

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY NEAL THOMAS,

Defendant-Appellant.

UNPUBLISHED

June 14, 2012

No. 304576

St. Clair Circuit Court

LC No. 11-000167-FC

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant Timothy Neal Thomas appeals as of right from his conviction by a jury of armed robbery, MCL 750.529. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to a term of 12 to 15 years' imprisonment. We affirm.

Defendant was identified as the man who robbed a Speedway cashier by knife in the early morning hours of January 3, 2011, through the testimony of the cashier and video surveillance footage. At trial, defendant presented five witnesses to attest to his whereabouts the night of the alleged robbery; however, they were confused about the day and night defendant was actually home. According to the testimony, it is unclear if defendant was actually home when the robbery was committed, because the witnesses could only attest to defendant's whereabouts during the early morning hours of January 4, when the police executed a search warrant. Consequently, the prosecutor requested a modification of the standard alibi jury instruction, which provides, in part, "You have heard evidence that the defendant could not have committed the alleged crime because [he/she] was somewhere else when the crime was committed." CJI2d 7.4. The trial court approved the modification and instructed the jury as follows:

The Defendant has asserted that the Defendant could not have committed the crime—the alleged crime because he was somewhere else when the crime was committed.

The Prosecutor must prove beyond a reasonable doubt that the Defendant was actually there when the alleged crime was committed. The Defendant does not have to prove he was somewhere else.

If after carefully considering all the evidence, you have a reasonable doubt about whether the Defendant was actually present when the alleged crime was committed, then you must find him not guilty

Defendant argues that the trial court's modification of the jury instruction regarding his alibi defense warrants reversal of his conviction. We disagree.

We review claims of instructional error de novo. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). Jury instructions must be examined "as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Reversal is only warranted if it is clear that the jury was misled by the instruction. See *id.*

The trial court's modification of the alibi instruction does not warrant reversal. First, the evidence does not support the use of the instruction in its original form. Defendant's alibi witnesses were confused about the day and night defendant was actually home, essentially providing an alibi for the night *after* the robbery had occurred. While the witnesses said defendant was home the evening of January 2, they also thought this was the night before the police arrived at the home. However, the police executed the search warrant on January 4; thus, according to the testimony, the witnesses saw defendant home on January 3, not January 2.¹ Essentially, defendant made *assertions* that he was elsewhere, as the trial court properly determined.

Moreover, even if the instruction was not as favorable to him as the standard alibi instruction, it fairly set forth defendant's alibi defense. With respect to defendant's assertion that the new instruction improperly placed the burden on defendant to establish a defense, defendant has failed to examine the jury instructions as a whole. *Id.* The trial court properly placed the burden on the prosecution to "prove beyond a reasonable doubt that the Defendant was actually there when the alleged crime was committed." It is clear that the instructions could not have misled the jury. *Id.*

Nor do we agree with defendant's concurrent assertion that the trial court improperly commented on the evidence by providing the above instruction. The change did not deprive defendant of a fair and impartial trial.

¹ Defendant argues that Ashley Horton provided unequivocal alibi testimony. However, Horton merely stated that she did not have "contact" with the police on the morning after spending the evening with defendant. Especially when viewed in light of her boyfriend's testimony about the timing of events, Horton's testimony was not as unequivocal as defendant claims.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood