability of the defense of mistaken identity.

Defendant next argues that counsel was ineffective for failing to move to suppress the victim's identification of him at the preliminary examination. Counsel's decision not to move for suppression of identification testimony is a matter of trial strategy. *People v Wilki*, 132 Mich

App 140, 145; 347 NW2d 735 (1984). And because we will not substitute our judgment for that of trial counsel regarding matters of trial strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), trial counsel's failure to move to suppress the in-court identification cannot form the basis of an ineffective assistance of counsel claim. Further, the circumstances of the preliminary examination were not unduly suggestive: it occurred only one month after the robbery, and the store clerk identified defendant by his height, build, and the shape of his nose and face, which she saw during the robbery through a nylon mask from a distance of three to four feet. There was no basis for suppression of the identification made at that proceeding, and counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey