

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 20, 2012

v

JOHNATHAN WILLIAM CURRY,
Defendant-Appellant.

No. 302701
Wayne Circuit Court
LC No. 09-022875-FC

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 42 months to 15 years in prison for his carjacking conviction, and two years in prison for his felony-firearm conviction. For the reasons set forth below, we affirm.

I. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that his carjacking conviction was against the great weight of the evidence. “An appellate court will review a . . . great-weight issue by deciding whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). “Further, the resolution of credibility questions is within the exclusive province of the [trier of fact].” *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009).

To establish the offense of carjacking, the prosecutor must prove: (1) that the defendant took a motor vehicle from another person; (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle; and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998); MCL 750.529a. The victim stated that defendant pointed a revolver at her chest and demanded the keys to her Ford Edge. Defendant then took the keys and drove away in the Edge. The victim further testified that she was able to look directly at defendant and that she looked him in the eyes.

Defendant argues that the victim's identification of him was implausible because she did not mention the scar below his eye and she described him to police as much shorter than he actually is. However, the victim testified that she merely told police that the carjacker was taller than she was, and she used herself as a point of comparison. Defendant is, indeed, taller than the victim. Further, the victim immediately identified defendant in a photo array. She also identified defendant in court and provided a description to police that otherwise matched defendant. For these reasons, the trial court found the victim's identification of defendant to be credible. Moreover, two police officers also identified defendant as one of the men who had the keys to the victim's stolen car later on the day of the crime. Because three people identified defendant at different stages of the crime, defendant's carjacking conviction was supported by ample evidence.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective. Because defendant failed to preserve his ineffective assistance of counsel claim, this Court reviews his claim for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). The determination whether a defendant was deprived of his constitutional right to counsel through ineffective assistance is reviewed de novo on appeal. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

A defendant asserting that he was deprived of the effective assistance of counsel bears the burden of demonstrating both deficient performance and prejudice, and he thus bears the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* In reviewing a claim of ineffective assistance of counsel, this Court will not substitute its judgment for that of counsel regarding trial strategy, and that a strategy failed does not render counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

We disagree with defendant's assertion that counsel was ineffective for failing to object to the victim's identification of defendant, or failing to make a motion to have defendant seated in the gallery during the identification. A decision not to object has been held to be sound trial strategy. See *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). The decision whether and when to make a motion are also matters of trial strategy and professional judgment that are entrusted to a defendant's trial counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Defendant has failed to overcome the presumption that counsel's decisions constituted sound trial strategy.

Defense counsel could have reasonably decided that cross-examination would be a better method of attacking the victim's identification than an objection or placing defendant in the gallery, particularly in light of the victim's prior identification and the identification of defendant by police. Rather, defense counsel was able to highlight inconsistencies in the victim's identification to the police, in the photo array, and in court. Defendant has failed to show how this decision constituted deficient performance.

Defendant asserts that defense counsel should have called an expert to testify about eye witness identification. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and this court will not review them with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398-399; 688 NW2d 308 (2004). The failure to call a witness constitutes ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *Id.* Defense counsel capably cross-examined the victim about her vantage point, her level of excitement during the carjacking, and discrepancies between her description of the perpetrator and defendant. He also called a witness to challenge the police officers' assertions that they saw defendant with the keys to the stolen vehicle. Thus, the lack of an expert did not deprive defendant of a substantial defense. Accordingly, defendant has not shown any error on the record and is not entitled to relief on this issue.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Henry William Saad