

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD WOODS,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2006

No. 262681

Wayne Circuit Court

LC No. 04-012254-01

Before: Cooper, P.J., and Hoekstra and Smolenski, 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. He was subsequently sentenced to serve 27 months to 10 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was deprived of a fair trial because the prosecutor improperly elicited testimony that he exercised his right to remain silent after being informed of his *Miranda*<sup>1</sup> rights during a voluntary police interview. Because defendant failed to object to this testimony at trial, our review is limited to a determination whether defendant has established plain error affecting his substantial rights, i.e., error that was obvious and which affected the outcome of his trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no such error on the facts of this case.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. See *People v Dennis*, 464 Mich 567, 573-575; 628 NW2d 502 (2001). However, constitutional error requiring reversal does not arise from the erroneous admission of evidence of a defendant's silence if the prosecutor did not exploit the issue of the defendant's silence and the error was otherwise harmless. *Id.* at 576-577; see also *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). Here, the police detective's testimony that defendant did not provide a statement at the interview was both isolated and brief.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Moreover, the prosecutor did not exploit this testimony. To the contrary, the prosecutor's sole and limited reference to the detective's testimony during rebuttal argument was responsive to the theories proffered by defense counsel during closing argument and did not place evidence of defendant's silence before the jury as substantive evidence of defendant's guilt. Cf. *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Given the limited nature and use to which the challenged testimony was put, and considering that defendant was identified by the robbery victim, Ibrahim Khaled, as one of the two individuals who entered his gas station and demanded money at gunpoint, we do not conclude that defendant has established that elicitation of that testimony constitutes plain error affecting his substantial rights.

Defendant next argues that he was denied a fair trial as a result of the improper admission of similar acts evidence; specifically, testimony regarding a recent string of robberies in the southwest Detroit area. We disagree. Because defendant failed to object to this testimony at trial, our review is again limited to a determination whether defendant has established plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant is correct that "evidence of other crimes, wrongs, or acts" is inadmissible to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Here, however, reference to the robberies at issue was not made to show defendant's character or for any other purpose relevant to MRE 404(b). Rather, reference to the robberies was made only to show that defendant became a suspect in this case based on information obtained during an investigation into those robberies, and to explain why Khaled was ultimately shown three separate photographic lineups. Thus, because the evidence was not offered to show character or for any other purpose relevant to MRE 404(b), the prohibition against evidence of other crimes, wrongs, or acts is inapplicable and admission of the challenged evidence did not amount to plain error. See *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

Defendant next argues that the evidence was insufficient to support his armed robbery conviction. Again, we disagree. In determining the sufficiency of the evidence to support a conviction, we review the evidence de novo and in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime had been proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

To convict a defendant of armed robbery, the trier of fact must find the following elements: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Carines, supra* at 757. In challenging the sufficiency of evidence to support these elements, defendant challenges only the evidence to support that property was taken "from the victim's presence or person." Regarding this elemental requirement, this Court has held that "[a] thing is in the presence of a person, in respect to robbery, [if it] is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976) (citation and internal quotation marks omitted).

At trial, Khaled testified that after defendant and his accomplice pointed a gun at him, he opened a door to let them near the cash register "so I don't die [sic]," then turned and "ran away

for my life” through the back exit of the gas station. After running around the building, Khaled reentered the gas station and discovered that there was no money in the cash register and his wallet as well as a joystick and a football were missing. In addition to this testimony, the security tape depicted defendant and his accomplice taking money and reaching through the cashier’s window after Khaled had fled. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Here, it is reasonable to infer from the foregoing testimony and evidence that Khaled, who was standing behind the cash register when guns were pointed at him, permitted defendant access to the cash register out of fear and would not have run from the station but for this fear, i.e., that Khaled was in control of the property taken and would have remained so “if not overcome by violence or prevented by fear.” *Beebe, supra*. Therefore, there was sufficient evidence to support defendant’s armed robbery conviction.

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. Because an evidentiary hearing on these claims has not been held, our review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant has been deprived of his right to the effective assistance of counsel presents a question of constitutional law that we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel’s errors, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). It is presumed that defense counsel’s decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, a defense counsel’s failure to call witnesses or present other evidence may amount to ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* “A substantial defense is one which might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

At trial, the police acknowledged that defendant’s accomplice, Dawan Colfer, admitted his involvement in the robbery and also named two other individuals who were involved, but did not make any statement implicating defendant during interrogation. Relying on these facts, defendant argues that Colfer’s statement exculpated him and that defense counsel’s failure to call Colfer as a witness or attempt to introduce his statement as one against penal interest, see MRE 804(b)(3), denied him the effective assistance of counsel. We disagree.

Although Colfer did not implicate defendant in the robbery, there is no evidence that Colfer made any statement specifically denying defendant’s involvement. Given this fact, it was objectively reasonable for defense counsel not to call Colfer as a witness because it is possible that Colfer may have implicated defendant. *Effinger, supra*. Because there is no evidence that Colfer’s statement explicitly exculpated defendant, a decision not to introduce Colfer’s testimony pursuant to MRE 804(b)(3) was also objectively reasonable. *Id.* Thus, given that the decision to call witnesses or present evidence constitutes trial strategy, we will not second guess defense

counsel's decision not to call Colfer or attempt to introduce his statement now that defendant has been convicted. *Dixon, supra*.

Moreover, given Khaled's testimony implicating defendant in the robbery, it is unlikely that a decision by defense counsel to call Colfer or seek introduction of his statement under MRE 804(b)(3), would have made a difference in the outcome of the trial. *Kelly, supra*. Thus, defense counsel's failure to call Colfer denied defendant neither a substantial defense nor the effective assistance of counsel. *Dixon, supra*.

Affirmed.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski