

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL DONNELL LONG,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 252733

Wayne Circuit Court

LC No. 03-008071-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of two counts of armed robbery, MCL 750.529. He was sentenced to twelve to twenty-five years' imprisonment with credit for 160 days served. This case arose when complainants Shaquela Moore, Kira Twilley, and Anthony Banks alleged that defendant, while holding what they believed was a gun, took \$1,170 from Moore and Twilley. We affirm.

Moore, Twilley, and Banks testified that after Moore finished working her shift, they drove to a gas station so that Banks could purchase something to drink; Moore was driving, Twilley was in the front passenger seat, and Banks was sitting behind Twilley. As Banks was getting in the car, a man, later identified as defendant, approached him from behind. Defendant had a black rag over his hand and ordered Banks to "give me your shit." Banks reacted by diving in the car, and defendant followed. Moore and Twilley stated defendant held his wrapped hand in the shape of a gun while he rummaged around the back seat with the other hand. Twilley attempted to shove her bag containing \$1,170 belonging to Moore and Twilley under the seat. When defendant saw the bag, he reached over the seat and grabbed it from Twilley; Moore also grabbed the bag, and she and defendant struggled for possession. According to Twilley, defendant stated, "give me your shit bitch, or I'll blast your ass." When defendant gained control of the bag, he ran off. Complainants drove after defendant but could not follow him after he ran inside a gated apartment complex. They drove back to the gas station and called the police; police wrote up a report but were unable to gain access to the gated complex. The next day, while Moore's mother was visiting Moore at work, Moore saw defendant walking along the street, and she told her mother that defendant was the one who robbed her. Moore and her parents followed defendant until police arrived and arrested him. Defendant did not have any property belonging to complainants at the time of his arrest.

Defendant first argues that he received ineffective assistance when his attorney failed to investigate and present his brother as an alibi witness. We disagree.

A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law; questions of constitutional law are subject to review de novo, while the court's findings of fact are reviewed under a clearly erroneous standard. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must prove that (a) his attorney performed in a manner below an objective standard of reasonableness according to prevailing professional norms, (b) had his attorney not erred, it is reasonably probable that the result of the proceedings would have been different, and (c) the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004), citing *LeBlanc, supra* at 578. Counsel's decision whether to call or question a witness is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). However, a strategic decision made after an incomplete investigation is reasonable only if the investigation's limitation is supported by reasonable professional judgment. *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003).¹

Although defendant argues that there could be no sound trial strategy for failure to investigate and present an alibi defense, an investigation involves more than interviewing the potential witness, and defendant did not otherwise establish that counsel failed to investigate. Given that counsel's theory of defense was mistaken identity – that defendant was not at the crime scene when the incident occurred – the fact that the address defendant gave police put defendant in the vicinity of the crime scene tended to corroborate complainants' testimony rather than rebut it.² Because counsel did not testify, it is unclear whether an investigation was performed and what counsel's reasons for not providing an alibi defense were. Given that this Court's review is limited to the facts contained in the record, *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), defendant has not rebutted the presumption that counsel's failure to present an alibi defense was trial strategy. And this Court will not evaluate trial strategy using hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Furthermore, defendant has failed to establish a reasonable probability that the results of the proceeding would have been different. Defendant argues that the descriptions given by complainants to the police differed greatly from defendant's actual physical appearance, and that

¹ To support his claim, defendant submitted his own affidavit indicating that (a) he told counsel that he was at his brother's home when the incident occurred, (b) his attorney never contacted his brother, and (c) his brother's messages to the attorney were never returned. *Id.* Of the three factual claims, defendant only had personal knowledge of and, thus, could only have testified competently to the first claim. MRE 602. Defendant did not present an affidavit of his brother to support the second and third claims. A defendant must establish the factual predicate for his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999).

² In fact, counsel argued during closing argument that nobody had presented evidence regarding where defendant lived.

the jury could have acquitted defendant if it had been told that defendant was elsewhere when the incident occurred. We find that the discrepancies in descriptions were not significant. Moreover, Moore instantly recognized defendant later that day and followed him until police arrived to arrest him. Each complainant positively identified defendant at the preliminary hearing and at trial, and Moore's mother identified defendant as the man she followed after Moore identified him. The evidence against defendant was considerable. It is not probable or even likely, given the evidence against defendant, that the testimony of defendant's brother – a biased witness – would have altered the outcome of the trial.

Defendant next argues the prosecutor did not sufficiently prove that defendant was armed. We disagree.

A claim of insufficient evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “A court must view the evidence in a light most favorable to the prosecution and 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). To convict a defendant of armed robbery, the prosecutor must prove: (a) an assault occurred, (b) property was feloniously taken from the victim, and (c) defendant was armed with a weapon described by the statute. *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). MCL 750.529 defines weapon as, “a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon.” In *People v Banks*, 454 Mich 469; 563 NW2d 200 (1997), our Supreme Court specifically addressed the evidence required to satisfy the “armed” element of armed robbery. The Court noted that a victim's subjective belief that the defendant had a weapon was insufficient; there had to be an actual article fashioned in a manner to cause a reasonable belief that a weapon was being used. *Id.* at 472-473, citing *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983).

The Court found insufficient a victim's testimony that he did not see a bulge in the defendant's coat and the defendant's hand was not shaped like a weapon, *Banks, supra* at 472, citing *People v Saenz*, 411 Mich 454, 458; 307 NW2d 675 (1981); however a bulge under a defendant's shirt combined with an accomplice's statement that the defendant had a gun was minimally sufficient, *id.* at 473-475, citing *People v Jolly*, 442 Mich 458; 502 NW2d 177 (1993). Both Moore and Twilley testified that they believed defendant had a gun. Defendant's hand was under a towel shaped like a gun. Moreover, defendant acted like he had a weapon when he did not use the towel-wrapped hand to search for items to steal, or when he struggled for possession of the bag. And Twilley testified that defendant told her to give him her “shit” or he'd blast her. Although words alone are insufficient to establish the armed element, words combined with an article intended to convince the victim of a weapon are sufficient. *Banks, supra* at 473-475.

Defendant next argues he was denied a fair trial when the court failed to sua sponte give a supplemental jury instruction regarding unreliability of eyewitness identification. We disagree.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions must be read as a whole rather than extracted piecemeal to create error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). An omission of an instruction is not error if the instructions in their entirety cover the substance of the omitted instruction. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651

(2002). Failure to challenge an instruction waives error unless relief is required to avoid manifest injustice. *People v Carines*, 460 Mich 750, 761-762, 764; 597 NW2d 130 (1999). Manifest injustice occurs if the omitted instruction concerns a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

Defendant argues that the court should have given an instruction regarding the unreliability of eyewitness identification consistent with the Michigan Supreme Court's opinion in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled in part *People v Hickman*, 470 Mich 602, 603; 684 NW2d 267 (2004). However, this Court has found that *Anderson* did not require a special jury instruction. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). In *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1, vacated 217 Mich App 801, adopted 220 Mich App 662, 678 (1996), this Court found that the principles in *Anderson* were adequately addressed by CJI2d 7.8 and noted that CJI2d 7.8 appeared to have been drafted to reflect the *Anderson* opinion. Nevertheless, the instruction defendant argues should have been given is apparently paragraph (4) of CJI2d 7.8.^{3 4} This Court in *People v Storch*, 176 Mich App 414, 418-420; 440 NW2d 14 (1989), indicated that failure to give, over objection, what is now CJI2d 7.8(4) was error when the instruction was supported by the evidence.

However, the instruction was not supported by the evidence here. Despite minor discrepancies, the complainants' descriptions of defendant generally matched his description at

³ CJI2d 7.8(4) states:

You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with (his / her) identification of the defendant during trial.

The use note indicates that this instruction should be given upon request when supported by the evidence.

⁴ In his argument that failure to sua sponte give the instruction was grounds for reversal, defendant attempts to analogize cases involving accomplice testimony with those involving eyewitness testimony. CJI2d 5.6(4) with respect to accomplice testimony belies defendant's contention. The instruction states:

In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

Defendant does not cite a single case indicating that accomplice testimony should be treated like eyewitness testimony; distinguishes *People v Johnson*, 58 Mich App 347, 355-356; 227 NW2d 337 (1975) (a judge is not required to sua sponte instruct the jury regarding identification testimony), and *People v Dyson*, 106 Mich App 90, 101-102; 307 NW2d 739 (1981) (an instruction need not be given, even if requested, when the witness is positive with respect to identification of the defendant); and fails to cite *People v Storch*, 176 Mich App 414, 416, 418-420; 440 NW2d 14 (1989), which indicates that failure to give the instruction is error if it is requested and supported by the evidence, but that the error standing alone does not necessarily require reversal.

trial, complainants positively identified defendant at the preliminary hearing and at trial, and nobody other than defendant was ever identified as the robber. Moreover, Moore immediately identified defendant on sight several hours after the incident occurred, and she and her family followed defendant until police arrived.⁵ Because the complainants here never failed to identify defendant or never identified someone other than defendant as the robber in the instant case, and their descriptions generally matched that of defendant, the evidence did not support giving a supplemental jury instruction. Thus, no error resulted from the court's failure to give the instruction. Our decision on this issue renders moot defendant's argument that counsel was ineffective for failing to request the supplemental instruction. The basis for a claim of ineffective assistance cannot be the failure to make a futile request. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White

⁵ In contrast, the complainant in *Storch, supra*, declined to identify anyone as the perpetrator in the first lineup conducted; when she saw the defendant arraigned on television for another crime, the complainant identified the defendant in a second lineup after expressing confusion about his eye color. *Id.* at 418-419. And complainant identified someone other than the defendant in a "voice" lineup. *Id.* at 419.