

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY MARSHALL POYNTZ,

Defendant-Appellant.

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UNPUBLISHED

March 21, 2013

No. 308166

Wayne Circuit Court

LC No. 11-006867-FC

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529. He was sentenced to 15 to 30 years' imprisonment for the armed robbery conviction. Defendant appeals by right, and we affirm.

Defendant argues that there was insufficient evidence to identify him as one of the perpetrators who committed the armed robbery. We disagree.

This Court reviews de novo a sufficiency of the evidence challenge. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). "Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). There is sufficient evidence to sustain a conviction if, after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). "This 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). Further, "all conflicts with regard to the evidence must be resolved in favor of the prosecution." *Lee*, 243 Mich App at 167.

Defendant does not challenge the individual elements of armed robbery, only his identification as the perpetrator of the offense. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). When assessing the sufficiency of identification evidence, "[t]he credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Davis*, 241 Mich App at 700. Further, "this Court has

stated that positive identification by witnesses may be sufficient to support a conviction of a crime.” *Id.*

It is undisputed that an armed robbery occurred; at issue is whether defendant was one of the perpetrators. After reviewing the record as a whole, it is apparent that there was more than sufficient evidence for a rational trier of fact to conclude that defendant was one of the perpetrators who committed the armed robbery. *Davis*, 241 Mich App at 700. A few weeks after the robbery occurred, the complainant picked defendant out of a photographic line-up without hesitation. At trial, the complainant also confidently identified defendant as the perpetrator. The complainant testified that during the robbery he was inches away from defendant and that he could clearly see defendant’s face. The trier of fact also reviewed and compared the physical description the complainant gave of the perpetrator to an officer investigating the robbery with that of defendant’s actual physical characteristics and found the description to be “pretty consistent” with defendant’s appearance. Defendant, however, argues that there was insufficient identification evidence because there were “several critical inconsistencies” in the complainant’s testimony that undermined his identification of defendant as the perpetrator. Indeed, there were a few inconsistencies between the statements the complainant provided to the responding officers and the statements the complainant provided to the police a few weeks after the robbery. Specifically, the complainant provided differing details regarding the commencement of the robbery and the weapons used during the armed robbery. In spite of these inconsistencies, however, the trier of fact was free to conclude that the complainant’s identification of defendant was credible. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). The trier of fact reviewed these inconsistencies within the context of the evidence presented and found the complainant’s testimony and identification to be both “sincere” and “accurate.” “This Court will not interfere with the [trier of fact’s] role of determining the weight of the evidence or deciding the credibility of the witnesses,” *id.* at 561, and the credibility of identification evidence is a matter specifically for the trier of fact to decide, *Davis*, 241 Mich App at 700. Considering this identification evidence coupled with the admitted MRE 404(b) evidence identifying defendant as the perpetrator in a similar Craigslist robbery, the prosecution provided sufficient evidence for a rational trier of fact to find that defendant committed armed robbery.

Defendant next challenges the scoring of offense variables (“OV”) 8 and 10. Defendant first argues that the trial court erred in scoring OV 8 because the victim voluntarily and willingly drove himself to the location where the armed robbery occurred and therefore, the victim was not “asported” within the meaning of OV 8 to a place of greater danger. We disagree.

The application of the sentencing guidelines is reviewed de novo, but the trial court’s scoring of a sentencing variable is reviewed for an abuse of discretion. *Harverson*, 291 Mich App at 179. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Further, “[s]coring decisions for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Under OV 8, 15 points are properly assessed if the “victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time

necessary to commit the offense.” MCL 777.38(1)(a). Although the term “asportation” is not defined within the statutory sentencing guidelines, this Court has determined that there must be some movement of the victim but “there is no requirement that the movement itself be forcible. Rather, the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense.” *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Thus, the movement of a victim, even if voluntary and willing, to a place of greater danger constitutes conduct that falls within OV 8. *Id.* at 647-648. A place or situation of greater danger exists where the crimes could not have occurred as they did absent the movement of the victim and the victim is moved to a location where he or she is secreted from observation by others or where others are less likely to see a defendant commit the crime. *People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009); *Spanke*, 254 Mich App at 648.

Initially, the complainant arranged to meet the purported buyer, defendant, at a police station and then in the lobby of a hospital. In doing so, the complainant chose to meet defendant in two seemingly safe and public locations. But after several telephone conversations, the victim proceeded to meet defendant at a residence because defendant represented that he could not leave his grandfather who was recently released from the hospital. The residence was located next to an abandoned house, which provided defendant the opportunity to execute the robbery in an area that was less likely to have witnesses or readily available avenues to seek assistance. Soon after arriving at the residence, the complainant received another telephone call in which he was directed to knock on the side door. After the complainant approached the side door, defendant and an unidentified assailant ambushed the complainant and stole the briefcase, which contained a diamond ring, from the complainant. Even though the victim voluntarily and willingly drove himself to this location, he did so because of defendant’s manipulative request. Although defendant asserts that OV 8 was improperly scored because he was not directly responsible for moving the victim, neither the statute nor the case law supports this interpretation of the term “asportation” and defendant has not provided legal authority stating otherwise. See *Steele*, 283 Mich App at 490-491; *Spanke*, 254 Mich App at 648. Accordingly, there was adequate evidence to support this variable, and the trial court did not abuse its discretion in assessing 15 points.

Next, defendant argues that the trial court erred in scoring 15 points for OV 10 because defendant did not engage in “predatory conduct” within the meaning of this scoring variable. We disagree.

OV 10 concerns the exploitation of a vulnerable victim. MCL 777.40(1). The trial court must assess 15 points for OV 10 for the involvement of predatory conduct. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). “Under MCL 777.40(3)(a), ‘predatory conduct’ is conduct that occurred prior to the commission of the scoring offense, which was directed at the victim for the primary purpose of victimization.” *People v Johnson*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 302173, issued October 16, 2012) (slip op at 3). “Predatory conduct,” however, “does not encompass *any* ‘preoffense conduct,’ but rather only those forms of ‘preoffense conduct’ that are commonly understood as being ‘predatory’ in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or ‘preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.” *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (citation omitted). A victim’s “vulnerability” may arise from a victim’s inherent characteristics, such as a mental or physical disability, and personal relationships, but may also arise from external

circumstances. *Id.* at 464-466. Further, “a defendant’s ‘predatory conduct,’ by that conduct alone (*eo ipso*), can create or enhance a victim’s ‘vulnerability.’” *Id.* at 468 (emphasis in original). For example, “a person walking alone at night in a parking lot while two armed people hidden from that person’s view lie in wait to rob that person is a vulnerable victim because he or she would have a readily apparent susceptibility to injury or physical restraint.” *Huston*, 489 Mich at 467 (internal quotations and brackets omitted).

Essentially, defendant argues that his conduct was not “predatory” within the meaning of OV 10 because his scheme and plan was no more predatory than any scheme or plan to commit any robbery. The record, however, supports a finding that defendant engaged in “predatory conduct.” As the trial court first noted, defendant was selective in picking the complainant as a target. The complainant was not selected randomly on the street, but because he was selling valuable items on the Craigslist website. Defendant posed as an interested buyer and arranged to meet the complainant at a public location to “purchase” the item. Defendant contacted the complainant several times and eventually coaxed the complainant to meet defendant at a side door of a residence in a location that was more conducive to executing the robbery instead of the seemingly safe and public locations that the complainant originally suggested as meeting locations. After arriving at the side door, defendant and another unidentified male ambushed the complainant and robbed him. On two levels, defendant engaged in predatory conduct: (1) by posing as an interested buyer targeting certain sellers on the Craigslist website, and (2) by luring the complainant to a location that allowed defendant and his cohort to spring from an unknown location and attack the complainant. Defendant created a situation where the complainant would have a readily apparent susceptibility to injury or physical restraint. Thus, the complainant was a “vulnerable” victim within the meaning of OV 10. *Huston*, 489 Mich at 467. Accordingly, the trial court did not abuse its discretion in scoring 15 points for this variable.

Defendant first argues in his Standard 4 Brief that he was deprived of his right to the effective assistance of counsel because of defense counsel’s failure to investigate and call witnesses, failure to object to a pretrial identification procedure, and absence at the preliminary examination and sentencing. We disagree.

Because defendant did not raise this issue in a motion for a new trial or request an evidentiary hearing, this issue is not properly preserved and therefore, this Court’s review is limited to errors apparent on the record. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). An ineffective assistance of counsel claim “is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

Both the United States and Michigan Constitutions guarantee the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel’s performance was deficient and that such deficiencies prejudiced the defendant’s case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel performed deficiently if his performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Avant*, 235 Mich App 499, 508;

597 NW2d 864 (1999). To establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defense counsel is afforded wide latitude on matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not substitute its judgment for that of defense counsel, review the record with the added benefit of hindsight on such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), or second-guess defense counsel's judgment on matters of trial strategy, *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (citation omitted). Additionally, defense “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” *Strickland*, 466 US at 691.

Defendant first argues that defense counsel was ineffective because he failed to investigate and call as witnesses his father, his girlfriend, and the attorney who represented him during a pretrial photographic line-up. Defendant alleges that his girlfriend would have served as an alibi witness during the time in which the charged crime occurred and that his father would have testified that the telephone number associated with the robberies belonged to him, not defendant. Defendant also alleged that the attorney may have provided testimony that demonstrated that the photographic line-up was unduly suggestive. The record, however, does not support defendant's allegations. An evidentiary hearing was not held regarding his ineffective assistance of counsel claim, and no testimony was offered or taken from these witnesses in the lower court. On appeal, defendant has provided affidavits from himself, his girlfriend, and his father in support of his argument. It is, however, “impermissible to expand the record on appeal.” *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Thus, beyond mere allegations, defendant has not established the predicate to analyze his ineffective assistance of counsel claim, and therefore, this claim fails on this ground. *Carbin*, 463 Mich at 600.<sup>1</sup>

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<sup>1</sup> “Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.” *Carbin*, 463 Mich at 600.

Nevertheless, defendant has failed to establish that defense counsel's decisions concerning these witnesses did not fall within the ambit of reasonable trial strategy. According to defendant, defense counsel told defendant that he did not intend to call defendant's girlfriend as a witness because of credibility issues. Consequently, it is presumed that this decision constituted a matter of trial strategy. *Rockey*, 237 Mich App at 76. Further, defendant has not demonstrated that his father's testimony would have provided him with a substantial defense. Even if the telephone number belonged to defendant's father, defendant's photograph was still used in two different photographic line-ups and selected by two witnesses. Further, the evidence surrounding the telephone number was not admitted to show that the telephone number belonged to defendant. Accordingly, defendant cannot establish that the failure to investigate or call these witnesses deprived him of a substantial defense at trial. *Dixon*, 263 Mich App at 398.

Defendant also argues that defense counsel should have called the attorney present during the pretrial photographic line-up as a witness and that defense counsel should have objected to evidence concerning that pretrial identification procedure. Again, there is no record supporting these allegations nor are these alleged deficiencies apparent on the record. Thus, as will be discussed below, there has been no showing that there was an unduly suggestive or prejudicial procedure employed, and therefore, defense counsel was not ineffective for failing to make a futile objection or argue a meritless position. *Odom*, 276 Mich App at 417.

Defendant also raises issues concerning the identification evidence and defense counsel's failure to address these issues. Mostly, defendant complains of perceived inconsistencies in the identification evidence. While there were inconsistencies, defense counsel more than adequately cross-examined the witnesses on the issues of identification and raised the issue of misidentification at trial. And in fact, the trier of fact reviewed the identification evidence and the inconsistencies, but concluded that the identification evidence was credible and found defendant guilty of armed robbery. Although defense counsel's strategy to undermine the identification evidence was unsuccessful, it is well-established that "[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Lastly, defendant argues that defense counsel was ineffective because he did not represent defendant at the preliminary examination and sentencing. Defendant, however, has failed to explain or establish how he was prejudiced by defense counsel's absence where defendant was represented by substitute counsel during both stages of these proceedings. To the extent that defendant implicitly argues that his stand-in counsel was ineffective, defendant has also failed to establish his claim. Regarding the preliminary examination, defendant complains that counsel "did nothing" and specifically, counsel did not even cross-examine the complainant or present an alibi defense. "The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). While it is true that counsel did not cross-examine the complainant, there has been no showing that the trial court lacked probable cause to bind over defendant. Further, even if counsel had presented an alibi defense at the preliminary examination that would have raised a reasonable doubt or created a conflict in the evidence, defendant would have still been properly bound over because such issues are to be resolved by the trier of fact. *Id.* Therefore, there has been no showing that the outcome of the proceedings would have been different. Likewise, there

has been no showing that counsel was ineffective at sentencing. During sentencing, counsel vigorously advocated on defendant's behalf and preserved perceived scoring errors, including the scoring variable issues raised on appeal. Accordingly, defendant was not deprived of his right to the effective assistance of counsel. *Carbin*, 463 Mich at 599-600.

Defendant next argues in his Standard 4 Brief that the victim's in-court identification of defendant as the perpetrator was inadmissible because the identification was the result of an unduly suggestive pretrial identification procedure. We disagree.

Because of defendant's failure to raise this issue below, this Court's review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Further, "[w]here issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice." *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

A defendant's right to due process of law is violated when a pretrial identification procedure is employed that is so suggestive in light of the totality of the circumstances that there is a substantial likelihood that it resulted in a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "Only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive." *Id.* at 114 (internal quotations omitted). The defendant bears the burden "to show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). If the trial court finds that the pretrial identification procedure was impermissibly suggestive, testimony concerning the identification is inadmissible unless it is established that there is an independent basis for the witness' in-court identification "that is untainted by the suggestive pretrial procedure." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Defendant has failed to establish that the pretrial identification procedure was unduly suggestive. The record is void of evidence to substantiate any of defendant's claims or allegations concerning the procedures employed. When the trial court admitted the photographic line-up and later when the trial court discussed this evidence, the trial court did not mention nor did defense counsel draw attention to any perceived issues with the photographic line-up that would have indicated that it was unduly suggestive. Further, there was no evidence suggesting the police assisted or encouraged the complainant to select defendant from the photographic line-up. Additionally, defendant alleges that counsel was not present during the photographic line-up, but also contradicts himself and states that counsel was present. By and large, defendant simply makes conclusory statements regarding the suggestiveness of the photographs. Thus, defendant

has failed to meet his burden in establishing that the procedure used was impermissibly suggestive. *Colon*, 233 Mich App at 304. Accordingly, no error occurred when the complainant's in-court identification was admitted at trial.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ David H. Sawyer  
/s/ Karen M. Fort Hood