

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS PATRICK O'BRIEN, JR.,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 245591

Oakland Circuit Court

LC No. 2002-186455-FC

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant was convicted by jury of assault with intent to rob while armed, MCL 750.89, and malicious destruction of property valued at more than \$1,000 but less than \$20,000, MCL 750.377a(b)(i). The trial court sentenced him as a fourth habitual offender, MCL 769.12, to concurrent prison terms of fifteen to forty years for the assault with intent to rob conviction and three to twenty years for the malicious destruction of property conviction. He appeals as of right. We affirm.

I. Basic Facts

Defendant's convictions arise from two incidents in Royal Oak. At approximately 4:15 p.m., a man entered a Walgreen's store and approached the cashier. He placed a gun on the counter, and whispered, "give me the money in the register." The cashier walked away and asked co-workers to call the police. Royal Oak Police Officer Steve Teichow responded to the call. After talking to the cashier, Officer Teichow relayed the information to police dispatch. The police set up a perimeter around the vicinity of the store and began a search.

Meanwhile, a man in a nearby apartment heard a thumping sound, and looked out the window to see a man, later identified as defendant, pounding his car. Defendant picked up a ten-foot long metal rod, rammed it several times into the car, and walked away. The man called the police. Repairs to the car cost \$1,927.

During this time, the police searched for the Walgreen's robber in the surrounding area. They learned from radio dispatches that a suspect matching the Walgreen's robber was seen attempting to break into a vehicle. Officer Patrick Stanton and other officers found defendant in the yard of a nearby house and apprehended him. They handcuffed and brought him back to the Walgreen's store. The officers had defendant exit the car in front of the store while the cashier

observed from a window where she could not be seen; she identified defendant as the robber. Stanton found what appeared to be a semiautomatic handgun near where defendant had been arrested. Upon later examination, he determined that the gun was a semiautomatic pistol that had been converted to a BB gun.

II. Cashier's Testimony

Defendant contends that the trial court erred in admitting testimony that the cashier identified him as the robber during an "in-field identification." Defendant did not object to the testimony at trial. Accordingly, this issue is reviewed under the plain error rule of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id.* The third requirement requires a showing of prejudice, meaning that the error affected the outcome of the lower court proceedings. *Id.*

Defendant contends that the identification testimony was improper because such procedures are generally disapproved, and because the procedure was unduly suggestive. With regard to defendant's first argument, this Court has stated its approval of such procedures:

Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. . . . Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability. [*People v Winters*, 225 Mich App 718; 571 NW2d 764 (1997) (citations omitted); see also *People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002).]

Accordingly, defendant's claim that the identification procedure is generally disapproved is without merit.

We also reject defendant's argument that the procedure here was unduly suggestive. Defendant did not raise an objection at trial, so there is no record for us to review the suggestiveness issue. To the extent defendant's argument suggests that the suggestiveness arose from the mere fact that the police handcuffed and brought him to the store for identification, this argument is without merit, because it would apply to almost any on-the-scene identification where the police ask the victim whether the suspect is the actual perpetrator or just an "unfortunate victim of circumstances." *Winters, supra* at 728. We therefore conclude that defendant has failed to establish a plain error with respect to the identification testimony.

III. PSIR

Defendant also claims that inaccuracies in his presentence information report (PSIR) entitle him to resentencing. To preserve an issue that the PSIR contains inaccuracies, the defendant must raise the issue at or before sentencing, or as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App

645, 647; 554 NW2d 391 (1996). Here, defendant preserved only some of his claims of inaccuracies. At sentencing, he challenged a statement in the victim's impact statement that the victim was scared. He disputed the statements that he had "a criminal history spanning five states" and that he had served a prison term in Pennsylvania. He challenged the prior criminal history information in the PSIR, denying that he had fifteen prior felonies, or twenty-six verified misdemeanor convictions. These issues are therefore preserved. However, defendant did not argue at sentencing that the PSIR gave the wrong place of residence for his mother, or that the PSIR incorrectly stated that he had used two aliases. These issues are therefore not preserved.

A defendant has the right to the use of accurate information at sentencing, and a court must respond to allegations of inaccuracies. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). When a defendant claims that a presentence report contains an error, the court may hold an evidentiary hearing to determine the report's accuracy, may accept the defendant's unsworn statement, or may ignore the alleged misinformation when sentencing. MCR 6.425(D)(3); *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). We review the sentencing court's response to claims of inaccuracies for an abuse of discretion. *Id.* When the alleged inaccuracies would have no determinative effect on the sentence, the court's failure to respond may be considered harmless error. *McAllister, supra*.

Although defendant disputed the PSIR's information that he had fifteen prior felonies and twenty-six prior misdemeanors, he conceded that his total prior record variable (PRV) score would be over one hundred points even if the disputed felonies were stricken. The prosecutor agreed that the PSIR should show that defendant disputed the information. The trial court did not specifically respond to defendant's claim that the PSIR showed the wrong number of prior offenses, or the wrong number of states, or that it showed a prison term in Pennsylvania. Instead, it accepted the parties' stipulation that defendant disputed the accuracy of this information, and that defendant's PRV range was at least one hundred points. This stipulation is noted on the PSIR. Because defendant stipulated to this resolution of the dispute, we find no abuse of discretion in the trial court's response.

Defendant also claims that the victim's impact statement wrongly reflects that the victim was scared during the incident. The PSIR states, "She indicated that on the day of the within offense she was afraid for her life," and "at the time, she felt that she easily could have lost her life." This information is consistent with the cashier's trial testimony that she prayed that she would not get shot, and that she felt panic after the incident was over.

Defendant's claims of errors regarding his mother's place of residence and his previous use of an alibi were not preserved for appeal. MCR 6.429(C); *Bailey, supra* at 647. To the extent this issue may be reviewed under the plain error rule, we find no plain error because there is nothing in the record that would enable us to ascertain that the PSIR is erroneous with respect to these matters. In any event, it is unlikely that either of these alleged inaccuracies could have affected defendant's sentence. Consequently, defendant cannot establish a plain error affecting his substantial rights.

Because the trial court appropriately responded to defendant's claims of inaccuracies in the PSIR, defendant is not entitled to resentencing.

IV. Sufficiency of the Evidence

Defendant claims that there was insufficient evidence to support his conviction of assault with intent to rob while armed. We review this claim by considering whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

MCL 750.89 provides:

Assault with intent to rob and steal being armed—Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Defendant contends that there was no evidence of an assault here, because the victim was not afraid at the time of the incident, she did not believe anything would happen to her, and there was no evidence that he threatened or attempted to injure her. We disagree. In *People v Reeves*, 458 Mich 236; 580 NW2d 433 (1998), our Supreme Court held that, in the criminal context,¹ the term “assault” includes the “apprehension-type assault.” With such an assault, “actual ability to inflict the threatened harm is largely irrelevant and unnecessary, as long as the victim reasonably apprehends an *imminent* battery.” *Id.* at 244. The “inquiry turns on what the victim perceived, and whether the apprehension of imminent injury was reasonable.” *Id.*

Here, the cashier testified that she did not feel afraid during the incident, but she also stated that she prayed, “Lord, don’t let nothing happen to me” as she walked away from defendant. Although the cashier’s emotional reaction did not set in until after she was out of harm’s way, her testimony was sufficient to enable the jury to infer that she perceived that she was in imminent danger of being shot. The evidence was sufficient to satisfy the elements of an “apprehension-type” assault. *Reeves*, *supra* at 244.

Defendant also contends that there was no assault because he did not threaten or attempt to harm the cashier. The assault element in assault with intent to rob is satisfied “where the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened.” *Id.* Defendant’s presentation of a gun, while demanding money he had no right to, constitutes overt conduct that would cause a reasonable person to believe she might be shot if she did not comply. The evidence was sufficient to support the assault element of the offense.

V. Effective Assistance of Counsel

Defendant also raises issues of ineffective assistance of counsel. Where, as here, a defendant claiming ineffective assistance of counsel fails to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court’s review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

¹ *Reeves* involved a conviction of assault with intent to rob while unarmed. MCL 750.88.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

A. Officer Teichow's Testimony

Defendant claims that trial counsel was ineffective because she failed to challenge Officer Teichow's testimony regarding the on-the-scene identification, and because she failed to move for a directed verdict. We have already concluded that the on-the-scene identification procedure was not improper. We also have concluded that there was sufficient evidence to support defendant's conviction of assault with intent to rob while armed, so a directed verdict motion would have been futile. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. Defense Witnesses

Next, defendant claims that counsel was ineffective because she failed to secure five defense witnesses. Although these witnesses were not in attendance on the first day of trial, one character witness was present on the second day, but defense counsel opted not to call her. Also, the prosecutor agreed to stipulate that defendant was employed at the time of the incident and that he sometimes carried money for his employer.

Because one of the witnesses was present to testify, and because defense counsel obtained a stipulation as to another witness' testimony, there was no error with respect to two of the witnesses. Further, without an evidentiary record showing how the other three witnesses would have testified, we cannot conclude that counsel's failure to secure the witnesses' attendance was "objectively unreasonable," or that it was outcome-determinative. Accordingly, this alleged error does not constitute ineffective assistance of counsel.

C. Questioning of Officer Teichow

Defendant's next ineffective assistance of counsel claim is based on the following questions that defense counsel asked Officer Teichow during cross-examination:

Q. Now, you repeatedly referred to [the cashier] as the victim. Is that because you assume Mr. O'Brien is guilty?

A. The Court will decide that.

Q. Actually the jury will.

A. The jury will decide that.

On redirect examination, the prosecutor asked:

Q. Counsel asked you a question, what your opinion is. So I'm going to ask you, based upon the facts that you know, all the evidence in this case that you know, what is your opinion?

Defense counsel objected, but the prosecutor replied that defense counsel had asked the question. The trial court overruled the objection, commenting that defense counsel had "opened the door." The prosecutor repeated the question, and Officer Teichow replied, "Undoubtedly he's guilty." The trial court then informed the jury that "we don't care what the officer's opinion is. We only care what your opinion is. The only reason I let it in is because defense counsel opened the door but it's not admissible."

A defendant claiming ineffective assistance of counsel must overcome the strong presumption that his attorney was exercising sound strategy. *Carbin, supra* at 600. Here, defense counsel's questioning of Officer Teichow was arguably sound trial strategy, to show that Officer Teichow had preconceived notions as to defendant's guilt. Furthermore, the trial court cured any potential prejudice by immediately advising the jury that Officer Teichow's opinion was of no importance. Consequently, defendant has not established either prong of the ineffective assistance claim with regard to the cross-examination of Officer Teichow.

D. Defendant's Prior Record

Next, defendant claims that defense counsel should have ascertained before trial whether the prosecutor could or would use his prior record for impeachment if defendant testified. Despite defense counsel's failure to do so, however, the trial court reviewed defendant's record, and informed him of which convictions could be used. The prosecutor also anticipated that defendant's testimony might open the door to impeachment by other offenses, for example, if defendant testified that the incident was a mistake, the prosecutor would offer his prior robbery convictions to restate that theory.

The record thus negates any causal connection between defense counsel's failure to pursue this matter before trial and defendant's decision not to testify. Defendant received the information he needed regarding his susceptibility to impeachment by his prior record. He had an evening to consider and decide whether to testify. He has not shown why his decision not to testify, or the outcome of the trial, would have been different if he had received this information sooner. Consequently, defendant has not demonstrated that he was deprived of the effective assistance of counsel.

E. Inaccuracies in the PSIR

Defendant's final two ineffective assistance of counsel claims relate to sentencing. Defendant contends that defense counsel was ineffective for failing to challenge the inaccuracies in the PSIR. Defense counsel did, however, raise several challenges to the accuracy of the PSIR. The two alleged errors that counsel did not raise involved insignificant matters that would not have affected defendant's sentence. Defendant has not demonstrated that but for defense counsel's failure to raise these two additional matters, there is a reasonable probability he would have received a shorter sentence.

Defendant also claims that counsel failed to challenge the validity of prior convictions for purposes of sentence enhancement. MCL 769.13 provides the procedures for notifying a defendant that his prior convictions will be used to enhance his sentence under the habitual offender statutes. MCL 769.13(4) provides that a defendant facing sentence enhancement “may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice” The trial court must then resolve the challenge. MCL 769.13(6).

Nothing in the record supports defendant’s claim that the prior convictions used to establish his habitual offender status were inaccurate or constitutionally invalid. Defendant’s sentence was enhanced pursuant to MCL 769.12, three or more prior felonies. At sentencing, defendant denied having a prior record of fifteen prior felonies, but never claimed to having fewer than three. Because defendant has not shown that defense counsel had any grounds for challenging his sentence enhancement under MCL 769.13(4), there is no basis for his claim that she either committed an objectively unreasonable error, or that the alleged error deprived him of a shorter sentence. Accordingly, this ineffective assistance claim is without merit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly