

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ALBERT,

Defendant-Appellant.

UNPUBLISHED

April 18, 2006

No. 258707

Oakland Circuit Court

LC No. 2004-195256-FC

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

A jury convicted defendant of two counts each of armed robbery, MCL 750.529, and assault with intent to rob while armed, MCL 750.89. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to four concurrent prison terms of 50 to 80 years each. He appeals as of right. We affirm, but remand for correction of the judgment of sentence.

At around midnight on February 19, 2002, a man entered a bar in Ferndale, where he ordered a beer and smoked a cigarette. He then walked behind one of the three other patrons in the bar, grabbed her, and put a gun to her head. The man then robbed and assaulted the bartender and the other patrons. The bartender and two of the customers gave descriptions of the suspect but failed to identify defendant in photographic lineups. The bartender and a patron identified defendant as the robber when they observed him in person at the preliminary examination. The cigarette that the suspect smoked in the bar was tested for DNA, which matched defendant's DNA. The likelihood of another Caucasian having matching DNA is one in 5.7 quadrillion. At trial, defendant pursued a defense of mistaken identity. The jury convicted defendant of two counts of armed robbery and two counts of assault with intent to rob while armed.

The judgment of sentence inaccurately indicates that defendant was convicted of three counts of armed robbery and one count of assault with intent to rob while armed. The parties acknowledge that this is incorrect. Therefore, although we affirm defendant's convictions and sentences, we remand for correction of the judgment of sentence to conform to the jury's verdict. Resentencing is not required.

Defendant first argues that the trial court committed error requiring reversal by failing to instruct the jury on the necessarily lesser included offenses of unarmed robbery and assault with intent to rob while unarmed. We disagree. Because defendant did not request these instructions

at trial, this issue is unpreserved and our review is for plain error affecting defendant's substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

The only element distinguishing armed robbery from unarmed robbery, and distinguishing assault with intent to rob while armed from assault with intent to rob while unarmed, is the use of a weapon during the offense. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002); *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993); *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Thus, unarmed robbery and assault with intent to rob while unarmed are necessarily included lesser offenses of armed robbery and assault with intent to rob while armed. However, a lesser offense instruction is only proper if "a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). There is no support for these instructions here.

Three of the four victims testified that the perpetrator was armed with a gun during the crime. The fourth victim could not clearly see defendant's other hand, so he could not say whether defendant had a gun. Because none of the victims testified that the perpetrator was unarmed, and because each of the victims who were in a position to see whether the perpetrator was armed testified that he had a gun, no rational view of the evidence could support instructions on either unarmed robbery or assault with intent to rob while unarmed. *Reese, supra* at 447-448. Therefore, failure to instruct on these lesser offenses was not plain error. In any event, the principal issue at trial was not whether the perpetrator was armed, but whether defendant was, in fact, the perpetrator. Failure to instruct on the lesser included offenses did not affect defendant's substantial rights. For the same reason, we reject defendant's argument that defense counsel was ineffective for failing to request these instructions. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant also argues that defense counsel was ineffective for failing to present an alternative theory at trial. We disagree.

Because defendant did not raise the issue of ineffective assistance of counsel in an appropriate motion in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Counsel's decisions about which theories to argue at trial and whether to present evidence or call witnesses are matters of trial strategy that we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will not find ineffective assistance solely because a trial strategy ultimately fails. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987). To establish prejudice, the defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Trial counsel's theory of the case was that reasonable doubt existed whether defendant was the perpetrator. Trial counsel emphasized the witnesses' erroneous identification of another individual. Defense counsel also argued that one possible explanation for the cigarette with defendant's DNA was that the perpetrator, who was smart enough to take his beer bottle with

him when he left, intentionally planted the cigarette butt in the bar in order to pin the crime on defendant. Defendant did not testify at trial, and the defense did not call any witnesses. Defendant argues that he wanted to testify that he was, in fact, at the bar that evening, which is how his DNA came to be present. Our review of the record reveals no support for defendant's claim that he was prevented from testifying by defense counsel.

In any event, defendant was not denied a substantial defense even if he was precluded from testifying. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The three patrons were all regular customers. All trial witnesses testified that it had been a slow night at the bar with few customers. The bartender had cleaned the bar and cleaned out the ashtrays before the perpetrator arrived. Even if defendant had testified that he had been in the bar earlier that evening and had left a cigarette butt in an ashtray, this would not have explained the presence of his DNA on the cigarette left by the perpetrator. Defendant was not deprived of a substantial defense by failing to present this testimony. Conversely, defense counsel more plausibly suggested that there was reasonable doubt about the perpetrator's identity, given the perpetrator's decision to take his beer bottle but leave his cigarette and the expert testimony that DNA evidence can remain viable for thirty years. Defendant has not overcome the presumption that counsel exercised sound trial strategy.

Defendant finally argues that the trial court erred in its scoring of offense variable (OV) 8 of the sentencing guidelines. We disagree. The trial court scored OV 8 at 15 points, which is proper if the "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). The evidence showed that defendant committed the offenses inside a bar, but he brought one of the victims outside at gunpoint, away from the other victims. This was sufficient to show that a victim was held captive for longer than necessary to commit the offense and moved to a situation of greater danger. Because there was sufficient record evidence to support scoring OV 8 at 15 points, we will uphold the trial court's scoring determination. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We remand for correction of the judgment of sentence in accordance with the jury's verdict. Affirmed in all other respects. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis