

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 28, 2011

v

LORING MARTEZ-ORLANDO WALKER,

Defendant-Appellant.

No. 296862
Wayne Circuit Court
LC No. 09-014023-FC

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 20 to 35 years' imprisonment for the armed robbery, assault with intent to murder and assault with intent to rob while armed convictions, and two years for the felony-firearm conviction to be served consecutively to the sentences for the other offenses. We affirm.

On an April 2009 morning, Barbara Campbell and her grandson entered the garage attached to her home intending to get into Barbara's vehicle. While standing in the garage, they were approached by a man, who pointed a gun at Barbara and demanded her purse. When Barbara did not immediately respond, the man went to the side of the vehicle and placed the gun to the temple of Barbara's 7 year old grandson. The man threatened to kill the boy if Barbara did not comply. Barbara gave the man her purse and he fled from the garage. She provided police with a description of the man who robbed her and later identified defendant as the robber in a lineup and at court proceedings.

On appeal, defendant first argues that the prosecution denied him a fair trial by failing to make reasonable efforts to locate and produce a missing witness. Related to this issue, defendant additionally argues that defense counsel was ineffective for failing to cross-examine the officer-in-charge about his efforts to locate the missing witness, failing to demand the witness's presence, and failing to request that the trial court give itself the missing witness instruction, CJI2d 5.12. We disagree.

Defendant did not argue in the trial court that the prosecution's efforts to locate and produce the missing witness were insufficient. Because the issue is unpreserved, defendant must

establish a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Regarding his ineffective assistance of counsel claim, defendant did not move for a new trial or request a *Ginther*¹ hearing below. This Court's review is thus limited to errors apparent on the existing record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

MCL 767.40a(5) provides that the prosecution "or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness." The request for assistance must "be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs." MCL 767.40a(5). Under this statute, "the prosecutor's duty to produce *res gestae* witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Here, the officer-in-charge attempted to locate the witness by going to his apparent address eleven times, knocking on the door, and, when no one answered, leaving his business card. Defendant did not request below that the prosecution make further efforts to locate the witness. Moreover, even if the prosecution should have undertaken additional efforts, defendant has not demonstrated that such an error affected the outcome of the trial. *Carines*, 460 Mich at 763. Defendant has provided no affidavit of the missing witness's anticipated testimony or other proof to suggest that the witness would have testified favorably to the defense.

Next, defendant has failed to establish that counsel was ineffective in addressing the missing witness. "To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). "Decisions 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." *Davis*, 250 Mich App at 368.

Defense counsel was not ineffective for failing to cross-examine the officer-in-charge regarding his efforts to locate the missing witness. The officer had already testified on direct examination regarding his efforts, and defendant has not established what further information defense counsel could have elicited on cross-examination that would have benefitted the defense. Defendant has also failed to show that a "demand" by defense counsel that the witness appear would have led to the witness's presence and testimony favorable to the defense. Nor was defense counsel ineffective for failing to request that the trial court give itself the missing witness instruction, CJI2d 5.12. No basis existed to request the instruction given that defendant did not request further efforts to locate and produce the witness. Moreover, the trial court in a bench trial is not required to instruct itself in open court; the trial court is presumed to know the

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

applicable law. *People v Casal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982); *People v Lanzo Construction Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006). Counsel was not ineffective for failing to make a meritless request. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant's next argument is that the evidence was insufficient to find him guilty beyond a reasonable doubt of the offenses of which he was convicted. We disagree.

To determine whether there was sufficient evidence to support a conviction, this Court reviews the evidence de novo, in the light most favorable to the prosecutor, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007).

Defendant does not challenge the sufficiency of proof for any particular element of any offense but contends more generally that the adult victim's identification testimony was insufficient to establish that defendant was the perpetrator. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Moreover, "positive identification by witnesses may be sufficient to support a conviction of a crime." *Id.* "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

Here, although one victim, a seven-year-old child, could not identify defendant, the other victim, an adult, unequivocally identified defendant as the perpetrator. While it is true that the adult victim did not report a tattoo on the side of defendant's neck or accurately estimate his height, she also reported other aspects of his physical appearance, including some facial features, skin color, hair, approximate age, and build. And, the adult victim had an opportunity to observe the perpetrator for two to three minutes in a well-lit garage. Her description and identification of defendant constituted sufficient evidence to establish defendant's identity as the perpetrator.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto