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STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

vs

DANIEL ALBERT LOEW,

Defendant-Appellant/Cross-Appellee,

SUPREME COURT NO: 164133

COURT OF APPEAL NO: 352056

LOWER COURT NO: 18-21709-FC

MOLLY S. SCHIKORA (P46997)
Assistant Prosecuting Attorney
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HEATH M. LYNCH (P81483)
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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

APPENDIX A

E-mail exchange between Judge Margaret Zuzich Bakker and Myrene K. Koch

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Becky Blaine

From: Myrene Koch
Sent: Wednesday, August 28, 2019 4:49 PM
To: Margaret Bakker
Subject: RE: trial

Unfortunately, no. The forensic interviewer is supposed to check that before case review but the list often is given to interns. I noticed it after the fact at case review but by then not clear on if the victim had much support.

Myrene K. Koch (P-62570)
Prosecuting Attorney
Allegan County
113 Chestnut Street, Allegan, MI 49010
(269) 673-0280
(269) 673-0599 fax

From: Margaret Bakker
Sent: Wednesday, August 28, 2019 9:03 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE: trial

I thought Safe Harbor would catch it.

From: Myrene Koch
Sent: Wednesday, August 28, 2019 9:02 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE: trial

Yes, because the prior APA assigned to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's in files.

From: Margaret Bakker
Sent: Wednesday, August 28, 2019 8:50 AM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: RE: trial

One more question....this victim was not referred for a medical, do you know why?

From: Myrene Koch
Sent: Wednesday, August 28, 2019 8:47 AM
To: Margaret Bakker <MBakker@ALLEGANCOUNTY.ORG>
Subject: RE: trial

They do but not typically for CSC's. This trooper has been given additional personal training since this investigation.

From: Margaret Bakker
Sent: Tuesday, August 27, 2019 3:41 PM
To: Myrene Koch <MKoch@ALLEGANCOUNTY.ORG>
Subject: trial

This trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

APPENDIX B

People v Gonzalez, unpublished per curiam opinion of the Court of Appeals, issued November 9, 2001 (Docket No. 223338)

RECEIVED by MSC 2/1/2023 9:33:24 AM

2001 WL 1404727
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,

v.

Dionicio Alemon **GONZALEZ**, Defendant–Appellant.

No. 223338.

Nov. 9, **2001**.

Before: K.F. KELLY, P.J., and MURPHY and FITZGERALD, JJ.

Opinion

PER CURIAM.

*1 Following a jury trial, defendant was convicted of delivery of 225 to 650 grams of cocaine. MCL 333.7401(2)(a)(ii). In accord therewith, the trial court sentenced defendant to twenty-five to forty years' imprisonment as a second offense drug offender. MCL 333 .7413. The trial court denied defendant's motion for new trial, and he appeals as of right. We affirm.

First, defendant argues that he was denied a fair and impartial trial when the trial judge and prosecutor allegedly engaged in ex-parte communications with a deadlocked jury while in recess. We disagree. Because defendant did not object or bring the matter to the trial court's attention, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain ...., and 3) the plain error affected substantial rights. The third requirement generally requires a showing of prejudice.... *People v. Carines*, 460 Mich. 750, 763; 597 NW2d 130 (1999). After a careful review of the record, we find no error. Even if the alleged ex-parte communication occurred, defendant failed to make a firm and definite showing of prejudice. Thus, defendant does not warrant appellate relief on these grounds. *People v. France*, 436 Mich. 138; 461 NW2d 621 (1990); see also *People v. Gonzales*, 197 Mich.App 385; 496 NW2d 312 (1992).

Next, defendant argues that he received ineffective assistance of counsel. We disagree. A claim of ineffective assistance of counsel is a constitutional issue. See *People v. Rhinehart*, 149 Mich.App 172, 174; 385 NW2d 640 (1986). This Court reviews constitutional issues de novo. *People v. Darden*, 230 Mich.App 597, 600; 585 NW2d 27 (1998).

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, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v. Toma*, 462 Mich. 281, 302–303; 613 NW2d 694 (2000). Because it is presumed that trial counsel was effective, defendant bears a heavy burden to prove otherwise. *People v. Rockey*, 237 Mich.App 74, 76; 601 NW2d 887 (1999). Specifically, trial counsel's defense—that defendant was expecting a lesser drug of marijuana rather than cocaine—while ultimately ineffective at trial, was valid trial strategy. Merely because a particular defense strategy fails does not definitively indicate that selecting that defense constitutes ineffective assistance of counsel. *People v. Stewart (On Remand)*, 219 Mich.App 38, 42; 555 NW2d 715 (1996). The remainder of the alleged errors cited by defendant are without merit, matters of trial strategy, or inadequately briefed. Indeed, defendant is not entitled to simply assert a position and leave it to this Court to discover the rationale behind them. *People v. Leonard*, 224 Mich.App 569, 588; 569 NW2d 663 (1997).

*2 Defendant argues next that he was entitled to a new trial because of a newly discovered alibi witness. We disagree.

This Court reviews decisions on motions for a new trial based on newly discovered evidence under a two-prong standard: the trial court's findings of fact are reviewed for clear error, while its ruling on the motion is reviewed for an abuse of discretion. *People v. Lester*, 232 Mich.App 262, 271; 591 NW2d 267 (1999).

A party seeking a new trial based on newly discovered evidence must satisfy four elements: (1) the evidence itself, and not merely its materiality, must be newly discovered; (2) the evidence must not be merely cumulative; (3) the new

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Habeas Corpus Conditionally Granted by Hereford v. Warren, E.D.Mich., March 30, 2007

2003 WL 193523
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Darron Lamar HEREFORD, Defendant-Appellant.

No. **227296**

Jan. 28, 2003.

Before: O'CONNELL, P.J., and WHITE and B.B. MACKENZIE,* JJ.

[UNPUBLISHED]

PER CURIAM.

ON REHEARING

*1 Following a bench trial, defendant was convicted of armed robbery, M.C.L. § 750.529, and sentenced to a term of 9 to 20 years' imprisonment. He appeals as of right. We affirm.

Defendant and two codefendants, Alvin Smith and Kyle Davis, were charged with the April 22, 1999, armed robbery of a Hungry Howie's restaurant in Southfield. Codefendant Smith stood trial separately and was convicted of armed robbery. Defendant and codefendant Davis stood trial together, with a jury determining Davis' guilt and the circuit court determining defendant's guilt.

I

Defendant first challenges the circuit court's findings that he participated in the armed robbery and that he possessed a gun during the robbery. To the extent defendant suggests that insufficient evidence supported the circuit court's findings, we review all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable factfinder could determine defendant's guilt beyond a reasonable doubt. *People v. Nowack,* 462 Mich. 392, 399-400, 614 N.W.2d 78 (2000); *People v. Legg,* 197 Mich.App. 131, 132, 494 N.W.2d 797 (1992). Questions regarding witness credibility must be resolved by the factfinder, and this Court should not interfere with the factfinder's role in determining witness credibility or the weight of evidence. *People v. Elkhoja,* 251 Mich.App. 417, 442, 651 N.W.2d 408 (2002).

In considering defendant's related claim that the circuit court clearly erred in finding that he participated in and held a gun during the robbery, this Court reviews the entire record to determine whether it possesses the definite and firm conviction that the circuit court made a mistake. *People v. Swirles (After Remand),* 218 Mich.App. 133, 136, 553 N.W.2d 357 (1996). An appellate court will defer to the circuit court's resolution of factual issues, especially where it involves the credibility of witnesses. *People v. Cartwright,* 454 Mich. 550, 555, 563 N.W.2d 208 (1997).

Defendant's claim that the evidence at trial did not support the circuit court's identification of him as a participant in the robbery lacks merit. The assistant manager of the restaurant testified extensively regarding his recollections of the armed robbery. Both the assistant manager and the restaurant's part owner recalled that the assistant manager had worked with defendant for at least a month, on several occasions each week. The assistant manager testified repeatedly and with certainty that he recognized defendant as one of the robbers when defendant's mask briefly slipped from his face. A police officer who responded to the restaurant after the robbery testified that the assistant manager positively identified defendant as a participant in the robbery. Codefendant Smith also offered testimony that defendant participated in the robbery.

This evidence amply supports the circuit court's finding that defendant participated in the robbery. *Nowack, supra.* While defendant questions the assistant manager's ability to have discerned his identity during the robbery, this Court will not

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interfere with the circuit court's assignment of significant weight to the assistant manager's unwavering identification testimony. *Elkhoja, supra.* Likewise, we will not second guess the circuit court's explicit determinations to credit the testimony indicating that defendant participated in the crime and to disbelieve defendant's testimony regarding his whereabouts. *Id.* In response to defendant's claim that some evidence suggested that a person other than defendant might have participated in the crime, we note that "the prosecutor need not negate every reasonable theory consistent with innocence...." *Nowack, supra* at 400, 614 N.W.2d 78.[1]

*2 We similarly conclude that, after reviewing the entire record, including the aforementioned evidence of identification credited by the circuit court, we do not possess the definite and firm conviction that the circuit court erred in finding that defendant participated in the robbery. *Cartwright, supra; Swirles (After Remand), supra.*

Regarding defendant's challenge to the circuit court's finding that defendant possessed a gun during the robbery, codefendant Smith's testimony to this effect constituted the sole evidence of record supporting the court's finding. Smith's testimony directly contradicted the assistant manager's recollection that defendant did not have the gun during the robbery. Although Smith never testified that anyone other than defendant had the gun during the robbery, Smith's account of the crime otherwise appeared vague and somewhat inconsistent with the victims' recollections.[2] Nonetheless, the circuit court apparently believed at least that portion of Smith's testimony recounting defendant's possession of a weapon, and we reiterate that "[t]his Court should not interfere with the [factfinder's] role in determining the weight of the evidence or the credibility of witnesses." *Elkhoja, supra.*

Accordingly, we find that sufficient evidence existed to support the circuit court's determination that defendant possessed a weapon during the robbery. Furthermore, because evidence supports the circuit court's finding that defendant possessed a weapon and the court found this testimony credible, we cannot conclude that the court clearly erred in making this finding. *Cartwright, supra; Swirles (After Remand), supra.*[3] Moreover, even disregarding Smith's testimony that defendant had a weapon, the substantial identification testimony discussed above amply supported defendant's conviction as an aider and abettor of the armed robbery. MCL 767.39; see also *People v. Acosta,* 153 Mich.App. 504, 512, 396 N.W.2d 463 (1986).[4]

II

Defendant also raises many and varied allegations that his defense counsel rendered ineffective assistance. Because defendant failed to properly preserve this issue for appellate review by timely moving for a new trial or evidentiary hearing on the basis of ineffective assistance, our review of defendant's allegations is limited to the existing record. *People v. Rodriguez,* 251 Mich.App. 10, 38, 650 N.W.2d 96 (2002); *People v. Oswald (After Remand),* 188 Mich.App. 1, 13, 469 N.W.2d 306 (1991).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v. Pickens,* 446 Mich. 298, 302-303, 521 N.W.2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327, 521 N.W.2d 797; *People v. Rodgers,* 248 Mich.App. 702, 714, 645 N.W.2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers, supra* at 714-715, 645 N.W.2d 294.

*3 Limiting our review to the existing record, we are not persuaded that defense counsel was ineffective. Defendant has failed to overcome the strong presumption that defense counsel's evidentiary decisions and witness examinations constituted sound trial strategy, or to demonstrate that any action by defense counsel deprived him of a substantial defense or otherwise adversely affected the outcome of his trial. *People v. Rockey,* 237 Mich.App. 74, 76-77, 601 N.W.2d 887 (1999); *People v. Hyland,* 212 Mich.App. 701, 710, 538 N.W.2d 465 (1995), vacated in part on other grounds 453 Mich. 902, 554 N.W.2d 899 (1996).

We note that defense counsel vigorously cross-examined both witnesses who identified defendant, namely the assistant manager and codefendant Smith. We further note that the record, which reflects defendant's knowing and voluntary

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waiver of his right to a jury trial, contradicts defendant's claim that defense counsel gave him poor advice regarding his decision to opt for a bench trial. See MCR 6.402(B); *People v. Reddick*, 187 Mich.App. 547, 549-550, 468 N.W.2d 278 (1991). We lastly observe that defense counsel did not provide ineffective assistance by failing to make a meritless motion to suppress defendant's precustodial statements to the police. See *People v. Zahn*, 234 Mich.App. 438, 449, 594 N.W.2d 120 (1999); *People v. Snider*, 239 Mich.App. 393, 425, 608 N.W.2d 502 (2000).

III

Defendant next argues that the circuit court erred in calculating the sentencing guidelines range by assigning fifty points to offense variable seven (OV 7). This Court reviews for an abuse of discretion a sentencing court's offense variable scoring, provided that some evidence exists to support the score. *People v. Hornsby*, 251 Mich.App. 462, 468, 650 N.W.2d 700 (2002).

We find that the circuit court properly scored fifty points for OV 7 (aggravated physical abuse) on the basis that the victims of the robbery were "treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). At the time of defendant's 1999 offense, terrorism was defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."[5] MCL 777.37(2). The instant record contains evidence that defendant had a gun during the robbery, that the gun was pointed at both victims during the robbery, that a robber used the gun to strike one victim on the back of his head, that the victims feared for their lives, and that the robbers fired the gun during the robbery. Under these circumstances, we cannot characterize the circuit court's scoring of OV 7 as an abuse of discretion. *Hornsby, supra* at 468-469, 650 N.W.2d 700.

IV.

Finally, defendant claims in his supplemental brief on appeal that his right to cross-examine a witness was diminished because the trial court held a bench conference without defense counsel being present. Defendant asserts that if his counsel was present he would have gained valuable information that would have allowed him to impeach witness and codefendant Smith's credibility.

*4 We agree with defendant that it was improper to conduct a bench conference without defense counsel's presence. See generally *People v. Riggs*, 223 Mich.App. 662, 677, 568 N.W.2d 101 (1997) (Sixth Amendment right to counsel attaches at "critical stage" of proceedings); *People v. Gonzalez*, 197 Mich.App. 385, 402, 496 N.W.2d 312 (1992) (improper ex parte communications deny right to fair trial). However, we conclude that the error was harmless beyond a reasonable doubt. See *People v. Watson*, 245 Mich.App. 572, 585, 629 N.W.2d 411 (2001) (violation of right of confrontation may not be redressed unless error is harmless beyond a reasonable doubt). As we have previously stated, disregarding Smith's entire testimony, the balance of the trial testimony supports defendant's conviction for aiding and abetting an armed robbery. *Id.* Further, the court, sitting as the trier of fact, was well aware of the problems with Smith's testimony, and knew from the bench conference that Smith had, in fact, spoken with the detective.

Affirmed.

All Citations

Not Reported in N.W.2d, 2003 WL 193523

Footnotes

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

1 Regarding defendant's repeated references in his briefs on appeal to a police evidence analysis that detected no gunpowder on defendant's hands, we decline to consider the analysis because defendant did not introduce this exhibit during trial. See *People v. Warren*, 228 Mich.App. 336, 356, 578 N.W.2d 692 (1998) (noting that this Court generally will not permit enlargement of the record on appeal), rev'd in part on other grounds 462 Mich. 415, 615 N.W.2d 691 (2000).

2 Defendant has not properly preserved for our review his assertion that the prosecutor improperly utilized leading questions to elicit Smith's testimony, because defendant failed to raise this issue in his appellate brief's statement of questions presented. *People v. Brown*, 239 Mich.App. 735, 748, 610 N.W.2d 234 (2000). Regardless, the circuit court did not abuse its discretion in permitting the prosecutor to employ leading questions because (1) Smith was "identified with an adverse party" and no indication existed that Smith had received consideration for his testimony against defendant, MRE 611(c)

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evidence would probably cause a different verdict on retrial; and (4) with reasonable diligence the party could not have discovered and produced the evidence at trial. *People v. Miller (After Remand)*, 211 Mich.App 30, 46–47; 535 NW2d 518 (1995).

We find that the testimony fails because it was not likely to produce a different result on retrial. The trial court evaluated the witness' testimony and found it incredible. We note that the "newly discovered" witness was actually defendant's ex-wife, and mother of his children, to whom he was married at the time of the incident. Until contacted by defendant's appellate attorney, this "witness" claimed that she did have any recollection of the day in question. In light of the overwhelming evidence against defendant and the witness' lack of credibility, the testimony would not produce a different result on retrial. Moreover, with reasonable diligence, defendant should have been able to produce the witness before trial, particularly in light of his claim that she accompanied him when the offense occurred.

Finally, defendant argues that the trial court improperly instructed the jury that defendant had a prior conviction for cocaine distribution. Notwithstanding, a review of the record does not reveal that the trial court rendered an instruction to that effect. Accordingly, we affirm the trial court's decision denying defendant's motion seeking a new trial.

Affirmed.

All Citations

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

APPENDIX C

People v Hereford, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2003 (Docket No. 227296

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Habeas Corpus Conditionally Granted by Hereford v. Warren, E.D.Mich., March 30, 2007

2003 WL 193523
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Darron Lamar HEREFORD, Defendant-Appellant.

No. 227296.
|
Jan. 28, 2003.

Before: O'CONNELL, P.J., and WHITE and B.B. MACKENZIE, * JJ.

[UNPUBLISHED]

PER CURIAM.

ON REHEARING

*1 Following a bench trial, defendant was convicted of armed robbery, M.C.L. § 750.529, and sentenced to a term of 9 to 20 years' imprisonment. He appeals as of right. We affirm.

Defendant and two codefendants, Alvin Smith and Kyle Davis, were charged with the April 22, 1999, armed robbery of a Hungry Howie's restaurant in Southfield. Codefendant Smith stood trial separately and was convicted of armed robbery. Defendant and codefendant Davis stood trial together, with a jury determining Davis' guilt and the circuit court determining defendant's guilt.

I

Defendant first challenges the circuit court's findings that he participated in the armed robbery and that he possessed a gun during the robbery. To the extent defendant suggests that insufficient evidence supported the circuit court's findings, we review all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable factfinder could determine defendant's guilt beyond a reasonable doubt. *People v. Nowack,* 462 Mich. 392, 399-400, 614 N.W.2d 78 (2000); *People v. Legg,* 197 Mich.App. 131, 132, 494 N.W.2d 797 (1992). Questions regarding witness credibility must be resolved by the factfinder, and this Court should not interfere with the factfinder's role in determining witness credibility or the weight of evidence. *People v. Elkhoja,* 251 Mich.App. 417, 442, 651 N.W.2d 408 (2002).

In considering defendant's related claim that the circuit court clearly erred in finding that he participated in and held a gun during the robbery, this Court reviews the entire record to determine whether it possesses the definite and firm conviction that the circuit court made a mistake. *People v. Swirles (After Remand),* 218 Mich.App. 133, 136, 553 N.W.2d 357 (1996). An appellate court will defer to the circuit court's resolution of factual issues, especially where it involves the credibility of witnesses. *People v. Cartwright,* 454 Mich. 550, 555, 563 N.W.2d 208 (1997).

Defendant's claim that the evidence at trial did not support the circuit court's identification of him as a participant in the robbery lacks merit. The assistant manager of the restaurant testified extensively regarding his recollections of the armed robbery. Both the assistant manager and the restaurant's part owner recalled that the assistant manager had worked with defendant for at least a month, on several occasions each week. The assistant manager testified repeatedly and with certainty that he recognized defendant as one of the robbers when defendant's mask briefly slipped from his face. A police officer who responded to the restaurant after the robbery testified that the assistant manager positively identified defendant as a participant in the robbery. Codefendant Smith also offered testimony that defendant participated in the robbery.

This evidence amply supports the circuit court's finding that defendant participated in the robbery. *Nowack, supra.* While defendant questions the assistant manager's ability to have discerned his identity during the robbery, this Court will not interfere with the circuit court's assignment of significant weight to the assistant manager's unwavering identification testimony. *Elkhoja, supra.* Likewise, we will not second guess the circuit court's explicit determinations to credit the testimony indicating that defendant participated in the crime and to disbelieve defendant's testimony regarding his

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whereabouts. *Id.* In response to defendant's claim that some evidence suggested that a person other than defendant might have participated in the crime, we note that "the prosecutor need not negate every reasonable theory consistent with innocence...." *Nowack, supra* at 400, 614 N.W.2d 78. [1]

***2** We similarly conclude that, after reviewing the entire record, including the aforementioned evidence of identification credited by the circuit court, we do not possess the definite and firm conviction that the circuit court erred in finding that defendant participated in the robbery. *Cartwright, supra; Swirles (After Remand), supra.*

Regarding defendant's challenge to the circuit court's finding that defendant possessed a gun during the robbery, codefendant Smith's testimony to this effect constituted the sole evidence of record supporting the court's finding. Smith's testimony directly contradicted the assistant manager's recollection that defendant did not have the gun during the robbery. Although Smith never testified that anyone other than defendant had the gun during the robbery, Smith's account of the crime otherwise appeared vague and somewhat inconsistent with the victims' recollections. [2] Nonetheless, the circuit court apparently believed at least that portion of Smith's testimony recounting defendant's possession of a weapon, and we reiterate that "[t]his Court should not interfere with the [factfinder's] role in determining the weight of the evidence or the credibility of witnesses." *Elkhoja, supra.*

Accordingly, we find that sufficient evidence existed to support the circuit court's determination that defendant possessed a weapon during the robbery. Furthermore, because evidence supports the circuit court's finding that defendant possessed a weapon and the court found this testimony credible, we cannot conclude that the court clearly erred in making this finding. *Cartwright, supra; Swirles (After Remand), supra.* [3] Moreover, even disregarding Smith's testimony that defendant had a weapon, the substantial identification testimony discussed above amply supported defendant's conviction as an aider and abettor of the armed robbery. MCL 767.39; see also *People v. Acosta,* 153 Mich.App. 504, 512, 396 N.W.2d 463 (1986). [4]

II

Defendant also raises many and varied allegations that his defense counsel rendered ineffective assistance. Because defendant failed to properly preserve this issue for appellate review by timely moving for a new trial or evidentiary hearing on the basis of ineffective assistance, our review of defendant's allegations is limited to the existing record. *People v. Rodriguez,* 251 Mich.App. 10, 38, 650 N.W.2d 96 (2002); *People v. Oswald (After Remand),* 188 Mich.App. 1, 13, 469 N.W.2d 306 (1991).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v. Pickens,* 446 Mich. 298, 302-303, 521 N.W.2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327, 521 N.W.2d 797; *People v. Rodgers,* 248 Mich.App. 702, 714, 645 N.W.2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers, supra* at 714-715, 645 N.W.2d 294.

***3** Limiting our review to the existing record, we are not persuaded that defense counsel was ineffective. Defendant has failed to overcome the strong presumption that defense counsel's evidentiary decisions and witness examinations constituted sound trial strategy, or to demonstrate that any action by defense counsel deprived him of a substantial defense or otherwise adversely affected the outcome of his trial. *People v. Rockey,* 237 Mich.App. 74, 76-77, 601 N.W.2d 887 (1999); *People v. Hyland,* 212 Mich.App. 701, 710, 538 N.W.2d 465 (1995), vacated in part on other grounds 453 Mich. 902, 554 N.W.2d 899 (1996).

We note that defense counsel vigorously cross-examined both witnesses who identified defendant, namely the assistant manager and codefendant Smith. We further note that the record, which reflects defendant's knowing and voluntary waiver of his right to a jury trial, contradicts defendant's claim that defense counsel gave him poor advice regarding his decision to opt for a bench trial. See MCR 6.402(B); *People*

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v. Reddick, 187 Mich.App. 547, 549-550, 468 N.W.2d 278 (1991). We lastly observe that defense counsel did not provide ineffective assistance by failing to make a meritless motion to suppress defendant's precustodial statements to the police. See *People v. Zahn,* 234 Mich.App. 438, 449, 594 N.W.2d 120 (1999); *People v. Snider,* 239 Mich.App. 393, 425, 608 N.W.2d 502 (2000).

III

Defendant next argues that the circuit court erred in calculating the sentencing guidelines range by assigning fifty points to offense variable seven (OV 7). This Court reviews for an abuse of discretion a sentencing court's offense variable scoring, provided that some evidence exists to support the score. *People v. Hornsby,* 251 Mich.App. 462, 468, 650 N.W.2d 700 (2002).

We find that the circuit court properly scored fifty points for OV 7 (aggravated physical abuse) on the basis that the victims of the robbery were "treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). At the time of defendant's 1999 offense, terrorism was defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."[5] MCL 777.37(2). The instant record contains evidence that defendant had a gun during the robbery, that the gun was pointed at both victims during the robbery, that a robber used the gun to strike one victim on the back of his head, that the victims feared for their lives, and that the robbers fired the gun during the robbery. Under these circumstances, we cannot characterize the circuit court's scoring of OV 7 as an abuse of discretion. *Hornsby, supra* at 468-469, 650 N.W.2d 700.

IV.

Finally, defendant claims in his supplemental brief on appeal that his right to cross-examine a witness was diminished because the trial court held a bench conference without defense counsel being present. Defendant asserts that if his counsel was present he would have gained valuable information that would have allowed him to impeach witness and codefendant Smith's credibility.

***4** We agree with defendant that it was improper to conduct a bench conference without defense counsel's presence. See generally *People v. Riggs,* 223 Mich.App. 662, 677, 568 N.W.2d 101 (1997) (Sixth Amendment right to counsel attaches at "critical stage" of proceedings); *People v. Gonzalez,* 197 Mich.App. 385, 402, 496 N.W.2d 312 (1992) (improper ex parte communications deny right to fair trial). However, we conclude that the error was harmless beyond a reasonable doubt. See *People v. Watson,* 245 Mich.App. 572, 585, 629 N.W.2d 411 (2001) (violation of right of confrontation may not be redressed unless error is harmless beyond a reasonable doubt). As we have previously stated, disregarding Smith's entire testimony, the balance of the trial testimony supports defendant's conviction for aiding and abetting an armed robbery. *Id.* Further, the court, sitting as the trier of fact, was well aware of the problems with Smith's testimony, and knew from the bench conference that Smith had, in fact, spoken with the detective.

Affirmed.

All Citations

Not Reported in N.W.2d, 2003 WL 193523

Footnotes

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

1 Regarding defendant's repeated references in his briefs on appeal to a police evidence analysis that detected no gunpowder on defendant's hands, we decline to consider the analysis because defendant did not introduce this exhibit during trial. See *People v. Warren,* 228 Mich.App. 336, 356, 578 N.W.2d 692 (1998) (noting

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that this Court generally will not permit enlargement of the record on appeal), rev'd in part on other grounds 462 Mich. 415, 615 N.W.2d 691 (2000).

2 Defendant has not properly preserved for our review his assertion that the prosecutor improperly utilized leading questions to elicit Smith's testimony, because defendant failed to raise this issue in his appellate brief's statement of questions presented. *People v. Brown,* 239 Mich.App. 735, 748, 610 N.W.2d 234 (2000). Regardless, the circuit court did not abuse its discretion in permitting the prosecutor to employ leading questions because (1) Smith was "identified with an adverse party" and no indication existed that Smith had received consideration for his testimony against defendant, MRE 611(c)(3); and (2) Smith possessed diminished mental capacity. MRE 611(a); see e.g., *People v. Wheeler,* 186 Mich. 489, 492-493, 152 N.W. 968 (1915); *People v. Stevens,* 230 Mich.App. 502, 507, 584 N.W.2d 369 (1998).

3 In a related contention, defendant suggests that the circuit court, which had presided over codefendant Smith's earlier trial, erred in relying on its knowledge regarding the evidence introduced at Smith's trial in finding that defendant had a gun during the robbery. We find that defendant's contention lacks merit. Smith testified at defendant's trial that defendant had a gun during the robbery, the circuit court cited and relied on Smith's testimony at the instant trial, and the court's finding that defendant had a weapon cannot be characterized as clearly erroneous. *People v. Cartwright,* 454 Mich. 550, 555, 563 N.W.2d 208 (1997); *People v. Swirles (After Remand),* 218 Mich.App. 133, 136, 553 N.W.2d 357 (1996).

4 Defendant failed to preserve for appellate review his argument, raised for the first time on appeal, that Smith lacked the capacity to testify pursuant to MRE 601. *People v. Dowdy,* 211 Mich.App. 562, 570, 536 N.W.2d 794 (1995). Defendant also failed to present any evidence rebutting the presumption that Smith, whose testimony reflected his ability to distinguish the truth from a lie, was competent to testify. See *People v. Watson,* 245 Mich.App. 572, 583, 629 N.W.2d 411 (2001).

Regarding defendant's suggestion that the circuit court should have discounted Smith's testimony on the basis of Smith's status as an accomplice to the robbery, defendant failed to properly present this claim within his appellate brief's statement of questions presented. *Brown, supra.* Furthermore, the record reflects the circuit court's awareness of Smith's accomplice status, Smith's denials that he received any promises of leniency, and Smith's own imminent sentencing hearing. *People v. Reed,* 453 Mich. 685, 691-692, 556 N.W.2d 858 (1996). Moreover, in light of the other identification testimony supporting defendant's conviction as an aider and abettor of the robbery, any error with respect to the admission of Smith's accomplice testimony qualifies as harmless. *People v. Carines,* 460 Mich. 750, 774, 597 N.W.2d 130 (1999).

5 We note that this statute was amended in 2002 to remove the "terrorism" language. See 137 PA 2002.

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STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

vs

DANIEL ALBERT LOEW,

Defendant-Appellant/Cross-Appellee,

SUPREME COURT NO: 164133

COURT OF APPEAL NO: 352056

LOWER COURT NO: 18-21709-FC

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

APPENDIX D

Amended List of Witnesses to be Called by the People for Case in Chief dated June 13, 2019

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

DANIEL ALBERT LOEW,

Defendant,

CASE NO: 18-21709-FC

HON. MARGARET ZUZICH BAKKER

ALLEGAN COUNTY FILED JUN 14 2019 DEPUTY CLERK

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Allegan, Michigan 49010

AMENDED LIST OF WITNESSES TO BE CALLED BY THE PEOPLE FOR CASE IN CHIEF

NOW COME, the People of the State of Michigan by and through Emily W. Jipp, Assistant Prosecutor for the County of Allegan, and amends the witness list dated March 27, 2019, as follows:

The following witnesses are being **added** to the People's Case in Chief:

1. Trooper Todd Workman
2. Anna Bluhm

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The following list will remain the same as filed on March 28, 2019:

1. Jenna Bluhm
2. Taylor Bluhm
3. Jane Heppe
4. Angela Gensler
5. Audriana Ordonez
6. Trooper Eric Desch
7. Thomas Cottrell

Date: June 13, 2019

Respectfully submitted,

Emily W. Jipp (P80894)
Assistant Prosecutor

/plc