

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY JO PRATT,

Defendant-Appellant.

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UNPUBLISHED

October 24, 2006

No. 261045

Crawford Circuit Court

LC No. 04-002176-FC

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of armed robbery, MCL 750.529. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to convict her of the charged offense. Specifically, defendant contends that the prosecution failed to present sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that she was the perpetrator of the armed robbery. We disagree.

This Court reviews de novo challenges to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; \_\_\_ NW2d \_\_\_ (2006). In reviewing whether sufficient evidence has been presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecution to 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 Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The standard is deferential and requires that this Court draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id.* at 400.

It is well established that identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Identity, as with any element, may be proved through circumstantial evidence and reasonable inferences arising from that evidence. *Martin, supra* at 340.

In the present case, the victim of the robbery testified that the assailant had green eyes and estimated that the assailant was between 5'5" and 5'6" and had a slender build and small hands. There was evidence that defendant weighed about one hundred pounds, was 5'6" tall, and had green eyes. In contrast, the victim testified that defendant's boyfriend Daniel Latesky,

who testified at trial that he alone committed the robbery, could not have been the assailant because of his height, weight, and eye color. The victim also testified that the person who robbed her held the gun in the left hand. Trial testimony established that defendant is left-handed as opposed to Latesky, who is right-handed. Hence, the victim's description of the robber was consistent with defendant.

Furthermore, the victim testified that the robber wore a gray-hooded sweatshirt with the hood up and fully zipped, wore black gloves, had a small black gun and a bright orange hunting mask. Testimony established that a toy gun, a pair of black gloves, a black knit cap/mask and a pair of sunglasses were found underneath a trashcan behind the home shared by defendant and Latesky a few weeks after the robbery. The victim stated that the gloves and toy gun were consistent with the ones used by the robber. In addition, defendant admitted that she owned a gray-hooded sweatshirt, which did not fit Latesky. In contrast, Latesky testified that, when he allegedly robbed the station, he was wearing a brown and black coat. Latesky also testified that the items recovered from underneath the garbage can were the items he used in the robbery. Latesky further described details of the crime that could only be known to the perpetrator of the robbery. Finally, there was evidence that the robber was accompanied by a second person, who remained outside the station.

Taking this evidence in a light most favorable to the people, there was sufficient evidence to establish beyond a reasonable doubt that defendant was the robber. A reasonable jury could conclude from the evidence that two persons participated in the robbery; one who entered the station with the gun and another who remained in the car used to leave the scene. Given Latesky's testimony, his knowledge of details peculiar to the crime and the recovery of the items found under the trashcan behind defendant's home, a reasonable jury could conclude that Latesky was one of those two individuals. Furthermore, given the evidence that defendant matched the description of the perpetrator, that defendant owned a sweatshirt that matched the sweatshirt worn by the perpetrator and that Latesky did not match the description of the robber, a reasonable jury could conclude that defendant accompanied Latesky and was the person who actually entered the station and robbed the victim. Although Latesky testified that he robbed the station and that he did so alone, the jury could properly reject this testimony as not credible and conclude that he was lying for defendant. See *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005) ("Witness credibility and the weight accorded to evidence is a question for the jury, and any conflict in the evidence must be resolved in the prosecution's favor."). Consequently, the prosecution presented sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that defendant was the perpetrator of the robbery.

Defendant next argues that the trial court erred in permitting Latesky to testify while shackled and wearing prison garb. Defendant argues that, because Latesky testified that he alone committed the robbery, his credibility was particularly important to her defense.<sup>1</sup> The orange prison garb and shackles, defendant further argues, likely undermined Latesky's credibility in the eyes of the jury and, thereby, deprived her of a fair trial. We do not agree.

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<sup>1</sup> We note that Latesky was actually called as a witness by the prosecution.

Generally, a party must object to an error at the trial court level in order to preserve the issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Defendant concedes that her defense counsel did not object to the witness testifying in prison garb and shackles, so this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Review of this unpreserved claim of error is limited to review for plain error affecting defendant's substantial rights. Reversal is warranted only if plain, unpreserved error resulted in the conviction of an actually innocent person, or seriously affected the fairness or integrity of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

Defendant argues that her conviction should be reversed because neither the trial court nor plaintiff provided any basis on the record for shackling Latesky. Defendant relies on *People v Banks*, 249 Mich App 247, 257; 642 NW2d 351 (2002), which held that "the handcuffing or shackling of a witness during trial should be permitted only to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial." However, the Court in *Banks* did not hold that it would be error for a trial court to permit a witness to be shackled without sua sponte articulating a proper reason. Instead, the decision is committed to the discretion of the trial court. See *Banks, supra* at 256-257. Because defendant never objected below and no record was developed as to why Latesky was shackled, it is not readily apparent that there was not a proper basis for the trial court's decision. Therefore, we cannot conclude that the trial court committed plain error.

Defendant next argues that she was denied the effective assistance of counsel because her trial counsel failed to object to Latesky testifying in prison garb and while shackled. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and that it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). The defense's theory was that reasonable doubt existed as to defendant's guilt because Latesky claimed that he committed the robbery alone. Defendant has not overcome the presumption that her trial counsel's decision was a matter of sound trial strategy. Defendant's trial counsel may well have declined to object because of a desire to emphasize that Latesky had been incarcerated for the robbery and was, therefore, the more likely perpetrator of the robbery. Consequently, there was no error warranting reversal.

Affirmed.

/s/ William C. Whitbeck  
/s/ William B. Murphy  
/s/ Michael R. Smolenski