

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN CHRISTIAN ALEXANDER,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 239241

Oakland Circuit Court

LC No. 00-175449-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced to seven to fifteen years' imprisonment, and now appeals as of right. We affirm.

Defendant contends that the trial court erred in admitting a videotape from a casino depicting only those times when defendant was near the victim. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant argues that the videotape was "manipulated" to make it appear as though defendants stalked the victim throughout his casino visit. Defendant argues that the "best evidence rule," MRE 1002, required the full original videotapes to be introduced, and that the composite videotape was not admissible under MRE 1003 or MRE 1004. Further, defendant argues, the composite videotape would not qualify as a summary of voluminous recordings under MRE 1006, because it did not "accurately summarize" the original videotapes in a neutral fashion, but rather slanted the contents of the originals in the prosecutor's favor.

MRE 1002 allows the use of copies when otherwise authorized by the court rules. MRE 1003, which governs the admissibility of duplicates, was not offended because defendant did not raise a genuine question as to the authenticity of the original videotapes from which casino personnel duplicated a summary, and defendant has not shown that it was unfair under the circumstances to admit the duplicated summary in lieu of the originals. Further, contrary to

defendant's argument, MRE 1006 must be read in harmony with MRE 1004 to allow the use of summaries even when original source documents have not been lost or destroyed.¹

To support admissibility under MRE 1006, the proponent must show that: (1) the summary was of voluminous recordings, which cannot conveniently be examined in court; (2) the underlying recordings must themselves be admissible in evidence; (3) the originals or duplicates must be made available for examination or copying by other parties; and (4) the summary must be an accurate summarization of the underlying materials. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 100; 535 NW2d 529 (1995), quoting *White Industries v Cessna Aircraft Co*, 611 F Supp 1049, 1070 (WD Mo, 1985). Here, the composite videotape satisfied those conditions. There were thirty-two original videotapes, each eight hours long. Even without taking breaks, viewing the original videotapes in their entirety would have occupied at least thirty-two days of trial. These were voluminous recordings that could not conveniently be viewed in court. Defendant does not dispute the second and third elements, that the underlying videotapes would be admissible, and that the videotapes were available for examination. Finally, the composite videotape was not inaccurate. It was taken directly from the original videotapes without cropping, and the time stamps imprinted on the videotape undermine defendant's claim that the jury would be misled into underestimating the time depicted. Consequently, we are not persuaded that the videotape was inadmissible pursuant to MRE 1006.

Defendant also argues that the videotape should have been excluded pursuant to MRE 403 because there was a danger of misleading the jury, and the impact of recorded evidence is greater than the impact of oral testimony. There is no merit to this claim. The greater impact generally afforded by recorded evidence does not render it *unfairly* prejudicial. Defendant has failed to demonstrate confusion of the issues, or that the jury was misled. Again, the time stamps on the composite videotape were sufficient to prevent confusion. Further, the use of taped summaries in lieu of 256 hours of raw recordings did not create undue delay, waste the jury's time, or give rise to the needless presentation of cumulative evidence. On the contrary, the use of a composite summary eliminated delay, made better use of time, and was not needless in light of the importance of the identification issue. The alternative suggested by defendant—forcing the prosecutor to show all the tapes—would be more offensive than the procedure actually used by the prosecutor. Accordingly, the trial court did not abuse its discretion when it allowed the composite videotape into evidence. *Cain, supra* at 122.

Defendant further argues that the trial court abused its discretion by allowing the prosecutor to replay portions of the videotape during closing argument. By playing the videotape, defendant argues, the prosecutor "duplicated" evidence already presented rather than focus on the proper scope of closing arguments. In his closing argument, the prosecutor replayed a section of videotape. As the videotape played, the prosecutor discussed the evidence, summarizing the contents of the videotape. When the videotape was nearly over, defendant objected that the prosecutor was "duplicating evidence."

¹ An exhibit cannot be characterized as a summary under MRE 1006 if it is merely the original document or tape. If MRE 1006 contemplated only the use of original documents as "summaries," the rule would not provide for the examination or copying of originals.

A trial court has broad power and wide discretion to control closing arguments. *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971). The purpose of closing argument is to allow the attorneys to comment on the evidence and to argue their theories to the jury. *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), aff'd 431 Mich 506; 431 NW2d 19 (1988). Here, the videotape was a matter of evidence and the purpose of replaying it was to enable the prosecutor to comment upon its content. We further note that defendant has not cited any authority holding that a prosecutor is precluded, during closing argument, from displaying, using, or referring to exhibits that were previously admitted into evidence.² Consequently, defendant's contention of error is without merit. *Cain, supra* at 122.

Defendant also contends that the trial court erred by admitting the victim's second statement to the police. However, the record does not indicate that the statement was introduced into evidence, much less admitted. Accordingly, defendant's contention of error is plainly without merit.

Next, defendant contends that the trial court improperly made an independent finding that he was guilty of armed robbery, thereby contravening the jury's verdict acquitting him of that higher offense and convicting him only of unarmed robbery. Indeed, when a jury finds a defendant guilty of a lesser offense, a trial court cannot contravene the verdict and impose a sentence based on a higher charge of which the defendant was acquitted. *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986). Here, the trial court noted that defendant was "lucky" because the evidence suggested that he was guilty of armed robbery, rather than unarmed robbery. However, the trial court immediately followed that commentary by stating: "But I am sentencing you under the guidelines of Unarmed Robbery." Accordingly, we are not persuaded that the trial court's commentary rose to the level of an independent finding of guilt or an imposition of a sentence based on a higher charge. Consequently, defendant's contention of error is without merit.

Defendant also challenges the scoring of two offense variables under the sentencing guidelines. Generally, we will uphold a scoring decision for which there is any evidence in support. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

First, defendant contends that offense variable 1 (OV 1), MCL 777.31, was improperly scored at fifteen points. Fifteen points are scored for OV 1 if a "firearm was pointed at or toward a victim," MCL 777.31(1)(c), whereas only ten points are scored if the victim was merely "touched by any other type of weapon," MCL 777.31(1)(d). While defendant concedes that the victim was struck by an item, defendant contends that there was no evidence that a firearm was involved. However, the victim testified that one of the assailants poked him in the chest with what he believed was "a rifle or a shotgun." In addition, the victim's statement to the police indicated that he was "hit in the chest with what appeared to be a gun barrel." Accordingly, there

² Defendant's argument that a prosecutor is not permitted to present in rebuttal proofs that should have been presented during the prosecutor's case-in-chief is inapplicable to this question because the videotape summary was presented as part of the prosecutor's case-in-chief.

was sufficient evidence supporting the trial court's scoring OV 1 at fifteen points.³ *Hornsby, supra* at 468.

In a supplemental brief, defendant also contends that the trial court erred in scoring fifteen points for OV 10, MCL 777.40. MCL 777.40(1)(a) provides that fifteen points should be scored if "predatory conduct was involved." The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, the evidence suggested that defendants staked out the casino and followed the victim home for nearly twenty miles for the purpose of taking his casino winnings. Accordingly, there was ample evidence supporting the trial court's scoring of this variable. *Hornsby, supra* at 468.

Next, defendant contends that the prosecutor violated his right to remain silent by introducing testimony disclosing that he did not provide information to the police. We disagree. Defendant waived his right to remain silent before giving a custodial statement. When the interrogating officer testified that defendant did not subsequently provide information other than his blanket denial that he was present or knew anything about the robbery, the officer was not commenting on defendant's right to remain silent, but instead was testifying that defendant said nothing beyond his denial. This was not improper. *People v Sholl*, 453 Mich 730, 732-738; 556 NW2d 851 (1996).

Defendant next argues that he was denied the effective assistance of counsel when, during cross-examination, his trial attorney "opened the door" to evidence that he "refused" to provide information to the police as discussed in the preceding section of this opinion. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *Snider, supra* at 423. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424. Here, it is certainly plausible that trial counsel's strategy was to place defendant's denial of involvement before the jury without having to put defendant on the stand. Moreover, to the extent that defendant challenges trial counsel's failure to object to the police officer's testimony, it is well established that trial counsel is not ineffective for failing to advocate a meritless position. *Snider, supra* at 425. Consequently, we reject defendant's contention that he was deprived of his constitutional right to effective assistance of counsel.

Next, defendant challenges the sufficiency of the evidence supporting his conviction. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

³ The victim's failure to unequivocally state that the item was a gun probably prevented the jury from finding that it was beyond a reasonable doubt that defendant was guilty of armed robbery. The standard for scoring variables, however, is substantially less than beyond a reasonable doubt. *Hornsby, supra* at 468.

Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Here, although the attack was not witnessed and the victim testified that he could not identify defendants as his attackers, there was sufficient circumstantial evidence supporting defendant's conviction. The videotape showed defendants in close proximity to the victim throughout the casino visit. A review of defendant's casino club card indicated that he had not been gambling during his lengthy visit to the casino. The defendants left the casino right after the victim and also left the parking garage right after the victim. Defendant drove a Ford Explorer and the victim testified that he twice saw headlights from a truck or SUV during his early-morning drive home. When the victim arrived home, two men emerged from an SUV with its lights off. One man—the taller of the two—was wearing a white jacket. Defendant was taller than codefendant Turner and had been wearing a white jacket while at the casino. DNA in the nylon cap recovered near the scene matched the DNA of codefendant Turner, who had been with defendant in the casino. Viewing this circumstantial evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence supporting defendant's conviction.⁴

Finally, defendant contends that the trial court erred in failing to instruct the jury about impeachment of witnesses. However, the record indicates that the trial court did, in fact, provide the impeachment instruction consistent with CJI2d 4.5. Accordingly, defendant's contention of error is plainly without merit.

Affirmed.

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

⁴ We further reject defendant's argument that the prosecutor showed only guilt by association. The proofs showed an active involvement by two perpetrators, one being defendant, who could properly be characterized as the leader in the criminal enterprise. Moreover, the jury was properly instructed that defendant must be found "not guilty" if he was merely present when a potential crime occurred.