

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DUANE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

January 18, 2007

No. 264362

Kent Circuit Court

LC No. 04-007564-FC

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b(a). We affirm.

On July 23, 2004, defendant and Davon Badger went to defendant's neighbor's apartment to play NFL Madden, a video game. His neighbors were Jamorei and Jacquoi Butler. Defendant and Badger bet money on who would win each game. They played four games of NFL Madden. Defendant won one game and Badger won three, including the last game. Badger won a total of \$240.

After Badger won the last game, he stood up to leave. Defendant also stood up to leave. Instead of leaving, however, defendant pulled a handgun from the waistband of his shorts. Pointing the handgun at the floor, defendant told Badger to give him the \$240. Badger refused to give defendant the money. Defendant then cocked the gun, pointed it at Badger's chest, and again told Badger to give him the \$240. This time, Badger gave defendant the money. Badger then left and drove home.

Jamorei and Jacquoi were in their apartment while defendant and Badger played NFL Madden. Jamorei watched the first game defendant and Badger played, but he then fell asleep. When Jamorei woke up, defendant and Badger were gone. Jacquoi watched defendant and Badger play NFL Madden in between washing the dishes and mopping the kitchen floor. He saw defendant and Badger finish the last game. According to Jacquoi, defendant won the last game. After winning, defendant picked up the money he won and defendant and Badger started talking. Jacquoi did not see any angry confrontation between defendant and Badger, nor did he see a gun. When Jacquoi walked to the kitchen, Badger followed him and left.

On his way home, Badger received a call on his cellular telephone from defendant. Defendant told Badger that he could come and get the \$240 back. Defendant also told Badger that he had pulled out the handgun because he was upset. Badger then called his brother, Maurice Barnes, and arranged to go to defendant's apartment with Barnes and Derek Minnema, a friend of Barnes.

When Badger, Barnes, and Minnema arrived at defendant's apartment, defendant was sitting on his porch. Badger and Barnes got out of the car, and both demanded that defendant return the \$240 to Badger. Replying, "Hold on," defendant went into his apartment for five to ten minutes. When defendant returned, there was "a bulge" in his shorts. Defendant was holding the bulge with one hand and carrying the money in his other hand. Defendant sat down on the porch and told Badger to come and get the money. Because the bulge appeared to be a handgun, Badger did not approach defendant. Instead, Badger and Barnes returned to their vehicle, drove across the street, and called the police. They remained across the street as they waited for the police to arrive. When the police arrived, they knocked on defendant's front door. One of the officers went to the back of defendant's apartment. Defendant did not answer the front door, but instead left through the back door, where the police officer was waiting and defendant was arrested. A pocket in defendant's pants held \$280.

Defendant first claims on appeal that he was denied the effective assistance of counsel on two separate occasions during the course of his trial. Defendant moved the trial court for a new trial on the basis that he received ineffective assistance of counsel. Accordingly, defendant has preserved this issue for review. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, because the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record. *Id.*

To prevail on a claim for ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must prove that his counsel's deficient performance was prejudicial to the extent that "but for counsel's error, the result of the proceedings would have been different." *Id.* Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden to prove otherwise. *Id.*

Defendant argues that he received ineffective assistance of counsel when counsel failed to timely request the criminal histories of the prosecution's witnesses. However, the record establishes that counsel requested the witnesses' criminal histories on the second day of trial before opening arguments, and defendant has failed to prove that he was prejudiced by counsel's late request for the criminal histories. Defendant does not argue, nor does the record indicate, that any of the prosecution's witnesses had a criminal history, much less a criminal history that included a conviction that could be used to impeach the witnesses' testimony under MRE 609. Accordingly, defendant has not demonstrated that, but for counsel's failure to timely request the criminal histories, the result of his trial would have been different. See *id.*

Defendant also argues that he received ineffective assistance of counsel when counsel failed to request that the jury be instructed on any lesser included offenses of armed robbery. Whether to request an instruction on a lesser included offense is a matter of trial strategy, *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996), and a defendant must overcome a strong

presumption that counsel's actions constituted sound trial strategy, *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). We have previously recognized that counsel's decision not to request any instructions on lesser included offenses can constitute sound trial strategy because instructions on lesser offenses may reduce the chance of acquittal. *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). Defendant has failed to overcome the strong presumption that counsel's decision not to request instructions on lesser included offenses was sound trial strategy.

Defendant next claims on appeal that his conviction for armed robbery is not supported by sufficient evidence. Specifically, defendant argues that, because he believed the money belonged to him after he won the last game, there was insufficient evidence to find that he had the intent to permanently deprive Badger of his property. When reviewing the sufficiency of the evidence to sustain a conviction, we "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 Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

"The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The offense of armed robbery, a specific intent crime, requires proof that the defendant intended to permanently deprive the victim of his property. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998). At trial, the jury heard three different stories of who won the last game and what occurred after the winner took the money. According to Badger, he won the last game and the \$240 but, after defendant pointed a gun at him, he gave defendant the money and left. However, according to Jacquoi, defendant won the last game and, after defendant picked the money up from the floor, defendant and Badger started talking. Jacquoi did not see an angry confrontation or a gun. When Jacquoi left to go the kitchen, Badger followed him and left the townhouse. Defendant, after he was arrested, told Officer VanderVeen that he won the last game and, after he took the money from the floor, Badger got upset and argued with defendant before he left.

Viewing this evidence in the light most favorable to the prosecution and making all reasonable inferences and credibility determinations in favor of the jury verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), we conclude that defendant's conviction for armed robbery is supported by sufficient evidence. Believing Badger's testimony, a rational trier of fact could find that Badger won the last game and infer that, because Badger won the last game, defendant knew that he did not have a right to the money that Badger had won. Therefore, a rational trier of fact could find that defendant pointed the gun at Badger's chest with the intent to permanently deprive Badger of the \$240.

Defendant finally claims on appeal that the prosecutor inappropriately introduced evidence of flight in her closing argument by arguing that it was "very telling" when defendant ran out the back door while knowing that two officers were outside his front door. Because defendant failed to object to the prosecutor's comment at trial, we review the claimed misconduct for plain error affecting defendant's substantial rights. See *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). In reviewing a claim for prosecutorial misconduct, we review the pertinent portion of the record and evaluate the prosecutor's comments in context. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

When the prosecutor's comment is read in context, it becomes apparent that the prosecutor was not arguing that defendant was guilty because he ran from his apartment but, rather, was arguing that the story defendant told the police officer who interviewed him was not credible. The prosecutor was merely arguing that because defendant avoided the police officers who came to his front door, defendant's story that he was scared that Badger, Barnes, and Minnema were going to jump him was not credible. Because a prosecutor may argue the credibility of witnesses, *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005), the prosecutor's comment was proper.

Affirmed.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Bill Schuette