# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 21, 2006 |
| v | No. 263440<br>Calhoun Circuit Court |
| JAMES DALLAS WALKER,<br><br>Defendant-Appellant. | LC No. 2004-004500-FC |

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

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and the court sentenced him as an habitual offender, fourth offense, MCL 769.12, to a prison term of 35 to 60 years. Defendant appeals as of right. We affirm.

At approximately 10:45 p.m. on September 18, 2004, a man walked into the Citgo gas station in Marshall, Michigan, and purchased a candy bar. The man returned to the gas station at 11:30 p.m., grabbed another candy bar, and brought it to the counter. He gave the cashier, Bethany Tucker, change for the candy bar. Before Tucker could close the drawer the man reached over the counter and grabbed the drawer. As Tucker repeatedly slammed the man's hand in the drawer, the man reached into his sweatshirt and pulled out a knife. The man grabbed four $20 bills from the drawer before running out of the gas station. He left the candy bar sitting on the counter. The robbery was videotaped by the gas station's video surveillance system. No fingerprints were recovered from either the candy bar or the cash register drawer.

The morning after the robbery, Tucker met with Sergeant Steve Eddy to compile a composite drawing of the man who perpetrated the robbery. Tucker rated the accuracy of the composite drawing a six or a seven on a scale of one to ten. She indicated that the perpetrator's ears were larger than the ears in the composite drawing and that the perpetrator's mustache was much thicker than it appeared in the drawing.

Tucker viewed a photographic lineup consisting of eight men on September 22, 2004. Defendant was designated as number 8 in the lineup. Tucker indicated that the men designated as numbers seven and eight resembled the perpetrator, but that the man designated as number seven looked more like the perpetrator. Tucker viewed a custodial lineup on December 9, 2004. The custodial lineup included defendant but did not include the man designated as number seven

in the photographic lineup. Tucker identified defendant as the perpetrator. She identified defendant as the perpetrator because of "[t]he way he looked, his eyes."

Deputy Chief Bruce Elzinga testified that he had frequent contact with defendant since defendant was a child. Elzinga viewed the videotape of the robbery and recognized the perpetrator's voice and hand movements as defendant's. Elzinga believed that defendant was the perpetrator. Sergeant Scott McDonald, who had prior contacts with defendant over the past eight to nine years, also viewed the videotape of the robbery. He recognized defendant as the perpetrator. Mary Leach, who dated defendant for two years, also viewed the videotape of the robbery and recognized defendant as the perpetrator. She noted that the perpetrator wore a black ring on his left hand. Leach indicated that defendant always wore a black ring on his left ring finger. Kayla Leach Bramble, who had known defendant for three months, also viewed the videotape and recognized defendant as the perpetrator.

McDonald interviewed defendant on October 11, 2004. After waiving his *Miranda*[1] rights, defendant told McDonald that he purchased a candy bar at the Citgo gas station on the evening of September 18, 2004. When asked whether he purchased the candy bar during the first visit or the second visit to the gas station, defendant stated that he was not going to "confess anything." McDonald drove defendant to and from Jackson, Michigan, for an interview on January 10, 2005. Defendant initiated conversation about the robbery during both legs of the trip. He denied any involvement in the robbery and indicated that his son and another man, Chris Weiss, committed the robbery.

Defendant testified that he was not the person seen in the videotape of the robbery and that he did not visit the Citgo gas station on September 18, 2004. He indicated that he told McDonald that he purchased a candy bar at the gas station in an effort to protect his son, whom defendant described as looking like his identical twin. Defendant indicated he had only seen Elzinga twice in the past 20 years, and not since defendant was a child.

Defendant first argues that there was insufficient evidence to establish that he committed the armed robbery. When reviewing the sufficiency of the evidence to sustain a conviction, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Identity is an essential element of every criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The credibility of identification testimony is a question of fact for the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). In the present case, four separate individuals identified defendant as the perpetrator of the armed robbery at the Citgo gas station on September 28, 2004. Tucker identified defendant at the custodial lineup, while Leach, Leach Bramble, and McDonald identified defendant after watching the videotape of the robbery. In addition, Tucker testified that the perpetrator purchased a candy bar at the gas station approximately 45 minutes before robbing the gas station.

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

Defendant admitted to McDonald that he purchased a candy bar at the gas station the night of the robbery. Further, defendant was present in the courtroom throughout trial. The jury was able to view the videotape of the robbery as well as still prints taken from the videotape to compare defendant's appearance to the likeness of the perpetrator. Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant was the perpetrator of the armed robbery.

Defendant also argues that he was denied the effective assistance of counsel at various times throughout the proceedings before the trial court. Because defendant failed to move for a new trial or for a *Ginther*[2] hearing, our review of defendant's claims is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To prevail on a claim for ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that "but for counsel's error, the result of the proceedings would have been different." *Id.* Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden to prove otherwise. *Id.*

Defendant first contends that defense counsel failed "to investigate his assertions as to key prosecution witnesses." But defendant fails to identify the alleged "assertions" that his counsel failed to investigate. A defendant may not leave it to this Court to find the factual basis for his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 262; 457 NW2d 136 (1990). A party's failure to properly address the merits of his argument constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Because defendant has abandoned this specific issue, we decline to address it. Within the context of his argument, defendant also claims that he received ineffective assistance of counsel because counsel lacked any trial strategy. It is apparent from the record, however, that counsel acted with the strategy of attempting to present the jury with reasonable doubt as to whether defendant was the perpetrator of the armed robbery. We will not substitute our judgment for counsel's on matters of trial strategy, nor will we assess counsel's performance with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defendant's argument that he received ineffective assistance of counsel because counsel lacked trial strategy is without merit.

Second, defendant contends that defense counsel failed to move to suppress defendant's statements made to police officers during his custodial interrogations. Relying on *Stephan v State*, 711 P2d 1156 (Alas, 1985), he asserts that counsel should have moved to suppress the statements because the interviewing officers failed to make a recording of the interrogations. But this court has held that the due process clause of the Michigan constitution does not require interviewing officers to record custodial interrogations. *People v Geno*, 261 Mich App 624, 626-628; 683 NW2d 687 (2004); *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Accordingly, any motion by counsel to suppress defendant's statements on the basis that the interrogations were not recorded would have been futile. Counsel is not ineffective for failing to make a futile motion. *Fike, supra* at 182.

Third, defendant asserts that defense counsel should have moved to suppress defendant's statements because the statements were not voluntarily made. The voluntariness of a statement is determined by looking at the totality of the circumstances. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005). There is no evidence on the record to support defendant's argument that his statements were involuntary. Although defendant has only a ninth-grade education, he has significant experience with the criminal justice system, was advised of his *Miranda* rights before each interview, and waived those rights in writing before the interview regarding the robbery. In addition, the record indicates that defendant agreed to speak with the police because he wanted to protect Tammy Elkins. Nothing in the record supports a finding that defendant's statements were involuntary. See *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988) (listing factors to consider when determining whether a statement is voluntary). Consequently, a motion to suppress defendant's statements on the basis that they were involuntary would have been futile. *Fike, supra* at 182.

Fourth, defendant argues that defense counsel failed to present mitigating factors at the sentencing hearing. Specifically, defendant contends that counsel failed to call individuals who made themselves available to speak on defendant's behalf. Defendant, however, fails to identify these persons or the substance of their proposed statements. Because a party's failure to properly address the merits of his argument constitutes abandonment of the issue, *Harris, supra* at 50, we decline to address this issue.

For his final argument, defendant maintains that the sentence imposed is disproportionate to the offense and the offender and constitutes cruel and unusual punishment because it is not reasonably possible that he will live to serve his sentence. Because defendant failed to properly preserve this issue by making an objection on this ground at sentencing, our review is limited to plain error affecting defendant's substantial rights. See *People v Sexton*, 250 Mich App 211, 227- 228; 646 NW2d 875 (2002). After review of the record, we find no such error.

Defendant's sentence falls within the sentencing guidelines' recommended range and therefore it is presumptively proportionate. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Given defendant's act of robbing a gas station attendant at knifepoint and his history of committing theft-type assaults, defendant has failed to overcome this presumption and, because the sentence is not disproportionate in relation to the crime, it is not cruel or unusual. *People v Williams (After Remand),* 198 Mich App 537, 543; 499 NW2d 404 (1993); see also *Drohan, supra* at 92. Defendant's reliance on *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), for the proposition that his sentence constitutes cruel and unusual punishment because it is not reasonably possible that he will serve his minimum sentence, is misplaced as *Moore* has implicitly been overruled. See *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997). Because defendant's sentence fell within the recommended sentence range under the legislative guidelines, we affirm defendant's sentence. See MCL 769.34(10) (this Court is required to affirm sentences within the legislative guidelines range unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information in sentencing defendant).

Affirmed.

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