STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2013
v	No. 310545 Calhoun Circuit Court
FRANK ALLEN LEVI HOLLAND, Defendant-Appellant.	LC No. 2011-003991-FC

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; two counts of unlawful imprisonment, MCL 750.349b; one count of unlawful driving away of a motor vehicle, MCL 750.413; and one count of possession of a taser, MCL 750.224a. The trial court sentenced defendant as a third habitual offender to concurrent terms of 30 to 60 years' imprisonment on the armed robbery counts; 12½ to 30 years on the unlawful imprisonment counts; 4 to 10 years on the motor vehicle count; and 2½ to 8 years on the taser count. Defendant appeals his convictions and sentences by right. We affirm defendant's convictions, but vacate his sentences and remand for resentencing because of a scoring error on offense variable 7. MCL 777.37.

Defendant's convictions arose out of a midnight robbery at an Arby's restaurant, where defendant had formerly worked as a night manager. Defendant entered the restaurant while two of his former co-workers were working, placed a written order for food and drink, and paid for his order. Defendant kept his face concealed by a hooded sweatshirt, but ate and drank in the dining area. None of the individuals acknowledged recognizing each other at that time.

As his former co-workers were preparing to close the restaurant, defendant came to the rear of the restaurant. Defendant's face was now covered by a bandana. Holding what appeared to be a handgun, defendant ordered one of workers to bind the other with duct tape and then to drag the other to a more secluded part of the restaurant. Defendant displayed a folding knife and ultimately bound the remaining worker with trash bags that defendant had retrieved from a storage area; defendant appeared to know where the bags were stored.

Defendant activated a taser, threatened the workers, took their keys, and went to the front of the restaurant to open the cash drawers. While defendant was in the front of the restaurant, one of the workers indicated to the other that the robber sounded like defendant. Soon thereafter,

defendant fled the restaurant, driving away in a car that belonged to one of the workers. The workers unbound themselves and called the police. One of the workers told the responding police officer that he thought the robber was defendant. A police technician collected evidence from the restaurant, including a used straw from the table where defendant had been sitting. The police sent the straw to a crime laboratory for DNA testing.

The police subsequently interviewed the workers a second time and then arrested defendant. At defendant's last known address, the police discovered a duffel bag that contained defendant's identification card, a starter pistol, a taser, and duct tape, among other things. The prosecution introduced the duffel bag and its contents at trial. In addition, the prosecutor presented testimony from the Arby's workers, the police, and two of defendant's former girlfriends.

On appeal, defendant contends that his trial counsel was ineffective for proceeding to trial without the DNA test results and for failing to move for a mistrial when the responding police officer did not appear as a witness. To prevail on these contentions, defendant must show that his counsel made errors and that those errors were so serious that the result of the trial was unreliable. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To demonstrate an error by counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court applies a presumption that counsel was effective, and defendant bears the heavy burden of overcoming that presumption. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). On strategic matters, defendant must show that counsel's decisions did not constitute sound trial strategy. *Id*. at 715.

We conclude that defense counsel's representation was objectively reasonable with regard to the errors alleged by defendant. Regarding the DNA evidence, defense counsel's opening statement and closing argument indicate that counsel made a strategic decision to proceed without the evidence. That this strategy was ultimately unsuccessful, does not warrant reversal on appeal. See *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Moreover, defendant has presented nothing on appeal to indicate that the DNA evidence would have been exculpatory. Without some indication that the evidence would have been exculpatory, defendant cannot establish prejudice arising from his counsel's decision to proceed to trial without the DNA evidence. See *Strickland*, 466 US 668, 694 (to prevail on a claim of ineffective assistance of counsel, defendant must show a reasonable probability that the outcome of trial would have been different but for counsel's error).

Defense counsel's decisions were also objectively reasonable regarding the remedy for the absence of the responding police officer at trial. Defendant contends that the officer's testimony was so significant that his counsel should have moved for a mistrial when the prosecution failed to call the officer as a witness. However, "[a] mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant 'and impairs his ability to get a fair trial.'" *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009), quoting *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Before declaring a mistrial, a trial court should determine whether there is any other way to address the prejudicial effect of the error. See *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

In this case, the responding officer's absence did not require a mistrial. Even if the officer had testified, his testimony would have at best impeached only the portion of the workers' trial testimony related to the first police interview. Aside from that interview, the workers testified at trial that they continued to believe that defendant was the robber. Both workers identified defendant at trial. The strength of these identifications was sufficient to offset any equivocation in the workers' statements to the responding officer. In addition, the circumstantial evidence found in the duffel bag would have been sufficient to support defendant's convictions. Accordingly, the trial court could properly have denied any motion for mistrial. See, e.g., *Waclawski*, 286 Mich App 708. Defense counsel had no obligation to present a futile motion for mistrial. See *People v McGhee*, 268 Mich App 600, 627; 709 NW2d 595 (2005) (failure to pursue a futile objection does not constitute ineffective assistance).

Defendant also argues that the trial court's decision to give CJI2d 5.12—the missing witness instruction—was an inadequate remedy for the responding officer's absence. We disagree. If a prosecutor does not call a named witness at trial, the trial court may instruct the jury in accordance with CJI2d 5.12, which reads, "[Witness name] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case." CJI2d 5.12; see also *People v Cook*, 266 Mich App 290, 293, nn 3, 4; 702 NW2d 613 (2005).

We review for abuse of discretion a trial court's decision regarding a missing witness instruction. *People v Eccles*, 160 Mich App 379, 389; 677 NW2d 76 (2004). We conclude that the trial court was within its discretion to use the missing witness instruction as the remedy for the responding officer's absence. Defense counsel pointed out in closing argument that the responding officer's absence from trial allowed the jury to infer the officer's testimony would have been unfavorable to the prosecution. This instruction properly apprised the jury of credibility issues regarding the workers' statements to the responding police officer. This Court presumes that jurors follow jury instructions. See *People v Fyda*, 288 Mich App 446, 465; 793 NW2d 712 (2010). In sum, we find no ineffective assistance that warrants reversal of defendant's convictions.

Defendant's sentences, however, must be vacated because the trial court erroneously assessed 50 points against defendant for offense variable (OV) 7, MCL 777.37. OV 7 requires that 50 points be assessed against an offender when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The statute defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).

The record in this case demonstrates that defendant's conduct was very similar to the conduct this Court addressed *People v Glenn*, 295 Mich App 529, 532; 814 NW2d 686, (2012), lv gtd 491 Mich 934 (2012). In *Glenn*, the Court vacated an armed robbery sentence on the ground that there was no evidence to support the assessment of OV 7 points against the offender. The *Glenn* offender had entered a gas station carrying an "airsoft" gun that looked like a sawed-off shotgun. *Id*. at 531. The offender knocked one of the gas station employees down with the butt of the gun, hit the other in the head, took money, and then fled. *Id*. The Court explained that the offender's conduct did not meet the definition of "sadism" because "no evidence showed

that the victims were subjected to extreme or prolonged pain or humiliation." 295 Mich App at 533. The *Glenn* Court also rejected the prosecution's contention that the offender's conduct was "designed to substantially increase the fear and anxiety a victim suffered during the offense." *Id*. The Court concluded:

> While defendant may have used more violence than would be strictly necessary to complete an armed robbery, it cannot be said that his conduct was "designed to substantially increase the fear and anxiety" beyond the fear and anxiety that occurs in most armed robberies. The plain language of OV 7 reveals that it was meant to be scored in particularly egregious cases involving torture, brutality, or similar conduct designed to *substantially* increase the victim's fear, not in every case in which some fear-producing action beyond the bare minimum necessary to commit the crime was undertaken. [*Id*. at 533-535 (citations omitted).]

Like the offender in *Glenn*, defendant in this case displayed a non-lethal gun. Also, as in *Glenn*, there was no evidence in this case of prolonged pain or humiliation: neither of the complainants were injured, the robbery lasted no more than 20 minutes, and the complainants were able to unbind themselves within minutes of the time the robber fled. Although both complainants testified that they were afraid, there is no indication that defendant's conduct was designed to substantially increase their fear beyond the already heightened fear involved in being a robbery victim. According to the *Glenn* precedent, the record in this case is insufficient to support the OV 7 score. The scoring error requires a remand for resentencing. *People v Jackson*, 487 Mich 783, 793; 790 NW2d 340 (2010).

Defendant also challenges the scoring of OV 8, which requires a trial court to assess 15 points against an offender if "a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1). A trial court may assess 15 points for OV 8 even if the victim voluntarily moved to another location. See *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). For purposes of OV 8, a victim's movement to a more secluded area can warrant an assessment of points, because the victim is concealed from potential rescuers. *Id*. at 648.

In this case, the trial testimony indicated that defendant ordered one of the workers to drag the other to the back of the restaurant. The testimony also indicated that the back area was a more secluded part of the restaurant. This evidence was sufficient to support the trial court's conclusion that a victim was asported to a place of greater danger for purposes of OV 8.

Defendant's convictions are affirmed; his sentences are vacated, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell