

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES SCOTT GARNER,

Defendant-Appellant.

UNPUBLISHED

February 3, 2005

No. 251010

Wayne Circuit Court

LC No. 03-005302-01

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 37 ½ to 70 years on the robbery conviction, to be served consecutively to the mandatory two-year term for felony-firearm. He now appeals as of right. We affirm.

Defendant first contends that the trial court erred in its instructions to the jury in that it overemphasized the elements of armed robbery and somehow dissuaded the jury from considering a not guilty verdict. Defendant waived any claim of error by answering in the negative when the court asked if there were any problems with the jury charge. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

Defendant next contends that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233; 661 NW2d 553 (2003) (citations omitted).]

Defendant first contends that counsel was ineffective for failing to object to the tracking dog evidence because a proper foundation for its admission was not established. “Where the admissibility of evidence is disputed, the burden establishing a proper foundation rests with the party seeking admission.” *In re Brock*, 193 Mich App 652, 669; 485 NW2d 110 (1992), rev’d on other grounds 442 Mich 101; 499 NW2d 752 (1993). The prosecutor did not lay a proper foundation for admission of the evidence, see *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972), presumably because defendant did not object to admission of the evidence. Whether the prosecutor could have laid the proper foundation had a timely objection been raised is impossible to determine from this record. Even if we assume that a proper foundation could not have been laid, defendant has nonetheless failed to establish that he was prejudiced by the admission of tracking dog evidence.

Officer Percin testified that the dog left the store, went north out the alley and wandered around in the vicinity of Newburgh and Palmer, ending up approximately 125 yards from the Mill Point subdivision. The dog did not lead the officers to defendant or to a place the other evidence showed him to have been and did not turn up any evidence from the robbery. Had the jury not heard that the dog followed a track that ended not far from the Mill Point subdivision, it still had evidence that the robber fled into the alley on foot, that one victim positively identified defendant as the robber, and that just about the time police responded to the reported robbery, defendant appeared on foot in the backyard of a friend who lived in the Mill Point subdivision and announced that he had money to pay a debt. Under the circumstances, it is unlikely that had the tracking dog evidence been excluded, the outcome of the trial would have been different.

Defendant next contends that counsel was ineffective for failing to obtain an expert to testify about the inherent unreliability of witness identification testimony or at least request a special instruction regarding same. These same arguments were considered and rejected in *People v Cooper*, 236 Mich App 643, 656-658; 601 NW2d 409 (1999). Accordingly, we find defendant’s contention to be without merit.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff

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COOPER, J. (*concurring*).

I concur with the majority that defendant's convictions and sentences should be affirmed. However, I write separately to note my disapproval of the trial court judge repeating the armed robbery instruction as such emphasis was neither required nor requested. Repetitive and lengthy instructions on a charged offense lead to confusion and overemphasizes the charge. *People v Reece*, 9 Mich App 108; 155 NW2d 870 (1967). See also *People v Ames*, 60 Mich App 168, 171-172; 230 NW2d 360 (1975); *People v McGuire*, 39 Mich App 308, 319-320; 197 NW2d 469 (1972). However, in light of the significant evidence against defendant, this error did not likely affect the outcome of defendant's trial.

/s/ Jessica R. Cooper