

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 23, 2014

v

JACK FENLEY THIEL,

Defendant-Appellant.

No. 316632
Wayne Circuit Court
LC No. 13-000706-FH

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of fourth-degree fleeing and eluding, MCL 750.479a(2). We affirm.

I. FACTS

On July 16, 2012, Officer Jeffrey Falkenstein (Falkenstein) was monitoring traffic when he observed a motorcycle accelerate away from a traffic light at about 70 to 80 miles an hour. Falkenstein followed the motorcycle into a turnaround. Falkenstein pulled behind the motorcycle and turned on his overhead lights. The motorcyclist turned around and looked at Falkenstein. Although the incident occurred at night, streetlights illuminated the area. Falkenstein saw the motorcyclist's face for 5 to 10 seconds while at a distance of 10 to 12 feet. The motorcyclist was not wearing a helmet, and Falkenstein observed the motorcyclist had something printed on his left arm. At trial, Falkenstein identified defendant as the motorcyclist.

Falkenstein ordered the motorcyclist to shut the motorcycle off. The motorcyclist proceeded through the turnaround, and accelerated away from Falkenstein. Falkenstein pursued the motorcyclist for approximately 3 to 4 minutes before stopping due to safety reasons. The entire incident was captured on video by a camera in Falkenstein's vehicle. The video was played for the trial court, and it shows the motorcyclist's face when he turns to look at Falkenstein.

On August 6, 2012, Falkenstein saw a motorcycle that matched the one from the chase. Falkenstein spoke with an unidentified individual who stated he owned the motorcycle and presented Falkenstein with a copy of the motorcycle's title. Defendant's name was listed on the title. Falkenstein ran defendant's name in the Law Enforcement Information Network (LEIN)

system, which is linked with the Secretary of State (SOS) database. Falkenstein found an image of defendant in the SOS database and used that image to identify defendant as the motorcyclist.

Defendant testified he was not in the area that the chase occurred on July 16, 2012. Defendant claimed that he previously owned the motorcycle, but traded it for a truck in September 2011. Defendant's ex-girlfriend, Sarah Myers (Myers), testified that she went with defendant to trade the motorcycle. Myers also testified that defendant has several Chinese symbols tattooed on his left arm. Myers physically pointed to the location of the tattoos on defendant, and indicated they are located on the back of defendant's upper left arm, between the shoulder and elbow.

Regarding Falkenstein's identification of defendant as the motorcyclist, and the video evidence, the trial court stated:

Now, I looked at [the video] three times. To me the person on that bike is unmistakably the defendant. I mean there he is and it's as clear as a bell. It's his body type. It's his profile. It's his jaw line. I was particularly looking at that because Mr. Thiel has a little bit of an overbite. And, and there it is right there on video. So I mean I'm satisfied that that's him on the bike.

* * *

Well, anyway, I don't find any of the defense evidence to be credible. It is largely non-credible and/or clueless. The, the People's evidence is solid. And the identification of the defendant as the biker is is [sic], is credible and believable.

Falkenstein actually made a very, I thought, persuasive and good witness. And I actually had an opportunity to see a, you know, a less vivid presentation of the defendant's image on, on video than Falkenstein saw, and I too came away with the firm belief that it was the defendant on the bike.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues the prosecution did not present sufficient evidence of identification to support his fourth-degree fleeing and eluding conviction, MCL 750.479a(2). We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012). All evidence is reviewed in the light most favorable to the prosecution, *id.*, and "[a]ll conflicts in the evidence must be resolved in favor of the prosecution," *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

"[I]t is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Defendant's identification as the motorcyclist was first established by Falkenstein's testimony. Falkenstein testified that the streetlights illuminated the

area, and he got a “very good look” at the motorcyclist’s face. Falkenstein saw the motorcyclist’s face for 5 to 10 seconds, from a distance of 10 to 12 feet. The motorcyclist was not wearing a helmet, so his face was unobstructed. Falkenstein identified defendant as the motorcyclist after he searched the LEIN system for defendant’s name and found an image of defendant in the SOS database. At trial, Falkenstein again identified defendant as the motorcyclist.

Falkenstein’s identification of defendant as the motorcyclist was also supported by Myers’s testimony. During the attempted traffic stop, Falkenstein observed that the motorcyclist had something printed on his left arm. Myers testified that defendant has several Chinese symbols tattooed on the back of his upper left arm. At the court’s request, Myers physically pointed to the location of these tattoos between the shoulder and elbow on the back of defendant’s upper left arm. The trial court found that Myers’s description of the tattoos and their location on defendant corresponded with Falkenstein’s description of the printing he observed on the motorcyclist’s left arm. At trial, a video of the chase taken from Falkenstein’s vehicle was admitted into evidence, and played for the court. The trial court compared defendant’s body type, profile, and jaw line, particularly the overbite, to the motorcyclist in the video, and found that defendant was the motorcyclist. This video, combined with the testimony of Falkenstein and Myers, was sufficient evidence to identify defendant as the motorcyclist.

Defendant argues that Falkenstein’s identification was not credible, challenging Falkenstein’s ability to clearly see the motorcyclist during the pursuit. However, on appeal, this Court may not interfere with the trier of fact’s role in determining a witness’s credibility. *Kanaan*, 278 Mich App at 619. See also, MCR 2.613(C) (“[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.”). Falkenstein testified that he had a clear and unobstructed view of the motorcyclist’s face. The trial court found Falkenstein to be a persuasive witness, and found his identification of defendant as the motorcyclist to be credible. This Court cannot interfere with the trial court’s determination. See *Kanaan*, 278 Mich App at 619.

Defendant also argues that there was overwhelming evidence to indicate defendant was not the motorcyclist who eluded Falkenstein on July 16, 2012. Defendant points to two pieces of conflicting evidence in this argument. The first is Myers’s testimony, which corroborates defendant’s testimony, that defendant traded the motorcycle in September 2011 and did not have the motorcycle in 2012. The second is that Falkenstein testified that the motorcyclist had tattoos on his left arm, but a still photograph from the video shows the motorcyclist with no tattoos on his left arm. Defendant’s argument lacks merit.

On appeal, “[a]ll conflicts in the evidence must be resolved in favor of the prosecution.” *Kanaan*, 278 Mich App at 619. Although defendant and other witnesses testified that defendant sold the motorcycle in September 2011, Falkenstein positively identified defendant as the driver of the motorcycle he pursued on July 16, 2012. In addition, the trial court was shown the video and the still photograph, and determined defendant was the motorcyclist. As the finder of fact, the trial court was entitled to weigh the evidence and resolve all conflicts. See *id.* The trial court found the defense witnesses and evidence to be incredible. Resolving this conflicting testimony in favor of the prosecution, as this Court must, *id.*, sufficient evidence was presented to support defendant’s fourth-degree fleeing and eluding conviction.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's also argues that his trial counsel was ineffective for failing to present defendant's actual tattoos as evidence. We disagree.

"A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). Because defendant failed to move for a new trial or file a motion for a *Ginther*¹ hearing, this Court's review is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To demonstrate ineffective assistance of trial counsel, the defendant must meet two requirements. "First, the defendant must show that counsel's performance fell below an objective standard of reasonableness Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). "[A] defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defendant argues that his trial counsel was ineffective for failing to have defendant show his tattoo markings to the trial court. Defendant claims that a still photograph from the police video shows the motorcyclist with no tattoos on his left arm, therefore, showing defendant's tattoos would clarify that he was not the motorcyclist. "[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and [this Court] will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). Falkenstein testified to seeing printing on the motorcyclist's left arm. Additional evidence of defendant's tattoos, located on his left arm, would have merely strengthened the prosecutor's case. Therefore, defense counsel's decision not to show defendant's actual tattoos was sound strategy.

Even if trial counsel's performance was unreasonable, defendant is unable to establish prejudice. Defendant argues that it is reasonably probable he would not have been convicted if he had been able to show the trial court his actual tattoos. However, evidence of his tattoos was admitted through Myers's testimony. Myers testified to the location of the tattoos, physically pointed to their location on defendant's arm, and gave a detailed description of the tattoos. The trial court found Myers's testimony regarding the description and location of the tattoos to be consistent with Falkenstein's description of the printing he observed on the motorcyclist. Thus, the same evidence that would have been observed by defendant showing his tattoos to the trial

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

court was admitted through Myers's testimony. Therefore, defendant was not prejudiced by being unable show his tattoos to the trial court.

Further, defendant's identity as the motorcyclist was proven by more than the tattoo evidence. Falkenstein identified defendant as the motorcyclist based on his view of the motorcyclist's face, and after viewing the police video, the trial court also identified defendant as the motorcyclist. The trial court noted the similarities in body types, profiles, and jaw lines, specifically overbites, between the motorcyclist and defendant. Based on these physical attributes, as well as Falkenstein's positive identification, the trial court found defendant to be the motorcyclist. Because defendant was identified as the motorcyclist based on his physical attributes, not just the tattoo evidence, it is not reasonably probable that allowing defendant to show his actual tattoo markings would have resulted in a different outcome. Thus, defendant has failed to demonstrate that he received ineffective assistance of counsel.

Affirmed.

/s/ Michael J. Riordan

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot