

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL W. MCKISSACK,

Defendant-Appellant.

UNPUBLISHED

August 12, 2003

No. 237026

Wayne Circuit Court

LC No. 00-013271-01

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, two counts of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of seven to fifteen years each for the armed robbery and assault convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that his convictions are against the great weight of the evidence because they were based solely on one witness' identification testimony, which defendant asserts was inherently incredible. We disagree.

MCR 2.611(A)(1)(e) provides that the trial court may grant a party's motion for a new trial on the ground that the verdict was against the great weight of the evidence. We review a trial court's ruling on a motion under this rule for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). The appropriate test "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The trial court may not act as a "thirteenth juror" when deciding a motion for a new trial, and this Court "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

In *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), our Supreme Court recognized only a narrow exception to the general principle against granting a new trial based on questions of witness credibility; which is when the witness' testimony contradicts indisputable

physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. We disagree with defendant's contention that this narrow exception applies here.

In *McCray, supra* at 637-638, this Court applied these principles in a case where the defendant argued that the verdict was against the great weight of the evidence because the witnesses' description of their assailant varied, and none of the descriptions exactly fit the defendant. This Court concluded that the discrepancies did not "preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand." *Id.*

Similarly, we find that the discrepancies between James Robertson's description of the robber and defendant's physical characteristics are not so significant that they render his identification testimony inherently implausible. The jury might have reasonably concluded that Robertson was able to recognize the robber's face, even if he erred in visually assessing the robber's weight, height, and age. This conclusion was consistent with Robertson's testimony that he got a good look at the robber's face, and Officer Tinney's testimony that Robertson unhesitatingly picked defendant out in the lineup. Tinney also testified that, although the participants' weights varied across a sixty-five pound range, they all appeared about the same size. The jurors were able to see defendant and determine whether his appearance was utterly inconsistent with Robertson's description. Because commonsense explanations could reconcile an accurate identification with the alleged discrepancies between Robertson's verbal description and defendant's physical characteristics, defendant has not established an exception to the general rule that matters of witness credibility, including identification, are for the jury to resolve. *Lemmon, supra* at 642-643; *McCray, supra* at 637-638.

Defendant raises several other arguments as to why Robertson's identification was insufficient to support a verdict, to wit: (1) the encounter was too brief and too stressful to enable Robertson to adequately observe and identify the robber, (2) studies documented in "psychological literature" prove that the three-day lapse between the robbery and the identification was too lengthy for Robertson to remember the robber's face; (3) cross-racial identifications are especially unreliable; (4) Robertson's trial testimony that he was twenty feet away when he saw defendant by the People Mover station conflicted with his preliminary examination testimony that he was thirty-five or forty feet away; and (5) Robertson picked the wrong person at the first lineup, and his attempt at trial to minimize this mistake was contradicted by Officer Tinney's testimony. However, these factors, even when considered in their totality, do not negate the jury's assessment of Robertson's credibility. The jury could have accorded greater weight to the factors that supported Robertson's credibility. This case does not qualify for the narrow exception to the rule that witness credibility is a question for the jury, and the trial court did not abuse its discretion in denying defendant's motion. *Lemmon, supra* at 642-643.

Defendant also argues that the evidence was legally insufficient to support his convictions due to the discrepancies and inconsistencies in the identification testimony. We disagree. Viewed in a light most favorably to the prosecution, Robertson's testimony was sufficient to identify defendant as the perpetrator of the charged crimes. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The credibility of that testimony was for the jury to resolve, and this Court will not

resolve it anew. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

II

Defendant raises three allegations of prosecutorial misconduct during the prosecutor's closing and rebuttal arguments. Because defendant did not object to the challenged remarks at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). 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. *Schutte, supra* at 721, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the prosecutor improperly vouched for Robertson's testimony when she stated that his identification was "a good I.D." A prosecutor may not vouch for a witness' credibility or suggest that the government has some special knowledge that a witness' testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may, however, argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor was referring to Robertson's testimony that he was sure he identified the correct person. There was no improper vouching.

There also was nothing improper with the prosecutor's "red herring" remark. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, but may respond to defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). In the instant case, although the prosecutor's "red herring" remark suggested that defense counsel was trying to distract the jurors from focusing on the evidence with an irrelevant theory, the remark was directly responsive to defense counsel's argument that the police erred in failing to check the stolen items for fingerprints. The prosecutor based this characterization on Officer Kraszewski's testimony that a fingerprint examination would have been useless under the circumstances. Consequently, the prosecutor's "red herring" remark was not improper under the circumstances. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

We agree that the prosecutor improperly argued facts not in evidence when she stated that Robertson's identification was the other robbery victims' belief. The evidence does not support this statement because none of the other victims offered an opinion concerning the accuracy of Robertson's identification testimony, and, in any event, such opinion testimony would have been contrary to MRE 401 and 402 (only relevant evidence admissible) and MRE 602 (witness must have personal knowledge of the subject of their testimony). However, the error does not warrant reversal. If defendant had raised a timely objection, the trial court could have easily cured any perceived prejudice by reminding the jurors that statements by the attorneys are not evidence, and that the witnesses themselves did not claim any belief in Robertson's identification of defendant. We will not reverse on the grounds of misconduct if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra* at 721. Furthermore, any error was cured when the trial court instructed the jury that "the lawyers' statements and arguments are not evidence." Consequently, defendant is not entitled to relief with regard to his claim that the prosecution improperly argued facts not in evidence.

III

Defendant argues, for the first time on appeal, that the trial court should have dismissed the charges on the ground of destroyed evidence, or instructed the jury that it could infer that the missing evidence was favorable to him. Because defendant failed to raise these issues in the trial court, they are subject to the plain error analysis. *Carines, supra* at 763; *People v Sabin (On Second Remand)*, 242 Mich App 656; 620 NW2d 19 (2000); MCL 768.29.

This Court held in *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992):

Absent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. . . . Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. [Citations omitted.]

Here, defendant has not demonstrated either that the police acted in bad faith or that the evidence was exculpatory. Officer Kraszewski testified that it would have been useless to examine the stolen items because they had been handled by an unknown number of persons before they were turned in to the police, and by at least three officers after that. Additionally, the items were either made of materials such as cloth that do not hold well, or had only small surface areas where a print might have been left. Kraszewski explained that the leather wallet was not smooth, and that plastic credit cards are largely covered by raised and sunken print. This un rebutted testimony established that the police did not act in bad faith. Defendant did not present any evidence to the contrary.

Defendant also failed to establish that examination of the items could have exonerated him if his prints were not found. The absence of his prints on the items would have had only minimal value as exculpatory evidence. Another robber took Becky Meyer's fanny pack, and thus, there was no evidence that defendant ever touched it. Kraszewski's un rebutted testimony established that there was little likelihood of the robber leaving a lasting and identifiable print on the wallet or its contents; hence, the absence of defendant's print would not have proved anything. Logically, there was no way that examining these items could have helped defendant. The presence of defendant's prints would have bolstered the prosecution's case with objective physical evidence, and the absence of his prints or presence of other prints would have neither weakened the prosecution's case nor strengthened defendant's defense. Because defendant cannot show either that the police acted in bad faith, or that the evidence was exculpatory, he is not entitled to reversal, and the trial court did not err in failing to sua sponte dismiss the charges.

Defendant argues, in the alternative, that the trial court should have sua sponte instructed the jury that it could infer that the "lost" evidence would have been adverse to the prosecution. The jury may infer that lost or destroyed evidence would have been adverse to the prosecution (1) if the government acted in bad faith in failing to preserve the evidence; (2) the exculpatory value of the evidence was apparent before its destruction; and (3) the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonable available means. See *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Cress*, 250 Mich App 110, 158; 645 NW2d 669 (2002), vac'd in part on other grounds 446 Mich 883 (2002), lv gtd 467 Mich 889 (2002), reversed on other grounds ___ Mich __; 664 NW2d 174 (Docket No. 121189, issued 7/9/2003) slip op p 13 n 4; *United States v*

Jobson, 102 F3d 214, 218 (CA 6, 1996). Here, there was no evidence that the police acted in bad faith, or that the items would have been exculpatory. Consequently, there was no basis for the trial court to instruct the jury that it could draw an inference adverse to the prosecution with regard to the stolen items.

IV

Defendant also claims that he was denied the effective assistance of counsel. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc, supra* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 694-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that defense counsel should have called an expert witness to testify that eyewitness identification testimony is unreliable because many factors can impair a crime victim's ability to accurately recall and recognize a strange assailant. This Court rejected this argument in *People v Cooper*, 236 Mich App 643, 657-659; 601 NW2d 409 (1999), holding that the defendant could not overcome the presumption that his counsel exercised sound trial strategy in attempting to undermine the eyewitness testimony without calling an expert witness. As the Court explained, "[t]rial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *Cooper, supra* at 658. This statement applies with equal force to the instant case, and therefore, we find no error.

Defendant's reliance on *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), is misplaced. Although that case extensively discusses psychological studies on identification error and case histories involving mistaken identification of innocent persons in the context of due process issues, the decision does not indicate that expert testimony is an indispensable means of alerting the jury to the potential for erroneous identification. *Anderson, supra* at 172-180, 187-190.

Defendant further argues that defense counsel should have requested a cautionary instruction on the dangers of misidentification, especially in a cross-racial context. This Court rejected this argument in *Cooper, supra*, and specifically rejected the defendant's implied argument that such an instruction was required by *Anderson, supra*. *Cooper, supra* at 656, 659. Defendant also relies on a foreign case, *Utah v Maestas*, 984 P2d 376 (Utah, 1999), aff'd after remand 63 P3d 621 (Utah, 2002), but we are not bound by that decision, nor do we find it persuasive.

Defendant also claims that counsel was ineffective for failing to preserve the issues discussed in parts II and III of this opinion. Because we have concluded that these issues are without merit, except for the prosecutor's brief statement that the other robbery victims believed in Robertson's identification, defendant cannot establish that counsel committed serious, prejudicial error. See *Bell, supra* at 694-696; *Toma, supra* at 302.

V

Finally, because we have found only one minor error in the prosecutor's closing argument, it follows that defendant was not denied a fair trial because of the cumulative effect of several errors. *Knapp, supra* at 387.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly