

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 24, 2014

v

THOMAS GEORGE MANUEL, JR.,
Defendant-Appellant.

No. 316756
Genesee Circuit Court
LC No. 12-031348-FC

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm (felon-in-possession), 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 terms of 25 to 50 years' imprisonment for the armed robbery conviction, 134 months to 25 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and 76 months to 25 years' imprisonment for the felon-in-possession conviction, which were consecutive to his sentence of two years' imprisonment for the felony-firearm conviction. On appeal, defendant raises issues in an appellate brief prepared by appellate counsel and in a pro se supplemental brief pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. We affirm.

I. SUFFICIENCY OF EVIDENCE

First, in the appellate brief, defendant argues that the prosecution failed to present sufficient evidence that he intended to permanently deprive the victim of her property. We disagree. We review de novo a sufficiency of the evidence challenge. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In doing so, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

“The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim’s presence or person (3) while the defendant is armed with a weapon.” *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). Armed robbery is a specific intent crime, which requires the prosecution to prove that the defendant intended to permanently deprive the

owner of property. *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). Circumstantial evidence and reasonable inferences arising from it constitutes sufficient proof. *Id.* at 168-169.

Viewing the evidence in the light most favorable to the prosecution, we note the record shows that the prosecution presented sufficient evidence that defendant intended to permanently deprive the victim of her property. The victim and Jeffrey Curl testified that they were smoking crack cocaine with defendant at Curl's home. Defendant and the victim were also gambling. Defendant and the victim had a disagreement because defendant wanted more drugs and the victim was out of crack cocaine. Defendant started to pace, left the room, and then returned with a gun in his hand. There was testimony from the victim and Curl that defendant pointed the gun at the victim and demanded that she give him "everything." Defendant told his sister, Lori Manuel, to get the victim's gun and purse, which included the victim's keys and cellular phone. The victim gave Lori her property and said, "Please don't shoot me." Defendant, standing about five to six feet away, then shot the victim in the abdomen and left the home with Lori through the front door. Although defendant argues that his testimony was more credible than the testimony of the victim and Curl, we will not "interfere with the jury's assessment of the weight and credibility of the witnesses or the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013); see also *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009) ("The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor."). Therefore, we conclude that sufficient evidence was presented to prove the elements of armed robbery beyond a reasonable doubt.

II. STANDARD 4 BRIEF

A. FAILURE TO PRODUCE WITNESSES

Next, defendant argues in his Standard 4 brief that the prosecution did not show due diligence in its attempt to locate Lori Manuel and Carl Montgomery to testify at trial. We disagree. Because defendant failed to preserve this issue for appellate review, we review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Under MCL 767.40a, the prosecution only has a duty to provide notice of known witnesses and to give reasonable assistance to locate them if the defendant requests assistance. *People v Burwick*, 450 Mich 281, 290-291; 537 NW2d 813 (1995). Due diligence is only required if the prosecution fails to produce an endorsed witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). In this case, the two witnesses were not endorsed. Further, the record reflects that the prosecution provided defendant with notice of the two witnesses and there is no indication that defendant requested the prosecution's assistance to locate them as required by the statute. MCL 767.40a(5) (stating that the defendant must make the request for assistance in writing not less than 10 days before the trial or at a time directed by the trial court). Accordingly, we find no error.

B. PROSECUTORIAL MISCONDUCT

Defendant next argues in his Standard 4 brief that the prosecutor committed prosecutorial misconduct by using perjured testimony to secure his convictions. We disagree. We review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich 750, 763-764.

A "prosecutor may not knowingly use false testimony to obtain a conviction," as it violates a defendant's due process rights under the Fourteenth Amendment. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), overruled on other grounds *People v Chenault*, 495 Mich 142; 845 NW2d 731 (2014). Accordingly, a prosecutor has "a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *Id.* However, a conviction obtained through the knowing use of perjured testimony will only be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009) (citations and internal quotation marks omitted). The focus remains on the fairness of the trial and not on the prosecutor's culpability. *Id.* at 390.

Defendant has failed to establish plain error affecting his substantial rights. Defendant argues that the victim's and Curl's testimony differed from their preliminary examination testimony and the police report and that the victim's testimony was contradicted by other witnesses. However, these inconsistencies do not establish that the prosecutor knowingly used perjured testimony to obtain defendant's convictions. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Although some of the details the victim and Curl testified to at trial differed from their preliminary examination testimony, there is no indication that the prosecutor sought to conceal these inconsistencies from defendant. In fact, the prosecutor noted some of these inconsistencies during her closing argument, and defense counsel cross-examined the witnesses on those same inconsistencies. Additionally, testimony that conflicts with other witnesses' testimony does not lead to the conclusion that the prosecution knowingly used perjured testimony. See *Lester*, 232 Mich App at 278-279 (stating that even if "the prosecutor was or should have been aware of the discrepancy, defendant cites no authority for the proposition that the prosecution must disbelieve its own witness when testimony from another witness contradicts her"). Further, there is no evidence to support defendant's claim that the prosecution coerced the victim's testimony or concocted the allegations against him. Accordingly, we find no plain error affecting defendant's substantial rights.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues in his Standard 4 brief that his trial counsel's assistance was ineffective for failing to locate and call Montgomery and Lori to testify at trial and for failing to impeach the victim's and Curl's testimony. We disagree. We review defendant's unpreserved claim of ineffective assistance of counsel for errors apparent on the record. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465

Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.” *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that “ ‘counsel’s representation fell below an objective standard of reasonableness.’ ” *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland*, 466 US at 688. “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.” *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). This prong “requires the reviewing court to ‘determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.’ ” *Vaughn*, 491 Mich at 670, quoting *Strickland*, 466 US at 690. Second, the defendant must show that trial counsel’s deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a “ ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ ” *Vaughn*, 491 Mich at 669, quoting *Strickland*, 466 US at 694. “ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland*, 466 US at 694.

Defendant has failed to show that his trial counsel’s representation fell below an objective standard of reasonableness. First, defendant argues his counsel’s assistance was ineffective for failing to locate and call Montgomery and Lori to testify at trial. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

On the first day of the scheduled trial, defense counsel noted that defendant wished to call Lori and Montgomery, but their addresses were unknown and thus counsel could not subpoena them. Defense counsel stated he had called defendant’s mother to obtain contact information for them, but it proved unsuccessful. Even defendant, Lori’s brother, was unable to provide contact information to defense counsel. The record also reflects that Detective Tim Williams attempted to locate Lori multiple times to interview her, but was also unsuccessful. He also distributed Lori’s picture through the Detectives Network and to patrolling officers, to no avail. Further, according to the police report, Montgomery was questioned at the scene and indicated that he did not know anything about the incident.

Defense counsel’s performance was not deficient for failing to call the two witnesses, where it is clear from the record that those witnesses could not be located by counsel, defendant, or the police after exerting reasonable efforts to locate them. Additionally, with regard to Montgomery, the record indicates that he had no knowledge of the incident, and thus would not

aid the defense. Therefore, we conclude that defense counsel was not ineffective for failing to locate and call Lori and Montgomery.

Second, defendant argues that defense counsel was ineffective for failing to impeach the victim's and Curl's testimony. However, the record reveals that defense counsel thoroughly cross-examined the victim and Curl regarding their drug use and perception of the incident and the victim's possession of a gun and her propensity for violence, which exposed inconsistencies in their testimony. Additionally, in his closing argument, defense counsel highlighted those inconsistencies by arguing that the victim possessed a nine-millimeter handgun, changed her story at trial, and had a history of violence. Defense counsel also argued that the victim was high on several drugs and that her perception of the events was impacted as a result. In light of all this, we conclude that defendant has failed to show that defense counsel's performance was deficient in this regard.

Affirmed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood