

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JONES,

Defendant-Appellant.

UNPUBLISHED
December 2, 2003

No. 241078
Wayne Circuit Court
LC No. 99-009385-01

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of bank robbery, MCL 750.531, and was sentenced to a prison term of forty-eight months to ten years. Defendant appeals as of right. We affirm.

This case arises out of a robbery of the First Federal Bank in Detroit. A bank teller positively identified defendant as the man who came to her window and handed her a note that said, "I have a gun, give me large bills." The teller handed defendant approximately \$2,000 in twenty-dollar bills, which he placed in his pants and walked from the bank. The teller identified defendant in a lineup the day after the robbery. At trial, the prosecution admitted surveillance photos from the day of the robbery, and the teller again identified defendant as the bank robber.

Defendant first argues that the evidence presented was insufficient to support the bank robbery conviction. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). All conflicts must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and questions of credibility and intent should be left to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Here, the bank teller testified that defendant handed her a hold-up note and, out of fear, she handed him approximately \$2,000. The teller then positively identified the defendant as the perpetrator at a lineup the following day and during trial. In addition, the trial court had the opportunity to view surveillance photos depicting the perpetrator at the scene of the robbery.

Viewed in a light most favorable to the prosecution, there was sufficient evidence presented to conclude that defendant intended to commit the crime of larceny and placed the victim in fear for the purpose of stealing money from the bank. MCL 750.531.

Defendant next claims he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or *Ginther*¹ hearing before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that but for counsel's errors, the result of the proceedings would have been different. *Strickland, supra* at 694. Furthermore, the 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).

Defendant first argues that counsel's failure to call alibi witnesses and failure to call two witnesses from the scene of the robbery constituted ineffective assistance of counsel. A failure to call witnesses can constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *Daniel, supra* at 58. Defendant has not demonstrated that these witnesses' testimony would have affected the outcome of the proceeding. Additionally, defense counsel introduced testimony that two other witnesses from the robbery scene failed to identify defendant. Therefore, defendant was not deprived of this defense.

Defendant next argues that counsel failed to send the surveillance tape to an expert for computer enhancement to better identify the man on the tape. We disagree. The record reveals that counsel attempted to obtain a copy of the tape but it was determined that the tape no longer existed. Counsel therefore obtained still photographs and had them enlarged. The result of the proceeding would not have been different had the tape been introduced in light of the fact that the victim identified defendant as the perpetrator and enlargements of the still photographs showed defendant as the perpetrator.

Finally, defendant claims that counsel failed to raise a jurisdictional issue relevant to the 180-day rule. However, counsel raised the issue and relief was denied. Defendant has failed to overcome the presumption that he received effective assistance of counsel.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad