

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 28, 2011

v

LAWRENCE ANTWONE JACKSON,

Defendant-Appellant.

No. 298420
Wayne Circuit Court
LC No. 10-000302-FC

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

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and receiving or concealing stolen property, MCL 750.535(4). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 20 to 35 years for each robbery conviction, two to five years for the felon in possession conviction, and one year for the receiving stolen property conviction, all to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the robbery of Andre Hampton and Andrew Williams outside a house where the two men were installing a door. The evidence indicated that defendant was accompanied by one other man, while a third acted as a lookout, but only defendant pointed a firearm at the complainants and demanded their belongings. After the robbery, Hampton followed defendant to a house, the police were summoned, and they brought out four men from that residence. Hampton and Williams both identified defendant as the person who robbed them at gunpoint. The defense theory at trial was that the complainants' identifications were inconsistent and not credible.

I. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant argues that there was insufficient evidence to identify him as one of the robbers. We disagree.

In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven

beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact’s] verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness may be sufficient to support a conviction for a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of the identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

In this case, both complainants had an opportunity to observe their assailant, and they both positively and unequivocally identified defendant as the armed robber. Hampton testified that as he was outside installing a side door at a home, defendant and a second man approached him and defendant demanded his belongings while pointing a gun at him. He observed that defendant was wearing a thin “short little mask” below his nose and a hooded sweatshirt, which left his eyes, nose, and hairline clearly exposed. Hampton relinquished his wallet, \$300, and his cell phone, as directed. Williams was subsequently called outside and also emptied his pockets at defendant’s direction. As defendant fled the scene on foot, defendant’s hood came off, giving the complainants an opportunity to fully see defendant’s hair. As Hampton pursued the men, intending to regain his identification, he observed the last of the men run into a particular house. The police were summoned and arrived within minutes, Hampton pointed out the house, and the police escorted four men from that house. Both Hampton and Williams immediately identified defendant as the person who pointed a gun and robbed them.

Both complainants testified that they had no problems seeing their assailant during the criminal episode. The robbery occurred as it was getting dark, but it was not yet fully dark. Hampton testified that the area was “lit up.” According to both complainants, the area was illuminated by lights on the side and front of the home, as well as a large, florescent drop light that provided lighting through the opened side door. Hampton testified that he had an opportunity to observe defendant for 15 or 20 minutes, and from a distance of approximately 12 to 15 feet; Williams had an opportunity to observe defendant from about six to eight feet. While defendant wore a small mask and a hood, defendant’s nose, eyes, and hairline were exposed. Both Williams and Hampton observed that defendant had distinctive “slanted” eyes, and thick hair that was pushed back underneath his hood. After defendant’s hood came off, Hampton observed that defendant had a “medium afro,” while Williams described defendant as having “wild looking hair.” When defendant was subsequently brought out of the house, he was easily recognizable to the complainants because of his distinctive eyes and hairstyle. Hampton and Williams both testified that they had no doubt that defendant was the person who robbed them at gunpoint. In addition, Hampton’s cash, credit cards, and cell phone were found in the basement of the house in close proximity to defendant.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to reasonably infer that defendant was the person who robbed the complainants at gunpoint. Although defendant provides reasons why the trial court should not have accepted the complainants' identification, it was up to the trial court, as the trier of fact, to evaluate the evidence and, for purposes of resolving defendant's sufficiency challenge, this Court is required to view the evidence in a light most favorable to the prosecution. *Wolfe*, 440 Mich at 515. There was sufficient evidence of defendant's identification to support his convictions for armed robbery.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at trial in numerous ways. Again, we disagree. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

First, defendant makes a general claim that trial counsel was ineffective for failing to pursue defendant's suggestions for cross-examining the witnesses, and for failing to visit him in the "bullpen" during trial recesses to develop issues in the case. However, counsel's decisions about what questions to ask and what arguments to make are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and mere disagreements with regard to trial strategy or professional judgment do not establish an ineffective assistance of counsel claim.

In a related claim, defendant argues that trial counsel was ineffective for failing to adequately challenge the complainants' identification testimony at trial. The record discloses that, throughout the trial, trial counsel consistently and vigorously argued the primary defense theory of misidentification. Defendant acknowledges trial counsel's questions, but asserts that counsel should have further "strenuously" questioned the complainants about their respective locations, vantage points, and overall ability to observe without adequate lighting. In making this claim, defendant ignores that codefendant's counsel cross-examined the witnesses first, and that the trial court specifically directed trial counsel not to "recreate the wheel" by covering the same matters that were covered by codefendant's counsel. Counsel specifically highlighted problems with the complainants' identification of defendant as one of the robbers, and elicited testimony intended to undermine the reliability of the identification testimony. In closing argument, trial counsel summarized the testimony and again argued that defendant's identification as one of the robbers was not established beyond a reasonable doubt. The record

does not establish that trial counsel's performance fell below an objective standard of reasonableness. *Frazier*, 478 Mich at 243.

Defendant's next ineffective assistance of counsel claim is that trial counsel was ineffective for failing to move to suppress the identification by Hampton. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Here, defendant fails to explain why Hampton's identification should be considered improper or unduly suggestive, and our review of the record fails to disclose a pretrial identification procedure that was improper or unduly suggestive. See *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993), and *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Consequently, defendant has not demonstrated that defense counsel's failure to file a motion to suppress was objectively unreasonable, nor has he demonstrated a reasonable probability that a motion to suppress would have been successful. Counsel was not required to make a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant has also failed to demonstrate that trial counsel was ineffective for failing to request the appointment of an investigator. A court-appointed investigator is not "automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case." *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984) (citation omitted). The trial court has discretion to determine whether an indigent defendant has demonstrated that an investigator is necessary to ensure due process, and a defendant's reasons cannot rest on "pure conjecture." *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001). Here, defendant does not specify what helpful or valuable information needed to be obtained by an investigator. Consequently, defendant has not shown that trial counsel was ineffective for failing to request an investigator. *Snider*, 239 Mich App at 425.

III. PROPORTIONALITY

We reject defendant's claim that he is entitled to resentencing because his sentence is disproportionate. Defendant's sentences for his robbery convictions are within the sentencing guidelines range of 135 to 450 months. This Court must affirm a sentence within the guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information. Accordingly, this Court must affirm his sentences.

IV. *BLAKELY V WASHINGTON*

Defendant lastly argues that he must be resentenced because the trial court's factual findings supporting its scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely*

does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Although defendant argues that these cases were wrongly decided, this Court is bound to follow decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

Affirmed.

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