STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 9, 2012
v	No. 301050 Ingham Circuit Court
LEON CLARK, JR., Defendant-Appellant.	LC No. 08-001140-FC

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 135 to 600 months for armed robbery and 25 to 60 months for felon in possession of a firearm, and to a consecutive two-year term for felony-firearm. Defendant appeals as of right. We affirm.

Initially, defendant, through appellate counsel, argues that trial counsel's failure to present an alibi defense denied him the effective assistance of counsel. We disagree. On de novo review, we are limited to the facts on the record because the trial court denied defendant's motion for an evidentiary hearing. *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000). To establish a claim of ineffective assistance of counsel, defendant bears the heavy burden of showing that trial "counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Further, a defendant must establish the underlying factual predicate to support their claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant alleges that he requested an alibi defense and had witnesses who would testify on his behalf. The only witness he named was his mother, and she testified that defendant left her apartment at some point on the day the store was robbed and that she was unsure of the time of defendant's departure. Thus, defendant has not shown what form his alibi would have taken, and has not overcome the burden of proving that counsel rendered ineffective assistance. *Effinger*, 212 Mich App at 69.

Defendant raises seven issues in his Standard 4 brief[1], and in many of these issues he argues in the alternative that he was denied the effective assistance of counsel.

First, defendant argues that insufficient evidence was presented to identify him as the person who robbed the store because it would have been physically impossible for the complaining witnesses to have seen the suspect's facial features through the shirt that covered his face. We disagree.

We review a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution to determine whether "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant's claim is without merit. Both witnesses testified that the shirt fell down at least twice and exposed the suspect's face. The witnesses were able to identify defendant as the suspect from photo line-ups and in court. This evidence, viewed in the light most favorable to the prosecution, was sufficient to identify defendant as the suspect who robbed the store.

Alternatively, defendant faults trial counsel for not questioning the witnesses as to how they could have seen the suspect's face through his clothing. However, counsel is afforded wide discretion on matters involving trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The record indicates that trial counsel attempted to impeach the witnesses' identifications by asking pertinent questions about how they were influenced by the stress they were under, the length of time they were able to see the suspect's face, and the distance they were away from the suspect. Trial counsel's decision to not follow this line of questioning was a matter of trial strategy and did not render his performance ineffective. *Id*.

Next, defendant argues that evidence regarding a break-in at an unoccupied home should have been excluded because it was evidence of a prior bad act that was used as substantive evidence of his guilt. We disagree.

No objection was made to the admission of this evidence; thus, our review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although MRE 404(b) limits the introduction of evidence of prior acts, evidence that is "so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime" is admissible without regard to MRE 404(b). *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978). It was important for the jury to know what happened after the suspect left the store because the subsequent events are what led to defendant being identified as the suspect. The police tracked the suspect into the vicinity of the unoccupied home with the assistance of canines but were

[1] See Administrative Order No. 2004-6.

unable to locate him. The next day, the home's owners discovered that it had been recently broken into and found defendant's cell phone in the bathtub. The only missing items were a change of clothes and a bag, which the prosecutor argued was used by defendant to avoid detection. This evidence provided the context of how defendant was first identified as a possible suspect, and its probative value is not substantially outweighed by any danger of unfair prejudice. The challenged evidence was properly admitted. Counsel did not render ineffective assistance by failing to object to the evidence because trial counsel is not required to advance futile arguments. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Next, defendant argues that trial counsel never informed him of his right to testify. This argument is without merit as defendant unequivocally indicated on the record that he was aware of his right to testify and was not coerced into waiving that right. He stated that he chose to not testify on his own behalf. This waiver forecloses our review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Next, defendant contends that his right to a public trial was violated because the courtroom was closed during jury selection in order to accommodate prospective jurors. We disagree.

Our Supreme Court recently granted leave to consider the legal aspects of a similar issue. See *People v Vaughn*, 490 Mich 887; 804 NW2d 118 (2011). However, the present case is factually distinguishable. Here, nothing in the record supports defendant's contention that the courtroom was closed during voir dire. The trial court did not ask defendant's family to leave or exclude them from attending voir dire. Defendant's claim is without merit. Counsel did not render ineffective assistance by failing to object. *Ish*, 252 Mich App at 118-119.

Next, defendant argues that the jury should have been instructed on the lesser included offense of unarmed robbery. Review of this issue has been waived because trial counsel expressed satisfaction with the jury instructions. *Carter*, 462 Mich at 215. Trial counsel's waiver of the jury instructions did not deny defendant the effective assistance of counsel because the decision not to pursue a jury instruction for unarmed robbery was a matter of trial strategy. *Odom*, 276 Mich App at 415. It would have been inconsistent for counsel to argue that defendant did not have a gun when he robbed the store when the defense theory was that someone else robbed the store.

Next, defendant argues that his convictions of both felony-firearm and felon in possession of a firearm violated the prohibition against double jeopardy. We disagree. Our Supreme Court has held to the contrary. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

Finally, defendant argues that the cumulative effect of errors denied him due process, and that counsel rendered ineffective assistance by failing to correct the errors. We reject this argument because there are no errors to cumulate. *People v LeBlanc*, 465 Mich 575, 591-592; 640 W2d 246 (2002).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray