STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2014
v	No. 316145 Macomb Circuit Court
ROBERT LATEEF TILLMAN, Defendant-Appellant.	LC No. 2012-001782-FC

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Defendant, Robert Lateef Tillman, appeals as of right his convictions, following a jury trial, of assault with intent to rob while armed[1] and possession of a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Tillman to serve consecutive terms of 180 to 300 months' imprisonment for his assault conviction and two years' imprisonment for his felony-firearm conviction. We affirm Tillman's convictions, but vacate his armed robbery sentence and remand for resentencing.

I. FACTS

A. BACKGROUND FACTS

Gene Christian testified that he and his wife, Mary Christian, own Coin Cove in Roseville, a business that buys and sells coins, jewelry, and precious metals. According to Gene Christian, on June 14, 2011, he and his wife were operating the store. Two people wearing masks entered, and one of them fired a shot into the ceiling and told everyone to get on the floor. One person was wearing all black, and the other person was wearing all white. Both men wore black masks and gloves.

Gerard Ziskie testified that he was a customer in the store. According to Ziskie, the person wearing white put a gun to his head and told him to get on the ground. Ziskie could tell

[1] MCL 750.89.

[2] MCL 750.227b(1).

that the person was a man by the sound of his voice. The man in white had a pistol and was wearing light colored jeans, a hooded sweatshirt, a black mask, and grayish sleeves.

According to Mary Christian, she was afraid for her life and ran into the back of the store. The man in black followed her. She retrieved a pistol and gave it to Gene Christian. The man in black shot at her and Gene Christian, and Gene Christian shot at the man in white. The man in white ran from the store. The man in black jumped over the counter and also ran from the store while firing additional shots. The man in black dropped his hat while jumping over the counter, and Mary Christian picked it up with a pencil and put it in a plastic bag.

B. DNA EVIDENCE

Roseville Police Officer Brian Dobryzcki testified that he was called to assist with locating the suspects. According to Dobryzcki, he is a canine handler and his canine partner, Cato, tracked the scent from the hat through a vacant lot and along an alley. Detective Steven Dzierzawski testified that, after questioning a nearby construction worker, he discovered a white hooded sweatshirt rolled around a black nine-millimeter handgun, a white backpack, and a black tank top with holes cut out of it in a dumpster. Dobryzcki testified that Cato had tracked past the apartment complex. Dobryzcki testified that officers later found a glove in the backyard of a house that Cato had also tracked past.

Jennifer Morgan testified as an expert in DNA comparison and analysis. According to Morgan, she received samples from the glove and knit hat and processed them for DNA evidence. The glove sample contained two DNA donors, at least one of which was male. Morgan developed a DNA profile from the glove, which she submitted into CODIS.[3] CODIS indicated that the DNA profile was associated with Tillman. Morgan later received a buccal swab from Tillman and confirmed that his DNA was in the glove. Morgan also matched Tillman's buccal swab profile to DNA evidence from the sweatshirt and tank top.

The jury found Tillman guilty of assault with intent to rob while armed and felony-firearm.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A defendant's claim that the evidence was insufficient to convict him or her involves the defendant's constitutional right to due process of law.[4] Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.[5] We

[3] The Combined DNA Index System, a federal database.

[4] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

[5] *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the prosecutor proved crime's elements beyond a reasonable doubt.[6]

B. IDENTIFICATION

Tillman contends that there was insufficient evidence of his identity as one of the robbers. We disagree.

"[I]dentity is an element of every offense."[7] Circumstantial evidence may prove the elements of a crime.[8]

Here, Gene Christian and Ziskie testified that one robber was wearing a white hooded sweatshirt and a black mask. Christian also testified that the robber in white was wearing a glove. Dobryzcki testified that his canine partner used scent to track the robbers past an apartment building, where officers found a white hooded sweatshirt and a black tank top with holes that could be utilized as a mask. Dobryzcki also testified that officers found a glove along the scent track. Morgan testified that the glove, sweatshirt, and tank top all contained DNA that matched Tillman's DNA profile. Viewing this evidence in a light most favorable to the prosecutor, we conclude that the prosecutor presented sufficient evidence to support the element of identity because a rational juror could conclude that Tillman was one of the robbers.

C. INTENT TO ROB

Tillman contends that there was insufficient evidence of his intent to rob the Coin Cove. We disagree.

The intent to rob or steal is an element of assault with intent to rob while armed.[9] Minimal circumstantial evidence and reasonable inferences arising from that evidence can prove the defendant's intent.[10] We will not interfere with the trier of fact's role to determine the inferences that can be drawn from the evidence and the weight of those inferences.[11]

Here, witnesses testified that two armed men with concealed faces and weapons entered the Coin Cove. One man shot into the ceiling and demanded that the store's occupants get on the ground. One of the men was carrying a backpack. These circumstances are typical of robberies. Viewing this evidence in the light most favorable to the prosecutor, we conclude that the

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[6] *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

[7] *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

[8] *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

[9] *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

[10] *Kanaan*, 278 Mich App at 622.

[11] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

prosecutor presented sufficient evidence of Tillman's intent because a rational jury could conclude from the circumstantial evidence that the men intended to rob the store.

III. IMPROPER TESTIMONY

A. STANDARD OF REVIEW

To preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal.[12] When Tillman challenged this issue below, it was on self-incrimination grounds, not relevance grounds. Thus, this specific issue is unpreserved.

We review unpreserved issues for plain error affecting a party's substantial rights.[13] An error is plain if it is clear or obvious.[14] The error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.[15]

B. APPLICATION

Tillman contends that the evidence that he initially refused a buccal swab was irrelevant, and that the admission of this evidence affected the fairness of his trial. We disagree.

The admission of evidence does not violate a defendant's constitutional rights unless it renders a defendant's trial fundamentally unfair.[16] Here, Detective Keith Waller testified that he attempted to obtain buccal swabs following Tillman's arrest, and Tillman initially refused:

> *Q*. You indicated that you mailed the buccal swabs. I don't see any postage there. Are you possibly mistaken?
>
> *A*. I am. When I was explaining the process when an individual is arrested, upon arrest we have a process. The state police requires that you do the process I told you, putting on pH paper, sealing it up, mailing that envelope in.
>
> Upon his arrest he refused to have that done, so I did not do it. But at the preliminary exam, we got cooperation from Mr. Tillman to have the buccal swabs done.

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[12] *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011).

[13] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[14] *Id*.

[15] *Id*.

[16] *Estelle v McGuire*, 502 US 62, 70, 75; 12 S Ct 475; 116 L Ed 2d 385 (1991).

> So I immediately retrieved some buccal swabs, did the swabbing, placed them in the envelope. These were physically transported to the state police crime lab by one of the detectives.
>
> *Q.* So we're clear, he consented to the buccal swab?
>
> *A.* Yes.
>
> *Q.* And it was, and you hand delivered it to the Michigan state police crime laboratory; is that right?
>
> *A.* Yes.

The prosecutor later followed up on this line of questioning:

> *Q.* So that I'm clear on this, because I think wasn't from your testimony. Did you arrest Mr. Tillman and then take the buccal swab, or did you take it prior to his arrest?
>
> *A.* He was arrested, refused the buccal swab at that point in time and then now from the process of his preliminary exam, at the preliminary hearing that is when the swabs were obtained.

After the second exchange, defense counsel requested a bench conference. The prosecutor conceded that Tillman's Fifth Amendment right against self-incrimination protected his right to refuse to provide the police with his DNA, and granted defense counsel's request for a curative instruction. The trial court instructed the jury that

> [Tillman] has an absolute right to remain silent. You must not draw a negative inference to the testimony that he refused to allow sampling of his DNA. Please disregard such testimony.

We conclude that Tillman cannot show plain error because the alleged error did not affect the outcome of his proceedings. In response to defense counsel's challenge on self-incrimination grounds, the trial court instructed the jury to disregard the testimony and to not draw negative inferences from it. Curative instructions sufficiently cure most prejudice, and we presume that jurors follow their instructions.[17] Given that the trial court instructed the jury not to consider Waller's testimony that Tillman initially refused to provide his DNA evidence, Tillman has not demonstrated that Waller's improper testimony affected the outcome of his trial or rendered his trial fundamentally unfair.

We note that Tillman also attempts to compare Tillman's refusal to submit his DNA for testing to a defendant's refusal to submit his breath for testing. Michigan's rules regarding the

[17] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

inadmissibility of a defendant's refusal to submit to a chemical breath test is a product of statutory law.[18] Tillman identifies no such comparable statute regarding a defendant's refusal to submit to DNA testing, and we reject this argument as unpersuasive.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

A defendant must move the trial court for a new trial or evidentiary hearing to preserve the claim that his or her counsel was ineffective.[19] When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.[20]

B. LEGAL STANDARDS

To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.[21] We must presume that counsel provided effective assistance.[22]

C. APPLYING THE STANDARDS

Tillman contends that counsel was ineffective for failing to challenge Waller's first statement about Tillman's initial refusal to provide a buccal swab. We disagree.

"[T]here are times when it is better not to object and draw attention to an improper comment."[23] Here, counsel may have reasonably decided not to highlight the first instance of Waller's testimony by challenging it. We note that counsel's successful challenge to the second instance of Waller's improper testimony also supports the conclusion that the counsel's response to the first instance was deliberate. We conclude that Tillman has not shown that counsel's strategy was objectively unreasonable.

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[18] See MCL 257.625a(6); *People v Duke*, 136 Mich App 798, 803; 357 NW2d 775 (1984).

[19] *Unger*, 278 Mich App at 242.

[20] *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

[21] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[22] *Unger*, 278 Mich App at 242.

[23] *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008) (quotation marks and citation omitted).

Further, Tillman cannot show prejudice. A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.[24] Here, as previously discussed, the trial court issued a curative instruction after defense counsel challenged Waller's second statement. We presume that the jury followed the trial court's instruction not to draw negative inferences from the testimony. Thus, Tillman has not demonstrated that, absent the error, the result of his proceeding would have been different.

We conclude that counsel did not provide ineffective assistance by failing to challenge Waller's statement that Tillman refused to provide his DNA to the police.

V. JUDGMENT OF SENTENCE

Tillman contends that he is entitled to resentencing on his armed robbery conviction because the trial court erred when it amended his initial sentence of 180 to 240 months' imprisonment to a sentence of 180 to 300 months' imprisonment. The trial court revised Tillman's sentence on the basis of a mistaken application rule that a defendant's minimum sentence may not exceed 2/3 his maximum sentence.[25] This rule does not apply when the statutory maximum sentence for a crime is life imprisonment,[26] as is the case here. The prosecutor concedes that the trial court erred. But the prosecutor contends that Tillman is only entitled to the correction of his judgment of sentence, rather than resentencing.

In pertinent part, MCR 6.435 provides:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> (B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. . . .

Here, the trial court's error did not arise from an oversight or omission, but instead arose from a mistaken application of the law. Further, the trial court has already entered judgment in the case. Accordingly, the trial court may not correct its mistake under MCR 6.435.

A sentence is invalid when it is based on a misconception of law.[27] When a sentence is invalid, it is appropriate for this Court to remand for resentencing.[28] Because the trial court

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[24] *Pickens*, 446 Mich at 312.

[25] MCL 769.34(2)(b); *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972).

[26] *People v Floyd*, 490 Mich 901, 902; 804 NW2d 564 (2011).

[27] *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

[28] See *id.* at 101.

sentenced Tillman on the basis of a misconception of the law, Tillman's sentence is invalid. Accordingly, remand for resentencing is an appropriate remedy.

VI. CONCLUSION

We conclude that the prosecutor provided sufficient evidence of Tillman's identity and intent to rob. Tillman has not shown that Waller's improper testimony, which the trial court instructed the jury to disregard, constituted plain error or rendered his trial fundamentally unfair. We also conclude that counsel was not ineffective for failing to challenge the testimony in the first instance. But we vacate Tillman's sentence for armed robbery and remand for resentencing because the prosecutor concedes that the trial court erred when it concluded that the 2/3 rule applied in this case, and we conclude that remanding for resentencing is the appropriate remedy.

We affirm Tillman's convictions, but vacate his sentence for armed robbery and remand for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck