

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KOBIE T. CAMPBELL,

Defendant-Appellant.

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UNPUBLISHED

August 6, 1996

No. 178069

LC No. 93-126096

Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,\* JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to three to twenty years' imprisonment on the armed robbery conviction and to two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that he was denied effective assistance of counsel because his trial attorney failed to impeach the victim of the robbery with her preliminary examination testimony where she stated that she was not able to positively identify any of the men that robbed her. To succeed on a claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance prejudiced him to the point of depriving him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show with reasonable probability that, but for counsel's error, the result at trial would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Because defendant failed to move for a new trial or a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), appellate review of this issue is limited to deficiencies apparent on the record. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994); *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

Prejudice cannot be established in this case because defendant's theory at trial was not that he had been misidentified as being involved in the robbery, but instead, that he had acted under duress, being forced to participate in the robbery by his co-defendants. Further, even if defendant had effectively impeached the victim's identification of defendant, the result at trial probably would not have been different because other witnesses identified defendant as one of the robbers. Various police officers testified that, although they did not actually witness the crime, they did see the Honda Accord immediately prior to and after the crime and that defendant was the driver of that car. Further, both Aaron Simons and co-defendant Bentley testified that defendant committed the robbery.

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\*Circuit judge, sitting on the Court of Appeals by assignment.

Additionally, the failure to cross-examine the victim with her preliminary examination statements may have been a matter of trial strategy. In general, a defense counsel's questioning of witnesses on cross-examination is a matter of trial strategy and, thus, not a basis for a claim of ineffective assistance of counsel. *People v Robideau*, 94 Mich App 663, 669; 289 NW2d 846 (1980), aff'd 419 Mich 458; 355 NW2d 592 (1984). Defense counsel may have chosen not to impeach the elderly victim with her inconsistent statements because they would not have assisted the defense and, in fact, may have only acted to make the jury more sympathetic to the victim.

Defendant argues that an excessive sentence was imposed in this case, compared to that which the court would have considered if defendant had pleaded guilty, and that the sentence thus was a penalty imposed against defendant for exercising his right to a jury trial. However, it is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty. *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985). To prevail on this claim, there must be something in the record to indicate that a higher sentence was imposed as a penalty for defendant's assertion of his right to a jury trial. *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987). Although defendant claims that the record contains evidence to support this claim, defendant points to no specific part of the record and our review does not indicate that the sentencing judge imposed a greater sentence as a penalty for the exercise of defendant's right to a jury trial.

Further, where the trial court offers a different reason for an increased sentence other than to penalize a defendant for demanding a jury trial, we will not assume that the sentence imposed was a punishment for the exercise of that right. *Rivers, supra* at 61. Here, the trial court stated that it was imposing the three-year minimum sentence because of the serious nature of the crime and because defendant was the "mover" in the crime as the driver of the vehicle and the person who demanded money from the victim. The court also noted that the victim was still in a state of shock, and that this was a "horrendous matter."

We affirm.

I concur in result only.

/s/ Richard A. Bandstra  
/s/ Stephen B. Miller

/s/ Michael J. Kelly