STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 280329
October 26, 2010
Wayne Circuit Court
LC No. 06-002883-02

JAMES ARTHER THOMAS,

Defendant-Appellant.

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of larceny from a person, MCL 750.357, and felonious assault, MCL 750.82. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

According to complainant Kassandra McCoy, she was driving on February 24, 2006, at approximately 6:45 p.m. when she ran into a parked car. McCoy stated that defendant and Mary Tucker were in the parked car. Tucker got out of the car and approached McCoy, and McCoy tried to calm Tucker down. However, Tucker became irate, took a device for securing a steering wheel, or car club, and used it to break McCoy's driver's side window. McCoy testified that defendant then came to the passenger side of McCoy's vehicle, opened the door, and struck her in the face. Tucker opened McCoy's driver's side door and pulled McCoy from the car. According to McCoy, the two women began to "tussle" and Tucker hit McCoy with the club several times. At this time, McCoy saw defendant enter her vehicle and take her purse. McCoy maintained that, as Tucker continued to hit her, defendant walked over, grabbed McCoy by her jacket, turned her around, and then took a "club" and hit her in the face with it.[1]

On appeal, defendant first maintains that the evidence was insufficient to show that defendant ever struck complainant or that he was in possession of her wallet. Defendant also

[1] McCoy testified that she saw two "clubs" but did not know whether it was just one device that had been separated into two pieces.

contends that the trial court's verdict was against the great weight of the evidence. He predicates his claim on testimony from an eyewitness, who essentially corroborated McCoy's testimony that defendant took McCoy's purse from her vehicle, but who maintained that defendant was not initially in the car McCoy struck, and that Tucker was McCoy's sole attacker.

Concerning defendant's sufficiency claim, we review the evidence in the light most favorable to the prosecution, drawing all reasonable inferences in support of the verdict, and will affirm a bench trial conviction where the evidence supports a rational trier of fact in finding that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted).

A motion for a new trial based on a claim that the verdict was against the great weight of the evidence should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial," and absent exceptional circumstances, credibility issues are left for the factfinder. *Id.* "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the [factfinder's] determination." *Lemmon*, 456 Mich at 645-646 (citation omitted).

Although we find defendant's arguments somewhat difficult to discern, it appears that defendant argues that the prosecution failed to show that defendant struck complainant, so he could not have been found guilty of felonious assault. Defendant also appears to argue that the prosecution failed to show that defendant "was in possession of the complainant's wallet because he had attempted to steal it from her."

Larceny from a person requires that the prosecution prove "(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence." *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005). Here, both complainant and the eyewitness testified that defendant entered complainant's van, either before or after the attack, or attacks, and took complainant's purse. This testimony was certainly sufficient to support the larceny conviction. And defendant cannot show that this conviction was against the great weight of the evidence.

In order to support a conviction of felonious assault, the prosecution must prove (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). Here, defendant was charged with assault under an aiding and abetting theory. However, the trial court apparently believed that defendant had taken an active role and had struck complainant with the club. Complainant's version of the assault provided sufficient

evidence to support this finding, where she specifically testified that defendant struck her with the club, or at least a portion of it. Thus, we find that the prosecutor presented sufficient evidence to support defendant's conviction.

Defendant's challenge to the great weight of the evidence also fails. Defendant has not shown that complainant's testimony was contradicted by indisputable physical facts or defied physical realities. And it was not "deprived of all probative value" such that the trial court could not have believed it. Even the eyewitness testified that Tucker separated the two parts of the car club, although he also admitted that it was getting dark, and he equivocated about how the club got to the truck where it was later found. Essentially, defendant would have this Court choose to believe the testimony more favorable to him, rather than the testimony that the trial court found credible. We decline to do so. Accordingly, defendant cannot demonstrate clear error in the trial court's decision to believe complainant's testimony and find that defendant struck complainant with the dangerous weapon. We find that defendant has not shown he is entitled to a new trial on the ground that the verdict was against the great weight of the evidence.

Defendant next argues that he was denied the effective assistance of counsel. While his arguments concerning this issue are again somewhat hard to discern, he apparently argues that counsel rendered ineffective assistance by failing to call numerous witnesses to the stand, and he particularly argues that trial counsel should have called as a witness a woman who was seated in the restaurant with the eyewitness who testified. Defendant also maintains that counsel was ineffective for failing to challenge the scoring of prior record variable (PRV) 2 (prior low severity felony convictions) at sentencing.

A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*. Defendant preserved this issue by raising it below in his motion for a new trial. However, because no *Ginther*[2] hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

As to defendant's claim concerning misscoring of the guidelines, and the argument that the trial court improperly sentenced defendant outside the guidelines, we note that defendant provides no discussion of these claims on appeal beyond a general discussion of law governing sentencing and the trial court's need to rely on accurate information during sentencing. Defendant has not provided any discussion as to why or how the trial court erred in scoring his sentencing guidelines. 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, with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, any complaint concerning defendant's minimum

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

sentence is moot because defendant was granted parole on October 7, 2009. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

As to defendant's claim that trial counsel rendered ineffective assistance for failing to call the eyewitness's companion as a defense witness, we note that, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The failure to call witnesses constitutes ineffective assistance only if it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996). Here, while defendant maintains that his cause would have been assisted by the testimony of this additional eyewitness, he has not provided any support for this claim. A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not, for example, provided an affidavit by this proposed witness stating that she saw the assault and would testify that defendant did not strike complainant. And defendant does not point to anything in the record to support his assertion. Although the eyewitness testified that this additional person was with him in the restaurant, he did not specifically testify that she witnessed the assault. Defendant has not provided the factual predicate for his claim. Defendant's assertion that the outcome would have been different had his proposed witness testified is therefore speculative.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly