

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
August 16, 2012

v

ERIC KARL ANDERSON,  
Defendant-Appellant.

No. 301666  
Wayne Circuit Court  
LC No. 10-005855-FC

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Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of armed robbery, MCL 750.529, one count of assault with intent to rob while armed, MCL 750.89, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to serve concurrent terms of 13 to 20 years in prison for the armed robbery and assault convictions and a consecutive two-year term for the felony-firearm conviction. We affirm defendant's convictions, except we vacate his conviction of assault with intent to rob while armed, MCL 750.89, and remand for resentencing.

I. DOUBLE JEOPARDY

Defendant argues that defendant's convictions of both assault with intent to rob while armed and armed robbery violate his double jeopardy protections against multiple punishments. We review unpreserved claims that a defendant's double jeopardy rights have been violated for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). The federal and Michigan double jeopardy provisions prohibit multiple punishments for the same offense to protect a defendant from being sentenced to more punishment than the Legislature intended. *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004). This Court has previously determined that assault with intent to rob while armed is a necessarily included lesser offense of armed robbery and, therefore, dual convictions of these offenses for a single criminal episode is a violation of double jeopardy protections. *People v Akins*, 259 Mich App 545, 547; 675 NW2d 863 (2003); *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979); see also *People v Wilder*, 411 Mich 328, 342-347; 308 NW2d 112 (1981) (where one offense is a necessarily included lesser offense of the other, conviction of and sentence for both violates double jeopardy protections against imposing double punishment for a single criminal act, absent legislative intent to the contrary).

Accordingly, we agree that in this case, defendant's convictions of assault with intent to rob while armed and armed robbery are contrary to double jeopardy provisions against multiple punishments for the same offense. "The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge." *Meshell*, 265 Mich App at 633–634. Therefore, we vacate defendant's conviction of assault with intent to rob while armed.

## II. IDENTIFICATION

Defendant argues that the eyewitness identification of defendant was not credible. Establishing the identity of defendant as the perpetrator of the crime is an essential element of any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be proven by either direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). The trier of fact is free to determine what inferences may be "fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Appeals regarding the sufficiency of the evidence are reviewed de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011); *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When considering a claim of insufficient evidence, the "court must view the evidence in the light most favorable to the prosecution and determine whether any trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Determinations as to the weight of the evidence and the credibility of witnesses remain within the province of the trier of fact; this Court will not interfere with those determinations when reviewing sufficiency of the evidence. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

In this case, Gregory Matthews testified that he recognized defendant from the neighborhood and that he saw defendant's face moments before the robbery occurred, when defendant walked past Matthews and his friend and then turned around and approached with his face covered. Approximately 10 days later, Matthews took a picture of defendant that he obtained from Facebook to the police station and identified the person in the picture as the person who robbed him and hit him in the face with a pistol. Defendant argues that he could not have been present when the alleged robbery occurred because he had been shot at a restaurant shortly before that time and was on his way to the hospital. Defendant and several other witnesses testified regarding the facts of defendant's alibi. The jury had the opportunity to hear all of the evidence presented and found the victim's testimony to be credible. Viewing the evidence in a light most favorable to the prosecution, we find there is sufficient evidence to support the victim's identification of defendant as the person who robbed him at gunpoint and hit him in the face with the gun.

## III. MISSING WITNESS JURY INSTRUCTION

Defendant argues that the trial court erred when it did not provide the jury with the missing witness jury instruction with regard to a witness endorsed by the prosecutor. This Court reviews a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010);

*People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). “The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice.” *Dupree*, 486 Mich at 702. “Reversal for failure to provide a jury instruction is unwarranted, unless it appears that it is more probable than not that the error was outcome determinative.” *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003), citing *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

When a witness is endorsed by the prosecutor under MCL 767.40a(3), the prosecutor must exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The test for due diligence is one of reasonableness, “whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.” *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court’s determination of due diligence is reviewed for an abuse of discretion. *Eccles*, 260 Mich App at 389. When the prosecution fails to produce an endorsed witness without proper excuse, the missing witness instruction, CJI2d 5.12, may be appropriate. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). The instruction provides that a jury may infer that a missing witness’s testimony would have been unfavorable to the prosecution. *Id.* at 293. Whether CJI2d 5.12 is appropriate depends on the facts of the particular case, and the trial court’s determination in that regard is reviewed for an abuse of discretion. *Eccles*, 260 Mich App at 389.

Here, the prosecution failed to comply with MCL 767.40a(4), which permits the prosecution to remove a witness from its witness list “upon leave of the court and for good cause shown or by stipulation of the parties.” *Perez*, 469 Mich at 420-421. Arielle Johnson was listed on the prosecution’s witness list and the prosecution was required to exercise due diligence to produce her. The parties stipulated to removal of several witnesses from the prosecutor’s witness list, but defendant did not stipulate to the removal of Johnson. At trial, the prosecutor stated that he inherited the case from another prosecutor and believed that all of the subpoenas were issued. It was discovered at trial, however, that a subpoena was not issued for Johnson, that her whereabouts were known, and that she was a student at Michigan State University. The trial court determined that she was not a *res gestae* witness and refused to give the missing witness jury instruction.

A *res gestae* witness is one who witnesses “some event in the continuum of the criminal transaction” and whose testimony would aid “in developing a full disclosure of the facts at trial.” *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). It was alleged that Johnson provided Gregory Matthews with defendant’s name and informed him that he could see a picture of defendant on Facebook. It was never alleged that Johnson witnessed any event in the continuum of the criminal transaction. Matthews testified that he had seen defendant in the neighborhood but did not know his name. When he was provided with defendant’s name by Johnson and looked up defendant’s picture on Facebook, Matthews was able to identify defendant as the perpetrator of the armed robbery. At trial, Matthews testified to these facts and the jury chose to believe him.

Although Johnson should not be considered a *res gestae* witness, she was an endorsed witness. The prosecutor was unable to show that due diligence was exercised to obtain her presence at trial. In this instance, a missing jury instruction may have been appropriate. However, even if the missing witness instruction were applicable, reversal is not warranted because defendant did not establish that the error resulted in a miscarriage of justice. See *Riddle*, 467 Mich at 124; *McKinney*, 258 Mich App at 163. At trial, defendant claimed that he did not commit the crimes and that he had been shot at a restaurant just before the time the crimes were committed. Defendant does not assert that Johnson would have provided any testimony to establish that he was innocent, only that she told the victim that she thought defendant was the individual who robbed him and that there was a picture of defendant on Facebook. After review of the nature of the error in light of the weight and strength of the evidence, it does not appear more probable than not that the failure to provide the instruction was outcome determinative. *Riddle*, 467 Mich at 125; *McKinney*, 258 Mich App at 163. We find that the trial court did not abuse its discretion when it did not provide the jury with the missing witness jury instruction.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was afforded ineffective assistance of counsel on four separate grounds. An ineffective assistance of counsel claim “is a mixed question of fact and constitutional law.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). A trial court’s findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 579. To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel’s performance fell below objective standards of reasonableness, (2) but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2008), and (3) the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed and the defendant bears a heavy burden to prove otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

First, defendant argues that his attorney was ineffective because he failed to object to defendant’s convictions of both armed robbery (MCL 750.529), and assault with intent to rob while armed (MCL 750.89) on double jeopardy grounds. Because we have vacated defendant’s conviction for assault with intent to rob while armed, we decline to address this argument.

Second, defendant argues that his attorney failed to move to suppress identification evidence as unreliable. Defendant argues that the victim identified him through suggestive or unreliable identification procedures, citing *People v Anderson*, 389 Mich 155, 218; 205 NW2d 461 (1973). To support his argument, defendant cites cases in which the *police* showed the witness a single photograph, and this was found to be unfairly prejudicial. *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *People v Gray*, 457 Mich 107; 577 NW3d 92 (1998); *People v Lafayette*, 138 Mich App 380; 360 NW2d 891 (1984). Here, the victim had seen the person who robbed him in his neighborhood but did not know his name. A mutual friend provided the name and suggested he could find a picture of defendant on Facebook. The victim then brought the picture of defendant to the police. Because we find no merit in defendant’s reliance on these cases, we again find that defense counsel was not ineffective for failing to make a futile objection. *Ericksen*, 288 Mich App at 201.

Third, defendant argues that his attorney failed to cross-examine Officer Ebey regarding the content of the video at the restaurant where defendant claimed to have been shot and failed to have the video introduced into evidence. The trial court transcript shows that defendant's attorney did cross-examine the officer regarding the content of the video, including the fact that there was a person in the video wearing clothing that was consistent with defendant's description of what he was wearing as well as what the victim stated that the robber was wearing. Defendant does not argue what further evidence the video would provide for the jury since the officer's testimony tended to corroborate defendant's statement that he was at the restaurant at the time of the shooting. Again, we find no merit to defendant's argument, and counsel was not ineffective in this regard.

Fourth, defendant's argument that his attorney failed to investigate and present evidence regarding his alibi is unfounded. Defendant does not indicate what his attorney should have investigated and what further evidence should have been presented. In fact, defendant presented an alibi defense that he could not have committed the robbery because he had been shot at a restaurant approximately 10 miles away just before the time the robbery was alleged to occur. Both defendant and his friend, Darius Nunlee, testified regarding this, and Officer Ebey testified regarding the contents of the restaurant's videotape. There was evidence that a person who could have been defendant was at the restaurant at 3:00 a.m. There was also evidence that an armed robbery occurred 10 miles away from the restaurant at approximately 3:18 a.m., shots were heard within minutes after the robbery occurred, and defendant presented at Sinai-Grace Hospital at 3:33 a.m. with a gunshot wound. The victim of the robbery identified defendant as his assailant. Even if the jury believed that defendant was at the restaurant when the shooting occurred there, defendant had time to get to the location where the robbery occurred and to the hospital approximately three miles away. Any errors in presenting defendant's alibi do not indicate performance by the defense attorney that was below an objective standard of reasonableness. *Frazier*, 478 Mich at 243. Defendant was not denied the effective assistance of counsel.

## V. RESENTENCING

Finally, we remand this case to the trial court for resentencing. Because our decision to vacate defendant's assault with intent to rob while armed conviction alters defendant's minimum sentencing guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 90-92; 711 NW2d 44 (2006). See generally *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010). On remand, the trial court should adjust the scoring for defendant's prior record variables (PRV). The trial court previously assessed 20 points for PRV 7, which requires two or more subsequent or concurrent convictions. After vacating defendant's assault with intent to rob while armed conviction, defendant has only one concurrent conviction- the other armed robbery. Accordingly, defendant should be scored ten points for PRV 7, as he has one concurrent conviction. After PRV 7 is revised, defendant's total PRV is 20 and defendant's PRV level is C. This recalculation will decrease defendant's minimum guideline range from 135 to 225 months to 126 to 210 months.

Affirmed in part, and vacated in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Donald S. Owens

/s/ Mark T. Boonstra