

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
March 13, 2014

v

GREGORY GLENN THOMPSON,  
Defendant-Appellant.

No. 314939  
Kalamazoo Circuit Court  
LC No. 2012-001227-FH

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Before: MARKEY, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for breaking and entering a building with intent to commit a felony, MCL 750.110, and larceny in a building, MCL 750.360. The trial court sentenced defendant under MCL 769.12 as a fourth offender to 28 months to 20 years for the breaking and entering conviction and 18 months to 8 years for the larceny conviction. We affirm.

On August 19, 2012, Myron Moore and Christie Moore heard a window break at about 10:00 p.m. After going to a window, Myron witnessed a heavysset African-American man walk out of the Eastwood Bait and Tackle (the shop) and leave on a bicycle. While responding to Christie Moore's 911 call, Officer Michael White came upon defendant about seven blocks east of the shop riding a bicycle. On August 24, 2012, Officer Bret Hake interviewed defendant on an unrelated case. Hake read defendant his *Miranda*<sup>1</sup> rights, and during the interview defendant admitted that he broke into the shop on August 19, 2012.

We review de novo defendant's claim that insufficient evidence supported that he perpetrated the crimes. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence in a light most favorable to the prosecution to determine whether a reasonable juror could find that the prosecution proved the essential elements of the charged offense beyond a reasonable doubt. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011). We must draw all reasonable inferences and makes credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The prosecution can establish the elements of a crime from circumstantial evidence and reasonable inferences arising from that evidence. *Nowack*, 462 Mich at 400.

In the instant case, a reasonable juror could find that the prosecution proved that defendant perpetrated the crimes beyond a reasonable doubt. First, Myron testified that the man left the shop on a bicycle. White found defendant riding a bike about seven blocks east of the shop on the same side of the road and traveling in the same direction as the perpetrator. Second, according to White, defendant matched the suspect's description perfectly, including his height, weight, age, and clothing. Third, defendant offered White an alibi story about coming from a friend's house, but defendant could not give the friend's last name or say where he lived. Fourth, defendant had on his person a wad of dollar bills, totaling \$208. The shop's owner testified that there was about \$230 to \$240 in the shop's cash register that night. Finally, defendant confessed to perpetrating the crimes during an interview with Hake. Viewing this evidence in a light most favorable to the prosecution, a reasonable juror could find that the prosecution proved beyond a reasonable doubt that defendant perpetrated the crimes.

There is no merit to defendant's argument that Hake's testimony about his interview with defendant lacks credibility because there was no corroborating evidence of defendant's confession. A jury is the sole judge of the facts and is in the best position to determine the credibility of a witness's testimony. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). The credibility of a confession, including whether the statement was made at all, are for the trier of fact to determine. *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981). Thus, it was for the jury to determine the credibility of Hake's testimony and decide whether defendant made the confession. This Court is required to make all credibility choices in favor of the jury's verdict. *Nowack*, 462 Mich at 400.

Defendant also argues that he was denied effective assistance of counsel when trial counsel failed to move for a *Walker*<sup>2</sup> hearing to determine the voluntariness of his statement to Hake. Because defendant failed to move for a new trial or a *Ginther*<sup>3</sup> hearing, this Court's review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a defendant must show that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id.*

An accused's statements during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). An accused's waiver of his *Miranda* rights

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<sup>2</sup> *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

<sup>3</sup> *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

is voluntary if it is made in the absence of police coercion. *Id.* “A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Id.* at 264-265.

“Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant points to no evidence in the record indicating that his waiver of the *Miranda* rights was the result of police intimidation, coercion, or deception, i.e., involuntary. Accordingly, based on the record, any motion for a *Walker* hearing would have been futile. Trial counsel is not ineffective for failing to make futile motions. *Sabin*, 242 Mich App at 660. Defendant’s ineffective assistance of counsel claim is without merit.

We affirm.

/s/ Jane E. Markey  
/s/ Kurtis T. Wilder  
/s/ Christopher M. Murray