

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 25, 2014

v

CEDRIC LEE WELCH,

Defendant-Appellant.

No. 313085
Kent Circuit Court
LC No. 11-009553-FH

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant Cedric Lee Welch of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a, for his role in the late-night holdup of a McDonald's restaurant in Grand Rapids.¹ The circuit court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 21 to 50 years' imprisonment.

Contrary to defendant's appellate challenge, the prosecutor presented sufficient evidence to support his armed robbery and conspiracy convictions. The prosecutor's submission of evidence triangulating defendant's locations at specific times based on his cellular telephone records was not "junk science" and was admissible through the proffered witness who interpreted the records. Defendant was not denied the right to confront the witnesses against him due to the admission of his codefendant's statement to a sheriff's deputy. The circuit court did not improperly allow a deputy to identify defendant's voice in a recorded jailhouse telephone conversation with codefendant Albert Woods. And the circuit court did not improperly score Offense Variable (OV) 12. Accordingly, we affirm defendant's convictions and sentences.

I. BACKGROUND

In the early morning hours of September 1, 2011, two masked men robbed a McDonald's restaurant on Alpine Road in Grand Rapids at gun point. The robbers entered the dining room

¹ Defendant was originally tried jointly with his codefendant in May 2012. The jury could not reach a unanimous verdict in relation to defendant, resulting in a mistrial. Defendant was retried alone in September 2012.

through a door mistakenly left unlocked. After ordering the restaurant's three employees to lie on the ground, the masked men forced the store manager to give them the contents of the safe. The robbers absconded with \$400 worth of paper gift certificates and \$3,233.73 in cash. The victims were only able to describe their assailants as African-American males who wore dark or black clothes. The victims agreed that one of the men carried a revolver. Surveillance footage also revealed that the robbers wore white cloth gloves.

As the robbers fled the scene, surveillance cameras captured their images and showed the men entering an older black Camaro. Two employees of a nearby Wal-Mart saw the men leave the McDonald's. And a man, who had been at the drive-through window during the robbery, testified that he saw a dull black Camaro drive away at a high rate of speed.

Later that morning, a Kent County Sheriff's deputy located a dull black, older Camaro parked in a nearby apartment complex, York Creek. Inside the vehicle, sheriff's deputies found several white gloves. Inside one glove, investigating deputies found DNA evidence, which later testing matched to codefendant Woods.² The deputies also placed a magnetic GPS system under the vehicle's rear bumper, which they later used to track the vehicle in motion. The deputies arrested Woods as a result of an ensuing traffic stop. At the time of his arrest, Woods had several large rolls of currency in various small denominations in his pocket. The deputies seized the currency and Woods' cell phone.

On Woods' cell phone, the investigating deputies found a video of defendant and Woods pretending to swim in money. They also found pictures of defendant and Woods holding a large amount of currency near their faces. The video had been e-mailed at 4:10 a.m. on September 1, to Woods' Google account from an account owned by defendant. The pictures were taken at 5:47 a.m. on September 1.

Inside Woods' apartment, deputies found 18 booklets of McDonald's paper gift certificates. They also found dark clothing lying on the ground outside of the master bedroom closet. There were spores on the pants matching plant life found along the trail between the Camaro's parking spot and the York Creek apartment of defendant's girlfriend. The deputies matched the still photographs of defendant and Woods holding currency to this location.

The deputies secured a warrant to search an apartment in York Creek belonging to defendant's girlfriend. The video of the men swimming in money was matched to this location. The officers then secured a search warrant for the home where defendant resided with his parents. In defendant's bedroom, the deputies found a plastic case for a revolver-style Daisy air gun. There was an alternate second barrel inside the case, but the revolver was never found. The deputies also never recovered the remainder of the currency. Of note, investigation of defendant's and Woods' cell phone records revealed that they were in the area of the Alpine

² Woods was also convicted of armed robbery and conspiracy. This Court affirmed Woods' convictions but remanded for resentencing based on the erroneous scoring of OV 13. *People v Woods*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2013 (Docket No. 311452).

Road McDonald's and the York Creek apartment near the time of the robbery. And surveillance footage from a local gas station placed defendant and Woods together only two hours after the robbery.

Defendant was not arrested until September 3, 2011. On September 2, 2012, Woods used a recorded jail telephone to contact defendant. The conversation was very cryptic and Woods immediately instructed defendant not to use any names. Woods told defendant to send a text message to Woods' cell phone that would activate a "Prey" software application he had downloaded onto his phone, ostensibly to delete or block access to the phone's contents. This task was never accomplished.

Based on the evidence presented at defendant's retrial, the jury convicted him of armed robbery and conspiracy. Defendant thereafter filed this claim of appeal.

II. CELL PHONE RECORD EVIDENCE

Defendant challenges the admission of testimony through prosecution witness Marilyn Dilley interpreting records regarding defendant's cellular telephone use on the night of the robbery. Defendant contends that the challenged evidence could only be admitted through an expert witness and even then, the evidence amounted to inadmissible "junk science." Defendant did not object to Dilley's testimony below. Our review is therefore limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We agree with defendant that the prosecutor should have moved for Dilley's qualification as an expert witness before presenting the challenged evidence. MRE 702 provides for the admission of expert, not lay, opinion testimony when "the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact. . . ." The cellular telephone records included information about the cell towers and sectors employed during the listed calls. Dilley explained the content of the records and the significance of the information. Absent Dilley's testimony, the jury likely would not have understood that the records placed defendant's cell phone in the area of the McDonald's and defendant's girlfriend's apartment between approximately 10 p.m. and 3:45 a.m. on the night of the robbery.

The failure to qualify Dilley as an expert witness does not require reversal, however. Had the prosecutor made such a motion, the court likely would have granted it. Dilley indicated that she had testified in court more than 175 times and had significant training and experience in reading and interpreting the records placed into evidence. As such, the prosecutor's failure in this regard was not prejudicial.

Further, the use of cell phone records to determine a user's general location is not inadmissible "junk science." Before expert testimony is admitted, a trial court must ensure that the expert's opinion is reliable and the underlying data and methodology is legitimate. *Gilbert v DaimlerChrysler*, 470 Mich 749, 782; 685 NW2d 391 (2004). Defendant argues that a person's location cannot be ascertained with certainty by cell tower data. The material he quotes on appeal relates to the inability of emergency services to find a person's exact location based solely on this information. Dilley conceded this point at trial. She also explained the reasons a call

might be routed through a more distant cell tower. But the prosecutor inferred only that defendant was in the general area before, during, and after the robbery. She did not attempt to prove defendant's exact location with this evidence. This evidence, along with surveillance footage placing defendant and Woods together shortly after the robbery and testimony from defendant's girlfriend that he had been in her apartment, supports an inference that defendant and Woods were together in the area of the robbery and committed the crime together.

III. CONFRONTATION VIOLATION

Defendant further challenges on hearsay and confrontation grounds testimony from Kent County Sheriff's Deputy Justin Deboode regarding Woods' statements during his investigatory traffic stop. Deboode testified that Woods told him that he had purchased the Camaro only two hours earlier, a fact that was proven false by other evidence. When Deboode conducted a pat-down search of Woods' person and found two "rolled bundles of cash," Woods commented that he had just cashed a check. Deboode indicated that Woods was unable to remember the value of the check. Woods did not testify and defendant could not question him regarding the false information he provided to Deboode.

We generally review a trial court's decision to admit evidence for an abuse of discretion and constitutional issues de novo. However, our review in this case is limited to plain error as defendant failed to object at trial. *People v Fackelman*, 489 Mich 515, 537; 802 NW2d 552 (2011); *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. The United States Supreme Court has held "that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," . . . but has also held that "the face-to-face confrontation requirement is not absolute[.]" [*People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012).]

The Confrontation Clause bars the admission of testimonial hearsay in the absence of the declarant when the declarant is available or the defendant has not had an opportunity to cross-examine the witness. *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Woods' comments to Deputy Deboode were clearly testimonial. Deboode elicited these comments after stopping Woods and while investigating the McDonald's robbery. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). And "a defendant is deprived of his Sixth Amendment confrontation rights when a nontestifying codefendant's confession that inculcates the defendant is introduced at a joint trial." *People v Pipes*, 475 Mich 267, 269; 715 NW2d 290 (2006). Yet, Woods' statements did not actually implicate defendant and therefore were not rendered inadmissible.

Moreover, the prosecutor did not present Deboode's testimony about Woods' statements to prove the truth of the matters asserted. The statements therefore are not truly hearsay. See MRE 801(c). The prosecutor was not attempting to prove that Woods purchased the Camaro two

hours earlier or that Woods cashed a check for an unknown amount. Rather, the prosecutor presented these statements to show that Woods made false statements about his activities to establish Woods' guilty conscience.

Defendant also challenges the performance of his trial counsel for failing to object to the admission of this evidence. Counsel is not ineffective for failing to raise meritless objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012). As Woods' statements presented through the testimony of Deputy Deboode did not implicate defendant and were not truly hearsay, any objection on these grounds would have been futile.

IV. VOICE IDENTIFICATION EVIDENCE

At 6:00 a.m. on September 2, 2011, Woods used a jailhouse telephone to call a cell phone number registered to defendant's father. That conversation was recorded and reviewed by the investigating deputies. Kent County Sheriff's Deputy Brian Muir testified that the individual who answered the phone was defendant. Muir testified that he was familiar with the voices of both defendant and his brother Tristan and, although the two sounded similar, he recognized the individual on the call as defendant. Defendant now complains that this voice identification evidence was not properly authenticated. Defendant failed to object below and our review is limited to plain error. *Carines*, 460 Mich at 763.

Pursuant to MRE 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The evidentiary rule provides examples of conforming methods of authentication or identification. In relation to voice identification, MRE 901(b)(5) provides, "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." When presenting a recording of a telephone conversation, the identity of the speakers may be authenticated "by having a knowledgeable witness identify the voices on the tape." *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991). As stated by this Court in *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009) (quotation marks, ellipses, and citations omitted):

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. Vocal identification evidence is competent if the identifying witness demonstrates certainty in the mind by testimony that is positive and unequivocal. Further, voice identification must be based on a peculiarity in the voice or on sufficient previous knowledge by the witness of the person's voice.

The prosecutor authenticated the recording and identified the speakers in the manner provided in the evidentiary rule. Deputy Muir testified unequivocally that he was familiar with defendant's voice and that he heard defendant's voice in the call. Defendant attempted to rebut this evidence with testimony by defendant's father that defendant's brother is actually heard in the tape. The defense evidence does not affect the admissibility of Muir's identification, only its weight. See *Berkey*, 437 Mich at 52.

Defendant also challenges trial counsel's performance for failing to object to the admission of this evidence. As noted, however, an attorney is not ineffective where he decides against raising baseless objections. *Eisen*, 296 Mich App at 329.

V. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecutor failed to present sufficient evidence to support either his conviction for armed robbery or conspiracy. The evidence, in defendant's estimation, implicates Woods in the robbery, but in no way connects him to the crime.

We review de novo challenges to the sufficiency of the evidence. We must determine if any rational trier of fact could determine that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). All conflicts in the evidence are resolved in favor of the prosecution. *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). On appeal, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The prosecutor presented sufficient evidence from which the jury could infer that defendant was the second individual involved in the robbery. Defendant's cell phone records show that he made and received calls in an area covered by the cell phone tower closest to the McDonald's between 10:10 p.m. and 3:45 a.m. on the night of the robbery. A Camaro matching the description of the getaway vehicle was found parked outside an apartment building where defendant's girlfriend lived. The girlfriend testified that she was at work all night and when she returned, there was evidence that defendant had been there in her absence. When Woods was arrested the following day in the Camaro, the deputies found a receipt from a purchase at a local gas station two hours after the robbery. The gas station surveillance footage showed defendant with Woods at the time of that purchase. Woods had a picture on his cell phone taken right after the robbery in which defendant held a large amount of currency by his face. Shortly after the robbery, defendant e-mailed a video to Woods of the two men swimming in money. This evidence was sufficient for the jury to infer that defendant was with Woods immediately after and during the time of the robbery. Given the cash found on Woods' person and the paper gift certificates found at his home, the jury could infer that defendant and Woods were the individuals that robbed the McDonald's.

The prosecutor also presented evidence that the crime was planned and not a spur-of-the-moment event, supporting defendant's conspiracy conviction. The culprits parked at a different location in an attempt to avoid discovery or identification of their getaway vehicle. When they fled the scene, defendant and Woods did not head straight home. Instead, they bided their time at a nearby apartment before leaving in two separate vehicles. Nothing in the conspiracy statute or the caselaw of this state requires a conspiracy to be a complex plan. Based on this evidence, we have no ground to interfere with the jury's verdict.

VI. SCORING OF OV 12

Defendant contends that the circuit court erred in scoring 25 points for OV 12 based on the number of victims present in the McDonald's restaurant during the robbery. Defendant preserved this challenge by objecting at sentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). The circuit court's factual findings underlying the scoring decision must be based on a preponderance of the evidence and our review is for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

MCL 777.42 provides for the scoring of a defendant's contemporaneous felonious criminal acts. Subsection (1)(a) permits a court to score 25 points when "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." The court may not consider acts that have or will result in a separate conviction. MCL 777.42(2)(a)(ii).

Here, the circuit court found that defendant committed three contemporaneous uncharged acts of felonious assault against the three McDonald's employees who were held at gunpoint and forced to lie face down on the floor during the armed robbery. The witness testimony supported these facts by a preponderance of the evidence. Defendant's act of placing three individuals at fear of imminent harm or death while holding a gun meets the definition of felonious assault. MCL 750.82; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Felonious assault is a crime against a person. MCL 777.16d. Accordingly, the circuit court did not clearly err in scoring OV 12 at 25 points.

We affirm.

/s/ Elizabeth L. Gleicher

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell