

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LEE MASSEY,

Defendant-Appellant.

UNPUBLISHED

July 26, 2011

No. 297672

Oakland Circuit Court

LC No. 2009-229892-FC

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

PER CURIAM.

Defendant Michael Lee Massey appeals as of right his jury convictions of three counts of armed robbery, MCL 750.529, three counts of felon in possession of a firearm, MCL 750.224f, three counts of discharging a firearm in a building, MCL 750.234b, and nine counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 25 to 70 years for each robbery conviction, 3 to 20 years for each felon-in-possession conviction, and to serve 3 to 15 years for each discharge of a firearm conviction, to be served consecutive to nine concurrent two-year terms for the felony-firearm convictions. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's convictions arise from three separate robberies in the city of Pontiac in October 2009. Two of the robberies took place at the Liberty Bar, and the third at the Elam Brothers Restaurant. In each incident, the robber entered the business, fired a gun into the air, and demanded money from the cash register. The police recovered shell casings from each location and ballistics testing indicated that the casings were all fired from the same gun. All three robbery victims and some additional witnesses identified defendant as the robber. The victim of the Elam Brothers Restaurant robbery also testified that he recognized defendant as a person he knew as a child living in the same neighborhood housing project.

Defendant first argues that he was denied the effective assistance of counsel at trial. Defendant contends that defense counsel was ineffective for failing to stipulate that defendant had a prior felony conviction and was ineligible to possess a firearm, and for instead allowing defendant's parole officer to testify about defendant's parole status and prior conviction for possession with intent to deliver cocaine. Because the trial court did not conduct an evidentiary

hearing on this issue, our review is limited to errors apparent from the record. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

To establish ineffective assistance of counsel, defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). There is a strong presumption that a defendant's trial counsel is effective; and this Court will not substitute its judgment for that of counsel on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

To prove defendant's guilt of felon in possession of a firearm, the prosecution was required to prove that defendant was a convicted felon who was ineligible to possess a firearm. MCL 750.224f. If a defendant offers to stipulate to the fact that he was previously convicted of a felony and is ineligible to possess a firearm, the trial court must accept the stipulation to avoid potentially unfair prejudice arising from the introduction of the defendant's prior felony conviction. *People v Swint*, 225 Mich App 353, 378-379; 572 NW2d 666 (1997). However, if the defendant does not offer to so stipulate, the prosecutor may introduce evidence of the prior felony. *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999).

In this case, the record indicates that defense counsel elected to permit the introduction of evidence of defendant's prior felony conviction and parole status as a matter of strategy; he did so in order to show that the police were under pressure to apprehend a serial robber and that they "put this case on my client because he is on parole and a likely patsy" If defense counsel had simply stipulated to defendant's prior conviction, there would have been no factual basis for defense counsel's "patsy" theory. On this record, defendant has not overcome the presumption that his trial counsel's decision was a matter of sound strategy.

Defendant next argues that there was insufficient evidence to support his robbery conviction in connection with the Elam Brothers Restaurant, because the evidence showed that the victim, Dorian Glenn, fled from the restaurant before any larceny was committed. We review de novo a defendant's challenge to the sufficiency of the evidence. *People v Chapo*, 283 Mich App 360, 363; 770 NW2d 68 (2009). This Court must consider the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. *Id.*

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence; and (3) the defendant must be armed with a weapon as described in the statute. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). Under this statute, it is not necessary to prove that the larceny was completed. *People v Williams*, 288 Mich App 67, 72; 792 NW2d 384 (2010).

In *People v Eddington*, 77 Mich App 177, 193; 258 NW2d 183 (1977), this Court upheld a defendant's conviction for armed robbery where the trial court instructed the jury:

that if [it] found that the barmaid was in charge of the bar, that the money in the till was under her control, and that the money was taken from the till while the barmaid's control was severed by the defendant, then the jury should find that the "from his person or in his presence any money or other property which may be the subject of larceny" elements of the statute were satisfied.

In this case, Glenn testified that defendant entered his restaurant, produced a gun, and fired the gun into the air. Glenn fled without waiting for further actions or instructions by defendant. When Glenn returned shortly thereafter, the money in the cash was gone. Glenn's testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant, while armed with a dangerous weapon, committed an assault "in the course of committing a larceny." The money in the cash register was under Glenn's control—he was the sole employee—and it was defendant's assaultive conduct that caused Glenn to flee from the restaurant, severing his control over the money. Although the theft of the money was not completed in Glenn's presence, for purposes of the robbery statute, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny. Accordingly, the evidence was sufficient to support the robbery conviction at issue.

Affirmed.

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