

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LOYD SCOTT,

Defendant-Appellant.

UNPUBLISHED

January 22, 1999

No. 200255

Wexford Circuit Court

LC No. 96-004841 FH

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of unarmed robbery, MCL 750.530; MSA 28.798. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, fifteen to thirty years' imprisonment. We affirm, but remand for resentencing.

Defendant first argues that he is entitled to a new trial because he was denied due process where the prosecutor violated the terms of a discovery order with regard to a video surveillance tape and a booking photograph. We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). "A criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 199269, issued 10/23/98), slip op p 8. In order to establish a violation of this right, a defendant must prove (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* In the instant case, the record reveals that defendant received the video surveillance tape from the gas station four days before trial. With regard to defendant's receipt of the booking photograph during trial and the other discovery violations raised by defendant, defendant has failed to articulate how the prosecutorial omissions deprived him of the opportunity to present a meaningful defense. See *Davie*, *supra* at 599. Because defendant has not shown that he was

prejudiced by the prosecution's failure to comply with the discovery order, we cannot conclude that the trial court abused its discretion in admitting this evidence.

Defendant next argues that he is entitled to reversal because a police officer's testimony referenced defendant's criminal history. We disagree. The complained-of testimony was elicited by defense counsel, who had knowledge of the items that had been seized from defendant's car and were listed in the search warrant return. The police officer's testimony appeared neither improperly interjected nor deliberate, and was, in fact, responsive to defense counsel's question. The matter was handled outside the presence of the jury; therefore undue attention was not drawn to the fact that defendant had a criminal history. Defense counsel did not request a cautionary instruction, maintaining that it would be futile. Finally, the evidence presented by other witnesses against defendant was strong. See *People v Holly*, 129 Mich App 405; 341 NW2d 823 (1983).

Defendant argues that he was denied the effective assistance of counsel in violation of his due process rights when counsel failed to suppress a suggestive in-court identification by two witnesses. A defendant that claims that he has been denied the effective assistance of counsel must establish 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. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

There is no need to establish an independent basis for an in-court identification where there has been no improper procedure involved. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995). Here, defendant argues that two in-court identifications were inadmissible because neither witness had identified defendant prior to the trial or the preliminary examination. Such an allegation presents "a credibility issue that was properly before the jury to determine." *Id.* Furthermore, it is clear from a reading of the transcript that defense counsel on cross-examination vigorously attacked the ability of the witnesses to properly identify defendant. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Defense counsel's actions were not objectively unreasonable and did not deprive defendant of a fair trial.

Defendant next argues that the lower court improperly scored certain offense variables used in the sentencing guidelines and that this resulted in a longer sentence. Defendant has failed to present a legally cognizable claim. A putative error in the scoring of sentencing guidelines is not a basis upon which an appellate court can grant relief. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998); *People v Mitchell*, 454 Mich 145, 175-178; 560 NW2d 600 (1997).

Defendant next contends that his sentence is disproportionate. We disagree. Defendant has an extensive criminal history. A trial court does not abuse its discretion in imposing a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant is unable to conform his conduct to the

laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Finally, defendant argues that the trial judge erred when he used three convictions arising out of the same transaction to adjudicate defendant as an habitual offender fourth. We agree. To be convicted as an habitual offender fourth, the fourth offense must be preceded by three convictions of felony offenses, and each of those three predicate felonies must arise from separate criminal incidents. *People v Preuss*, 436 Mich 714, 717; 461 NW2d 703 (1990). In the present case, the trial judge improperly used three felony convictions arising from the same criminal incident to sentence defendant as a fourth habitual offender. Defendant is entitled to resentencing as a second habitual offender, MCL 769.10; MSA 28.1082.

Affirmed and remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

/s/ Michael R. Smolenski