STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2006
V	No. 263853 Wayne Circuit Court
JAMES DAVID THURBER, Defendant-Appellant.	LC No. 04-012301-01

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his waiver trial convictions for armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). Because defendant was not denied the effective assistance of counsel, sufficient evidence existed upon which to convict defendant, and the court correctly found the facts and stated the law based upon the evidence presented, we affirm.

On November 10, 2004, John Spears was at home with his daughter when defendant entered the home. Both Mr. Spears and his daughter testified that defendant was holding an object in his hand and asked Mr. Spears for money. Mr. Spears' daughter ran out of the home, and defendant grabbed a cordless phone from the home and ran out the door as well. Defendant was arrested some time later and ultimately convicted of armed robbery and first-degree home invasion. Defendant was sentenced to 8 to 20 years' imprisonment for the armed robbery conviction and 2 to 20 years' imprisonment for the first-degree home invasion conviction.

On appeal, defendant first contends that he was denied the effective assistance of counsel. Generally, whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, defendant did not move for a new trial or an evidentiary hearing on this basis below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support his claims and, if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To prevail

on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was so deficient that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant argues on appeal that trial counsel was ineffective for establishing an essential element of the armed robbery charge during cross-examination of the victim, failing to present a defense theory, failing to impeach the victim by asking about his prior criminal history or prior inconsistent statement, and by making no attempt to rehabilitate defendant after the prosecutor's cross-examination. As discussed above, however, decisions regarding what evidence to present and whether to question witnesses are presumed to be a matter of trial strategy. Because the above asserted claims pertaining to ineffective assistance are matters of trial strategy, this Court will not substitute its judgment for that of counsel regarding these matters. *Rockey, supra* at 76; *Garza, supra* at 255. Moreover, defendant cited little authority in support of the above claims and, more importantly, the four claims are simply incorrect.

First, contrary to defendant's assertion otherwise, defense counsel did not establish an essential element of the case because any questions he asked regarding the victim's fears were redundant in light of what the prosecution had previously asked, and because trial counsel attempted to discredit the victim's testimony. Second, trial counsel did present a theory of the case by arguing that the entire case was based on a misunderstanding and that defendant only wanted to sell the victim a car. Third, nothing in the record indicates that the victim has a prior criminal history or made any prior inconsistent statements necessitating impeachment. Finally, nothing in the record indicates that defendant needed to be rehabilitated after the prosecutor's cross-examination. We therefore conclude that defendant was not denied the effective assistance of counsel on these grounds.

Defendant also argues that trial counsel was ineffective for failing to make an opening statement. Subjective judgments on the part of trial counsel, such as waiver of opening argument, can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Where defense counsel gives a complete closing argument and is given a full and fair opportunity to comment on the case and the evidence, prejudice cannot be shown by the lack of an opening statement. See *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds sub num *People v Holcomb*, 444 Mich 853 (1993).

Here, defense counsel waived his opening statement while later giving a complete closing argument that fully commented on the case and the evidence. We therefore conclude that

defendant cannot show that trial counsel was deficient under an objective standard of reasonableness for failing to give an opening statement.

Defendant further argues that trial counsel was ineffective for failing to object to damaging hearsay testimony or to a damaging, leading question. Defendant, however, fails to identify the specific allegedly objectionable testimony, argue why counsel was deficient for failing to object to it, or argue how the testimony prejudiced defendant. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant's failure to cite any supporting legal authority constitutes an abandonment of this part of the issue. *Watson, supra* at 587.

Defendant next argues that the evidence presented at trial was insufficient to support a conviction for armed robbery. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The trier of fact is in a better position to determine the credibility of witnesses and weight of the evidence, so its factual conclusions are given deference. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of intent are likewise left to the trier of fact to resolve. *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995). Considering the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to infer intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

The elements necessary to prove armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while armed with a weapon as described in the statute. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. Defendant challenges the sufficiency of the evidence with respect to the third element.

To constitute armed robbery, the robber must be armed with an article that is in fact a dangerous weapon, or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon. *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997), quoting *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). The armed robbery statute does not define the term "dangerous weapon." *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999); MCL 750.529. Whether an object is a dangerous weapon depends upon the object itself and how it is used, and whether an object is a dangerous weapon under the circumstances of a case is a question of fact. *Norris, supra* at 414-415. A dangerous weapon has been described as "either (1) a weapon designed to be dangerous and capable of causing death or serious injury (e.g., a loaded gun) or (2) any other object capable of causing death or serious injury that the defendant used as a weapon (e.g., a screwdriver used as a knife)." *Norris, supra* at 415.

In this case, two witnesses testified that defendant had an object in his hand when he entered the victim's home, possibly a screwdriver. The victim testified that defendant then raised the object over defendant's head while stating that he needed money. Defendant himself conceded that he might have had a screwdriver in his hand when he entered the house, and a screwdriver was ultimately found in his car. Viewing the above evidence in a light most favorable to the prosecution, and keeping in mind that in *Norris, supra*, a screwdriver used as a knife is given as an example of a type of dangerous weapon, we conclude that there was sufficient evidence presented for a rational trier of fact to conclude that defendant was armed with a dangerous weapon when he took the phone.

Defendant also argues that the evidence presented at trial does not show that he had the requisite intent to be convicted of armed robbery. Armed robbery is a specific intent crime, and the prosecutor must establish that the defendant intended to permanently deprive the owner of the property. *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000).

Here, defendant snatched a phone off a table in the victim's house, then fled the house. Defendant denied intending to keep the phone and while he did discard it as he left the house, we cannot ignore that the victim was also pursuing defendant at that time. Deferring to the trial court's superior position to judge witness credibility and viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to support the finding that defendant intended to permanently deprive the victim of the phone when he took it.

Defendant's last argument on appeal is that the trial court erred in making its findings of fact and conclusions of law based on the evidence presented. In a waiver trial, the trial court must make findings of fact and state separately its conclusions of law. MCR 6.403. Its findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). A finding is considered to be clearly erroneous if, after a review of the entire record, this Court is left with the firm and definite conviction that a mistake was made. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). This Court reviews a trial court's conclusions of law de novo. *Id*. We defer to a trial court's determinations of witness credibility at a waiver trial. MCR 2.613(C); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

As discussed above, the trial court's factual finding that defendant was armed with a dangerous weapon is not clearly erroneous. Furthermore, after deferring to the trial court's determination of witness credibility at a waiver trial, we also conclude that the trial court did not err when concluding that defendant possessed the requisite intent to permanently deprive the victim of the phone. The trial court's findings of fact and conclusions of law are thus consistent with the evidence presented.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot