STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2005
v	No. 254124 Bay Circuit Court
LESELIE DONALD MCDONALD, Defendant-Appellant.	LC No. 03-010564-FC

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. He was sentenced to twelve to thirty years' imprisonment and appeals as of right. We affirm.

Debora Finkbeiner, the bartender and manager of Stretch's Curve Bar, was working on July 18, 2003, with Harvey Booms, another bartender. At the end of the shift, the front door was locked, but the back door had not yet been locked. Suddenly, two men came running in the back door. One man held a gun, the other held a pipe, and they hollered, "it's a robbery, give me your money." Finkbeiner was standing near the bar, but Booms was sitting at a table across from her, dividing their tips. Booms' friend, Ryan Freeborn, was also present in the bar. The money from the bar had been taken downstairs, part of it stored in the filing cabinet and part of it stored in the liquor cabinet. The gunman followed Finkbeiner downstairs and instructed her to put the money from the filing cabinet in a Crown Royal liquor bag. After she emptied the register drawers, the gunman said, "there's more." Finkbeiner brought the money from the liquor cabinet and put it in the bag. After she told the gunman there was no more money, he ran out the door. At that time, Finkbeiner could see that the robbers were African American males, dressed in black.

Although the robbers were dressed in black with black bandanas covering a portion of their faces, Booms recognized the men because he used to work with them at a restaurant. Booms knew the men by their nicknames "Q" and "Little Man." He kept his head down as instructed by the robbers. However, he did peer through his fingers and was able to identify defendant as the man who held the pipe during the robbery. Booms felt betrayed because he was friends with both robbers, had been to defendant's home before, and knew defendant's stepfather

and cousin. Defendant had been in the bar with his stepfather playing pool one week before the robbery. Because Booms only knew the men by their nicknames, he directed police to an individual who could provide their real names.[1] Within a couple of days of the robbery, Booms received a phone call telling him to "stay quiet, shut up" about the robbery.[2] Booms indicated that it sounded like defendant's voice, but he was not completely certain.

Police were given information that a girlfriend of one of the suspects resided on Catherine Street. Police went to a residence located at 519 Catherine Street. When police arrived on the scene, four males were seated on the porch at 518 Catherine Street. Two of the men ran into the home upon seeing police. Police went to the home where the robbery suspects were found, hiding in the basement. One of the men who came out of the basement was defendant. During a search of the home, a Crown Royal bag was discovered in an upstairs bedroom inside a box.

Defendant initially denied any involvement in the robbery to police. However, he later gave a statement acknowledging his participation. Police also received a statement from defendant's accomplice, who told police that the gun used in the robbery was only a toy gun. This information regarding the accomplice's statement was brought out by the defense at trial. Following a jury trial, defendant was convicted of the two counts of armed robbery and the conspiracy charge, but was acquitted of the two counts of possession of a firearm.

Defendant first alleges that trial counsel's decision to introduce the co-defendant's statement, which implicated defendant, constituted ineffective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). A defendant bears the heavy burden of overcoming the presumption that trial counsel's representation was effective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Furthermore, a defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). When an evidentiary hearing is not held regarding effective assistance, this Court's review is limited to mistakes apparent on the record. *Id*. at 139.

Furthermore, the defense may not waive objection to admission of evidence before the trial court, then raise the admission as error on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). "To hold otherwise would allow defendant to harbor error as an appellate parachute." *Id*. Counsel may not rely on such a procedure in the event of jury failure. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995). Moreover, decisions regarding the

[1] Police contacted Tabitha Voss, a Ruby Tuesday's manager. She was able to provide the names of the robbers and their nicknames. She testified that defendant utilized the nickname "Little Man."

[2] Booms had caller identification, and police were able to trace the number to a female. The phone number of the call to Booms belonged to defendant's sister.

evidence to be presented, the witnesses to be called, and the questions posed are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We do not substitute our judgment for that of counsel addressing matters of trial strategy, and we will not assess counsel's competence with the benefit of hindsight. *Id*. at 76-77.

Review of the record reveals that trial counsel purposefully admitted the co-defendant statement to negate the elements of the felony-firearm charges by asserting that the gun used in the robbery was merely a toy. The contention that trial counsel sacrificed the firearm charges at the expense of challenging the robbery charges is not supported by the record. In light of defendant's own statement and the identification by his former co-worker, the challenge to the weapon offenses was completely reasonable and ultimately effective. The record does not support the assertion that there was a basis to challenge the identification of defendant by his former co-worker. This victim testified that, although he kept his head down, he knew both perpetrators when he worked with both men at a restaurant. He recognized their voices and had seen defendant in the bar approximately one week before the robbery. The victim's identification of the men by their nicknames allowed the police to track defendant and his accomplice to a home where they fled upon seeing the police. A Crown Royal bag, similar to the one utilized in the robbery, was located at the home where defendant was found. Thus, it was completely reasonable for the defense to admit evidence that would negate the elements of the firearm charges, even when it involved incriminating statements by a co-defendant.[3] Under the circumstances, defendant has failed to overcome the presumptions governing effective assistance and trial strategy. *Riley, supra*.

Defendant next alleges that it was reversible error for the trial court to admit irrelevant and prejudicial evidence of drugs into the trial. We disagree. The trial court's decision regarding admission of evidence is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). Defendant contends that the admission of this evidence was improper other acts evidence, irrelevant, and more prejudicial than probative. MRE 404(b)(1) prohibits the admission of evidence that a defendant committed other crimes, wrongs, or acts to prove the character of a person in order to show conformity therewith. However, other acts evidence may be admitted under certain circumstances. Prosecutors are entitled to give the jury an intelligible presentation of the full context in which disputed events

[3] We note that defendant has alleged that the admission of the incriminating statement by the co-defendant was erroneously admitted in violation of the Confrontation Clause, US Const Am VI, Const 1963, Art 1, § 20. This clearly is not the case. The admission of this statement was not brought in through state action (i.e, by the prosecutor) against defendant, but rather, was purposefully elicited by the defense to challenge the weapon charges. Moreover, we note that alleged violations of the Confrontation Clause are reviewed in light of plain, outcome determinative error, see *People v McPherson*, 263 Mich App 124, 131-132; 687 NW2d 370 (2004), and the defendant's own statement or confession may be examined on appeal when determining whether a Confrontation Clause violation was harmless. *People v Etheridge*, 196 Mich App 43, 47; 492 NW2d 490 (1992). Even if defendant had been able to establish a violation of the Confrontation Clause, plain, outcome determinative error could not be established where defendant himself admitted his participation in the robbery. *Etheridge, supra*. Thus, the attempt to elevate this issue to a violation of the Confrontation Clause is without merit.

took place. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). "Relevant evidence is any fact that is of consequence to the determination of the action." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Relevant evidence is admitted to provide the trier of fact with as much useful information as possible. *Id*. Evidence of motive is highly relevant, particularly in circumstantial cases or cases where the only witness is the accused. *Id*. at 453.

The prosecutor did not seek to admit the statements that the money from the robbery was used to buy drugs as a prior bad act. Rather, the prosecutor sought introduction to establish the motive for the robbery or to place the robbery in context. Accordingly, we cannot conclude that the trial court's decision constituted an abuse of discretion. *Washington, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette