# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 27, 2013 |
| v | No. 304072<br>Calhoun Circuit Court |
| KEVIN ALLEN DUBOSE,<br><br>Defendant-Appellant. | LC No. 2010-003025-FC |

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

The jury convicted defendant of armed robbery, MCL 750.529, and felonious assault, MCL 750.82. Defendant appeals, and, for the reasons set forth below, we affirm.

## I. FACTS AND PROCEEDINGS

Margaret Perrin owned Romance and More, an adult novelty and lingerie store located on East Columbia Avenue in Battle Creek. On March 1, 2010, Perrin moved the store to a location on West Columbia. At the new location, the store had glass cabinets that were not at the previous location. Perrin recognized defendant as a regular customer before March 1, 2010, but had not seen him at the store after the relocation.

Kristin Smyth was working at the store on June 28, 2010. She testified that she wiped down the glass cabinets in the store early in the day, before the robbery.[1] Between 5:00 and 6:00 p.m., a man came in the store. Smyth described the man to police officers as between 5'7" and 5'8" tall, about 200 pounds, and with a thin or medium build. She told police he had a dark complexion, short hair, and that he wore a white t-shirt, grayish white shorts, and sunglasses. Smyth testified that she described the man to police as "clean shaven," but that he also had a mustache or goatee. Smyth testified that by "clean shaven," she meant "not scraggly looking" and "clean, not long, goatee kind of short, you know, not extra - - extra hair features." The man

[1] Perrin testified it was routine for everything to be wiped down when the store opened for the day. She further noted that Smyth would regularly wipe down surfaces, including the glass cabinets, throughout the day.

touched the glass cabinets while looking at merchandise. He then asked Smyth to show him an item in another room of the store and, when she did, the man stabbed Smyth four times with what appeared to be a steak knife and then demanded that she open the cash register. Smyth escaped from the store before she gave defendant any money, but she testified that the cash register could be easily opened.

Officers received a tip that defendant was involved in the robbery and assault and took him into custody the following day. At that time, defendant had facial hair and a goatee. Police found fingerprints on the glass cabinet in the precise area where Smyth says the robber placed his hand on the glass. One fingerprint and one palm print matched defendant's prints.[2] After a police interview, defendant made a telephone call to his wife. Detective Randy Reinstein heard the conversation and testified that defendant was crying and said, "I'm sorry," "I'm going away for a long time," and "I got into some trouble."

Smyth was unable to identify defendant in a corporeal lineup. She noted that all of the people in the lineup, including defendant, had no facial hair, and she recalled that the robber had a goatee or mustache.[3]

After the jury found defendant guilty, his appellate counsel moved for a new trial and/or resentencing. Defendant's appellate attorney argued that defendant's trial counsel was ineffective because he did not honor defendant's request to testify and because he did not move for a directed verdict. He further argued that the trial court erred by failing to obtain, on the record, defendant's waiver of his right to testify. The trial court granted defendant a *Ginther*[4] hearing on his claims of ineffective assistance of counsel. At the hearing, defendant's trial attorney testified that he counseled defendant not to testify, but told defendant that it was ultimately his decision. Trial counsel also testified that if there were a disagreement about testifying, defense counsel would have placed the waiver on the record. Defendant testified that he wanted to testify, but his trial attorney did not want him to take the stand. According to defendant, he would have testified that he had been in the store previously that week, which was why his prints were found on the cabinet. Yet, at the hearing, defendant could not explain why his finger and palm prints would be on the glass cabinet if the cabinet was wiped down the day of and prior to the robbery. The trial court denied defendant's motion for new trial and

[2] Police also found a pair of sunglasses on top of the cabinet. The fingerprints on the sunglasses did not match defendant's prints, but the record does not reflect whether the sunglasses belonged to defendant.

[3] Given the victim's initial statement that her assailant was "clean-shaven", the police had defendant shave his moustache and goatee before the line-up and used only men without facial hair in the line-up.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

specifically ruled that trial counsel used sound trial strategy in advising defendant not to testify, but that counsel did not prevent defendant from testifying.

## II. WAIVER OF RIGHT TO TESTIFY

Defendant argues that he was denied the right to testify and that the trial court abused its discretion when it did not grant him a new trial on this basis. "Under statute, as well as the court rule, the operative principles regarding new trial motions are that the court 'may,' in the 'interest of justice' or to prevent a 'miscarriage of justice,' grant the defendant's motion for a new trial." *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998), citing MCL 770.1; MCR 6.431(B). The trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Id.* at 634-635, 648 n 27. The right to testify is a question of constitutional law and, therefore, is reviewed de novo. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010). The right of a defendant to testify in his or her own defense comes from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011) (citation omitted). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id.* When a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify," the right to testify is waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985) (quotation omitted).

Here, defendant claims that he wished to testify, but trial counsel advised him not to do so. There is no evidence in the record that trial counsel either told defendant he could not testify or that he prevented defendant from testifying. To the contrary, at the *Ginther* hearing, trial counsel testified that he made it very clear to defendant that the ultimate decision whether to testify was defendant's alone. Again, when a defendant follows his attorney's advice not to testify, the right to testify is waived. *Simmons*, 140 Mich App at 684-685. The record reflects that defendant acted on advice of counsel and, therefore, defendant was not denied his right to testify. *Id.* Moreover, regarding defendant's argument that the trial court erred by failing to obtain a waiver *on the record*, a waiver of the right to testify is not required to be made on the record[5] and a trial court has no duty to advise a defendant of the right to testify or to determine whether a defendant made a knowing and intelligent waiver of the right to testify. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

Because defendant was not denied his right to testify, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Lemmon*, 456 Mich at 634-635.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

[5] We take judicial notice of the practice that, notwithstanding the absence of a legal requirement to do so, some counties, prudently and routinely, place waivers on the record to avoid the specific dispute raised here. Such a practice provides for much more judicial efficiency by avoiding the need for post-trial hearings to determine whether counsel properly advised his client of his right to testify and that the choice not to testify was ultimately made by the client.

Defendant maintains that he was denied effective assistance of counsel. A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* If the trial court made any findings of fact, they are reviewed for clear error and the constitutional issue of ineffective assistance of counsel is reviewed de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). There is a strong presumption that trial counsel's action was sound trial strategy. *Id.* With regard to trial strategy, "this court neither substitutes its judgment for that of counsel regarding trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303 (quotation and citation omitted). "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003) (citations omitted).

Defendants have a constitutional right to testify in their own defense. *Bonilla-Machado*, 489 Mich at 419. The final decision of whether to testify belongs to the defendant. *Id.* When trial counsel advises a defendant not to testify, to prove ineffective assistance of counsel the defendant must overcome the presumption that the advice was sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which [this Court] will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation omitted).

Here, the trial court did not err when it found defense counsel used sound trial strategy by advising defendant not to testify. *LeBlanc*, 465 Mich at 582. As discussed, defendant represented that he wanted to testify to explain the presence of his finger and palm prints because he was in the store earlier in the week. However, importantly, he had no explanation for how the prints remained even after the cabinet had been repeatedly wiped down, the morning of and prior to the robbery. Also, there was no indication that defendant had a response to the evidence that he made comments to his wife that suggested he was guilty. Further, there was no dispute that defendant had a prior conviction for uttering and publishing, which could be used to impeach defendant pursuant to MRE 609(a)(1). Instead of subjecting defendant to cross-examination and likely impeachment, trial counsel advanced the theory that defendant did not commit the crimes by emphasizing Smyth's inability to identify defendant in a physical lineup and that she described the robber as clean shaven when defendant had a goatee when he was taken into custody the day after the robbery. Trial counsel's representation and his advice against testifying did not fall below an objective standard of reasonableness and defendant was not denied the effective assistance of counsel. *Toma*, 462 Mich at 302.

Defendant also argues that counsel should have moved for a directed verdict. When there is a motion for directed verdict, the evidence is viewed in the light most favorable to the prosecution and if it is "insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict" must be granted. *Lemmon*, 456 Mich at 634. When there is sufficient evidence to defeat a motion for directed verdict, defense counsel is not ineffective for failing to move for directed verdict. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Here, there was sufficient evidence to defeat the motion because, most damaging to defendant, defendant's prints were found at the very spot that Smyth saw the robber place his hand on the glass counter, Smyth identified that her attacker had a goatee or mustache, defendant had a goatee and facial hair when arrested the following day, and defendant made statements to his wife that suggested his guilt. Because there was sufficient evidence, trial counsel was not ineffective for failing to move for directed verdict. *Id.*

## IV. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues the prosecutor presented insufficient evidence to show that he was the person who committed the crimes. Claims of insufficient evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and 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, 516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citations omitted). Additionally, "[t]he standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Identity, the only element about which defendant argues there was insufficient evidence, may be established through direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Here, defendant was directly connected with the crime because his prints were found at the store, in the precise area where Smith saw the robber place his hand on the glass cabinet, a cabinet that she cleaned shortly before the robbery. Smyth described her attacker as having a goatee or mustache, and defendant had facial hair and a goatee when arrested the following day. Additionally, defendant made incriminating statements to his wife on the telephone that implied he had committed crimes.[6] Viewed in a light most favorable to the prosecution, a rational jury could conclude, beyond a reasonable doubt, that defendant was the person who committed the armed robbery and the felonious assault.

Defendant does not request resentencing given that his minimum sentence was within the guidelines. However, we remand for resentencing given statements by the trial court strongly

[6] Appellate counsel argued that defendant's statements were not necessarily incriminating, but the fact remains that the jury could have reasonably viewed these statements as evidence of guilt.

suggesting that it may have been confused about some of the evidence it considered at the time of sentencing.[7] At the sentencing hearing, defendant asserted his innocence as he had throughout the case. The trial court then made several inaccurate assertions just before imposing sentence. First, the court incorrectly stated that the victim had identified the defendant as her assailant. The court stated:

> I disagree with you, Mr. Dubose, about the accuracy of the jury verdict. *You were identified. This was not a fleeting glimpse of you by [the victim].* You were supposedly a customer. You talked to her. *You left your sunglasses on the counter*. You had questions about things. *She went with you into a side room. This was not, as I say, a fleeting glimpse. She saw you. She knows it was you.* (emphasis added).

It is difficult to square these comments with the actual proofs given that the victim never identified defendant as her assailant despite multiple opportunities to do so. Thus, there was no basis for the statement, "She knows it was you." In fact, the opposite was true; the victim never identified defendant as her assailant even though, as the court correctly pointed out, she had a good long look at her assailant. In addition, the court's statement that "[y]ou left your sunglasses on the counter" is difficult to understand given that the sunglasses found on the counter were never identified as belonging to defendant and the fingerprints found on them were determined to belong to an identifiable person other than the defendant.

The trial court imposed a 20 year minimum term. While that sentence was within the enhanced guidelines,[8] we should not assume that the court would necessarily have imposed the same sentence absent its inaccurate recollection about certain evidence. Even if a sentence is within the guidelines, MCL 769.34(10) provides that resentencing may be ordered where "inaccurate information [was] relied upon in determining the defendant's sentence." Under these circumstances, where at the very moment of sentencing the trial court emphasized inaccurate, significant information, we conclude that the prudent course is to remand for resentencing.

Defendant's conviction is affirmed. We remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry W. Saad
/s/ Douglas B. Shapiro

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[7] "Generally we do not address issues not raised by the parties on appeal. However, our function is to dispense justice, and we are given the limited power to raise questions on our own." *People v Noel*, 88 Mich App 752, 754; 279 NW2d 305 (1979), citing *Dearborn v Bacila*, 353 Mich 99, 118; 90 NW2d 863 (1958). See also MCR 7.216(A)(7).

[8] Defendant was charged as a third felony offender based on his prior convictions in 2003 on a count of uttering and publishing and a count of resisting and obstructing.