STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED February 23, 2001
v	No. 217345 Wayne Circuit Court
MARVIN L. MAYWEATHER, Defendant-Appellant.	LC No. 98-006613

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was sentenced to four to fifteen years' imprisonment for the armed robbery conviction and two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to convict him of felony-firearm because the evidence did not establish that he possessed a "firearm." A firearm is described in MCL 8.3t; MSA 2.212(20) as "any weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion," excluding BB guns. Defendant maintains that this definition implies that a firearm must also be operable. He contends that no evidence at trial established the operability, caliber, means of propulsion, if any, or other characteristics of the alleged weapon, and therefore the evidence was insufficient to establish that he possessed a "firearm" within the statutory meaning.

Defendant's argument concerning operability is misplaced. "Operability is not and has never been an element of felony-firearm." *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991). Direct examination established that the robbery occurred in a lighted area. Complainant testified that she had an unobstructed view of the gun and that she was close enough to touch it. While complainant could only describe the gun as "dark," she stated that she thought she knew the difference between a revolver and an automatic handgun but could not tell the difference in this specific instance. There was no cross examination of complainant on any aspect of the firearm. Moreover, defendant's motion for directed verdict did not address this subject. Thus we conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict defendant of felony-firearm. See *People v Perry*, 172

Mich App 609, 432 NW2d 377 (1988) (Evidence was sufficient to establish felony firearm when victim felt what she believed to be the tip of a gun).

Defendant next contends that his conviction must be reversed because the trial court's jury instruction, regarding the elements of felony-firearm, did not include a definition of "firearm." Defendant did not object to the jury instructions as given. Absent an objection, relief is only granted in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). The instruction as given "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). We therefore found no manifest injustice and decline to further consider this issue.

Next, defendant claims that he was denied due process when the trial court refused to suppress his identification at a pretrial lineup and the subsequent in-court identification. At trial, defendant argued that the lineup was impermissibly suggestive because defendant was older than the description complainant had given police. Defendant also argued that he was of a lighter complexion than the other lineup participants. On appeal, defendant asserts that the complainant's description was too vague for police to even place defendant in a lineup. Defendant also suggests that the skullcaps worn during the lineup impermissibly altered his appearance. Lastly, defendant maintains that police photographed him prior to the lineup and that this picture was shown to complainant.

We review a trial court's decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994); *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). Upon defendant's motion to suppress the lineup identification and in-court identification, the trial court held an evidentiary hearing. Complainant testified that she was robbed at gun point and that she got a good look at the robber. She reported the robbery to police that day, describing the robber as an African-American male, approximately twenty-one to twenty-four years old, with a medium complexion, short Afro haircut, and a mustache. Approximately ten months later, complainant saw a man that she recognized as the robber crossing the street. Again, complainant called the police and about a month later the police requested that she view a lineup.

The police conducted a line-up of six participants. According to the officer, these individuals possessed similar weight, complexion, and overall characteristics. Once in the observation room complainant immediately identified defendant as her robber. An attorney was present at the lineup and did not make any objections. At the evidentiary hearing, complainant denied three times that police showed her any photographs before the lineup. There was no evidence presented that police used improper procedures in conducting the lineup. The trial court admitted the identification.

Complainant had ample time to see her robber and defendant failed to establish that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996), lv den 454 Mich 853; 562 NW2d 203 (1997). To sustain a due process challenge to a pretrial identification, defendant must establish "that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, *supra* at 302, citing *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972). Generally, physical differences between lineup participants and the

suspect do not, alone, constitute impermissible suggestiveness. *Id.* at 312. Rather, such differences go to the weight of the identification, not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). The trial court did not err in admitting the identification testimony.

Finally, defendant asserts that he was denied effective assistance of counsel. Defendant bases this claim on the fact that his counsel failed to call the arresting officer and defendant as witnesses at the evidentiary hearing to establish the circumstances of his arrest. Moreover, defendant claims counsel was inadequate in failing to question the police or defendant about an alleged photograph taken of defendant prior to the lineup. Defendant also points to his counsel's failure to call defendant as a trial witness to testify on this own behalf. In order to establish ineffective assistance of counsel, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Because there was no *Ginther*[1] hearing, the Court's review of this issue is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). There was no evidence on the record of counsel's ineffectiveness during the evidentiary hearing or trial.

Likewise, there was no evidence presented that defendant was photographed before the lineup. Rather, complainant denied three times during the evidentiary hearing that she was shown any photographs before viewing the lineup. Based on complainant's denial and with no further proof presented, defendant has not shown that his counsel's failure to call the arresting officer or defendant to testify regarding the alleged photograph resulted in prejudice.

Defendant also claims that defense counsel was ineffective because she failed to put defendant on the stand to testify on his own behalf. Defendant contends that his only defense was a sworn denial that he committed the crime. He maintains that he had no criminal record with which to impeach his testimony and that an attorney of ordinary skills and training would have called defendant to the stand. The decision of whether to call a defendant to testify is considered a matter of trial strategy and this Court will not substitute its judgment for that of trial counsel. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). At most, defendant's testimony would have set up a credibility contest with complainant, who was

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

"certain" at trial that defendant was the man who robbed her. Thus, defendant has failed to show that his testimony would have changed the trial result and has not established that his counsel was constitutionally ineffective for failing to call him to testify.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper