STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2004
v	No. 244287 Kent Circuit Court
LEONARD ANTHONY BURROS, Defendant-Appellant.	LC No. 01-002972-FC

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

PER CURIAM.

Defendant was convicted by a jury of one count of armed robbery, MCL 750.529, and one count of unarmed robbery, MCL 750.530. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of ten to thirty years for the armed robbery and ten to twenty years for the unarmed robbery. He appeals as of right and we affirm.

Defendant first contends that his trial attorney was ineffective because he called a witness whose credibility was impeached by the prosecution and because he failed to object to improper rebuttal testimony. Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon***,** 248 Mich App 522, 531; 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

In the instant case, defense counsel's decision to have an unlicensed and inexperienced investigator testify does not mandate a new trial. Defense counsel only hired the witness to take photographs and to make measurements at the restaurant. Although the prosecution emphasized on cross-examination that the witness was not a licensed investigator, the witness had already admitted he was not licensed and had no special training. Further, the witness testified concerning measurements that required no particular expertise to make. Defendant has failed to show how the witness' lack of credentials as an investigator altered the effect of his testimony concerning whether or not defendant could have fit through the security bars. We must conclude

that defendant has failed to demonstrate that a different outcome would likely have resulted if the witness had not testified.[1]

Defendant's claim that his attorney failed to object to an improper rebuttal witness must also fail. After defendant presented testimony of a restaurant employee concerning a video tape from the restaurant's security camera, the prosecution called a detective who testified that no such tape existed. Defendant argues that his trial counsel should have objected to this last statement because the detective testified to something about which he had no personal knowledge. Although he did not object on the grounds that the detective testified to matters beyond his personal knowledge, defendant's counsel thoroughly cross-examined the detective on this point. The decision to attempt to impeach the witness rather than object to his testimony constituted a matter of trial strategy. *People v Rockey,* 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Further, we are satisfied that this rebuttal testimony did not affect the outcome of the trial.

Defendant next asserts that the trial court should have granted his motion for a new trial because the jury's verdict was against the great weight of the evidence. A trial court's decision to grant or deny a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

A trial court may grant a motion for a new trial based on the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.*, 647. However, two narrow exceptions to this standard exist. *Id.*, 643-644. The first occurs when the "the testimony contradicts indisputable physical facts or law." *Id.*, 643-644. The second is "where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror." *Id.*, 644.

In the instant case, defendant asserts that the jury's verdict was against the great weight of the evidence because the two complainants gave testimony that contradicted that of the officer who arrested him. The cashier, Gail McSwain, stated that when defendant entered the restaurant, he was "very drunk," but Officer Greg Alcala testified that he did not believe that defendant was intoxicated. Additionally, Diane McSwain, a second employee, testified that, after she fled, she observed defendant 's movements inside the restaurant for approximately ten minutes while Gail telephoned the police. However, Officer Alcala stated that he and his partner arrived on the scene in approximately one minute and that they captured defendant forty-five seconds later.

Despite these conflicts, the testimony does not preponderate heavily against the jury's verdict. Gail McSwain identified defendant as the robber both at the scene of his arrest and at trial and stated that the police arrived within five minutes of her call. Although the witnesses gave different accounts of how long it took the police to respond, all of the times given were

[1] To the extent that defendant argues that a trained investigator might have secured the missing tape, such a conclusion would be pure speculation.

approximations and were within a few minutes of each other. Under *Lemmon*, these discrepancies in the testimony provide insufficient grounds for granting a new trial.

Defendant also argues that the testimony showed that it would have been extremely difficult or impossible for a person of his size to climb over the counter and through the metal security bars separating the front of the restaurant from the kitchen. All of the witnesses presented on the issue stated that it would be possible for defendant to accomplish this feat and only one said that it would be difficult. Furthermore, both employees testified that they saw defendant crawl through the bars on the night of the robbery. Because defendant presented no evidence showing that this testimony contradicts the physical facts, he is not entitled to a new trial.

Defendant next contends that the verdict was against the great weight of the evidence because the two restaurant workers disagreed as to whether a weapon was used during the robbery. He correctly states that only one witness testified to seeing a weapon. However, she testified that the other witness had escaped from the restaurant before defendant pulled out a knife. Further, the jury convicted defendant of one count of armed robbery and one count of unarmed robbery. Therefore, we find that the verdict was not against the great weight of the evidence and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Lastly, defendant argues that he was denied the right to a jury drawn from a venire representing a fair cross section of the community. The Sixth Amendment entitles a criminal defendant to an "impartial jury drawn from a fair cross section of the community." *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire.

Despite the existence of this right, we find that defendant in the instant case is precluded from raising the issue on appeal. Challenges to the composition of a jury must be asserted in a timely manner. *People v McCrea*, 303 Mich 213, 278; 6 NW2d 489 (1942). In a case dealing with the same alleged errors in the Kent County jury selection process as the instant case, this Court stated that in order to properly preserve a challenge to the jury array, a party must raise the issue before the jury is empanelled and sworn. *People v McKinney*, 258 Mich App 157, 160-161; 670 NW2d 254 (2003). The *McKinney* Court held that because the defendant failed to object to the composition of the jury array, she forfeited appellate consideration of the issue. *Id.* Defendant's appeal in the instant case must similarly fail because he did not object to the composition of the jury array until he filed his first motion for a new trial five months after the trial court impaneled the jury.

Defendant argues that he could not have challenged the composition of the jury array earlier, because the error in the selection process did not come to light until after his trial. At the time of the trial, Kent County officials maintained that the jury selection system was functioning

properly even though it was not. However, this was the case in *McKinney* as well, and the Court, nevertheless, found that the issue was not properly preserved.[2]

Affirmed.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

[2] Defendant's reliance on *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988), is misplaced. Amadeo concerned the cause and prejudice standard for federal habeas corpus review. Further, *Amadeo* is factually distinct from the instant case. Unlike in *Amadeo*, no evidence has been presented to show that the basis for defendant's claim was not reasonably available to his attorney, or that Kent County officials intentionally interfered to keep the underrepresentation from coming to light.