STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES FREEMAN,

Defendant-Appellant.

UNPUBLISHED
January 29, 2002

No. 227327
Wayne Circuit Court
LC No. 99-007882

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Following a jury trial, defendant James Freeman was convicted of carjacking,[1] armed robbery,[2] and possession of a firearm during the commission of a felony.[3] The trial court sentenced Freeman to concurrent prison terms of eighty-one months to twenty years' imprisonment for the carjacking and armed robbery convictions, and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

On July 29, 1999, at approximately 2:30 a.m., Eugene Brooks was at a Citgo gasoline station located at Asbury Park and Fenkell in the City of Detroit. Brooks, who was driving his niece's 1998 Geo Prism, had stopped at the pumps in front of the station, an area he described as very well lit. Brooks observed a man walking out of the gasoline station, which was also "[w]ell lit," with "a young lady." Brooks was able to see this man "very well" because the lighting was "[v]ery good" and the man was only about ten or fifteen feet away from where he was.

Brooks got out of his car and walked to the side of the gasoline station, which was well lit and allowed him to "see very well." While standing at the side of the building, Brooks observed the man, who was standing at a distance of approximately twenty feet, say something to his companion before the man reached "down into his pants to get something." The man pulled a gun out of his pants, walked over to Brooks, pointed the gun at his head, and said "[g]ive me

[1] MCL 750.529a.

[2] MCL 750.529.

[3] MCL 750.227b.

your m***** f***ing keys before I blow your m***** f***ing head off." The man also demanded Brooks' money as Brooks was looking straight at him. Complying with the demand, Brooks threw his car keys and money to the ground. After retrieving the car keys and money, the man got into Brooks' car and drove away from the gasoline station. In all, Brooks observed the man for two or three minutes during the incident.

The next afternoon, Brooks was standing in his doorway on Lyndon Street when he saw the man who had robbed him the previous night drive past in the stolen Geo Prism. The man parked the car at the corner of the street, got out of the car, and went into a house. Brooks then called the police.

Several Detroit police officers responded to Brooks' call. The officers waited for the man to leave the house. When the man finally left the house, Brooks had another opportunity to observe him, this time as the man returned to the stolen car accompanied by two other men. The police watched this transpire and stopped the man, with his two passengers, as the man drove away in the car. The officers removed the man from behind the wheel of the car and placed him under arrest. The police then took the man to Detroit Police Headquarters.

While at headquarters, after being advised of his constitutional rights and agreeing to talk to police, the man made the following statement:

> I was walking up Fenkell and I saw a guy over by the dumpster peeing. The dumpster is right on the side of the gas station. I went up to the guy, pulled a gun on him and said 'Give me your money. I need some money.' The man threw the car keys at me and handed me two dollars. After I got the two dollars I backed up, picked up the car keys and took the man's car. It was by the gas pump. It was the only car there so I knew it was his."

The man admitted to the police that he used a .380 caliber handgun during the robbery and that he took the victim's money and car.

The next day, Brooks went to the police station to identify his assailant. He "instantly" picked the man, Freeman, out of a lineup of five men. Detroit Police Officer Robert Ennis confirmed that Freeman was in the lineup with five other individuals and that Brooks identified Freeman as the perpetrator. According to Officer Ennis, Freeman was represented by counsel during the lineup procedure. Some time before trial, defense counsel filed a motion, without a supporting brief, to suppress the identification evidence. However, the trial court never conducted a *Wade* hearing.[4]

During voir dire, the trial court informed the prospective jurors of the prosecutor's burden to prove Freeman's guilt beyond a reasonable doubt, explaining at length:

> Let me explain to you a couple of principles of law that will apply to this case as they apply in every criminal case, and then we will get a few questions from the attorneys. But the first principle that I want you to understand is a

[4] See *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

principle that applies in criminal cases, and it says that any person accused of a crime is presumed to be innocent.

* * *

The other principle says that in a criminal case the responsibility or burden of proving the case rest with the prosecuting attorney. *The prosecuting attorney has the responsibility to prove each and every element of the offense that is being charged here beyond a reasonable doubt*. That responsibility starts with the prosecuting attorney, that responsibility stays with the prosecuting attorney, that responsibility does not shift to the defense, so that the defense is under no obligation to say or do anything in order to prove his innocence. The burden is on the prosecuting attorney . . . . And [prospective juror] Ploucha, that's a little bit different from your experience in the civil case. Now, you remember when you received your instructions there, when they started talking about the standard of proof that was needed in order to decide the case, they talked about a preponderance of the evidence, whoever was able to garner . . . over 51 percent of the evidence in their favor, they won the case.

* * *

[In a civil case, it's] a slight tipping of the scales one way or another, 50 plus determined the outcome. *In this case I've indicated to you that since this is a criminal case, that the standard is much more. I've indicated that the standard is beyond a reasonable doubt. So you have a little steeper mountain to climb*.

* * *

Now, the terms that we've used here, we talked about *beyond a reasonable doubt*. And sometimes that is somewhat confusing to people who are not involved in the system on a regular basis. In the movies or TV, we always hear the statement that someone is required to prove the case beyond all doubt. You've heard that I'm sure in a trial on TV. They say you've got to prove the case beyond all doubt. That is not true. *The standard is beyond a reasonable doubt.* I'm sure you've heard the expression that you have to prove the case beyond a shadow of a doubt, beyond a shadow of a doubt. And again that is not true. *The standard here is beyond a reasonable doubt*. And when you make that determination, you use common sense and everyday experience . . . . And I'm going to give you this one illustration before we turn it over to the attorneys for questions.

* * *

Let's say, [prospective juror] Denny, that you're out looking for a house and you contact a real estate broker, tell them what you want in a house, they say we have a number of houses that suit your specifications. So you go out with the realtor to a house and you look at the house, and going in from the outside it's a very beautiful house, the neighborhood is nice, the school system, everything that

you want is there. You get into the house and you go upstairs and you look in one of the bedrooms around the ceiling and you can see the paint peeling and the watermarks and the plaster seems to be cracking in this room. And then you go into the basement and you smell, it smells like water has settled in the basement, and you look around the borders around the walls and you see watermarks and you see some dampness. Now, is there anything about that that would make you have a reason to doubt whether you want to go along with that purchase?

JUROR #7: Well, if there's a reason, do an investigation.

THE COURT: It's a reasonable doubt, there, isn't is?

JUROR #7: Yes.

THE COURT: So you say to the realtor, this house has some problems, it might need a new roof, there's some definite plumbing problems and they might be substantial, so I'm not, I don't want to go through with this, show me something else. And they take you someplace else and you see another house. And this house is better, look[s] better than the one that you left. And you make a tour and then you say I'm going to get someone who knows about houses. You have a friend who knows everything about houses, whether the plumbing, the electricity and all that stuff, and you get the person in and they go over and they say this house is in tiptop condition, everything is wonderful, water, plumbing, electricity, everything. So you go back and you look at the house and you go upstairs to the bathroom and the bathroom is painted powder blue. And you say, I really can't stand that color, I really can't. I don't like that color. Now, is that a reason to doubt whether or not you're going to buy that house, Miss Denny?

JUROR #7: No.

THE COURT: That's just a minor detail, isn't it[?]

JUROR #7: I can paint.

THE COURT: That's right. So does everyone see what we're driving at? *Look for something substantial, something that using common sense makes you hesitate*. You hesitated when they showed you the first house because you had something that you could look at that was a reason to doubt. The second time there was no reason to doubt, it was just a minor detail.[5]

At trial, Brooks again identified Freeman as the man who robbed him at gun point. Freeman, however, denied committing the charged offenses. He claimed that he got the car from a "crackhead" the day after the carjacking. He said that he was coerced into making the statement to the police and that the contents of the statement were untrue The jury, however, found Freeman guilty of carjacking, armed robbery, and felony-firearm.

[5] Emphasis added.

II. Jury Instructions

A. Standard Of Review

Freeman argues that the trial court's preliminary instructions concerning reasonable doubt were improper. He claims that the trial court erred in informing the prospective jurors that the criminal standard of proof is "a little steeper" than the civil preponderance standard, using the example of two home purchases to illustrate reasonable doubt, and instructing the prospective jurors to "look for something substantial" as reasonable doubt. Because Freeman did not object to the jury instructions at trial, we review this issue for plain error affecting his substantial rights.[6]

B. Analysis

We review jury instructions in their "entirety to determine whether the trial court committed error requiring reversal."[7] Somewhat imperfect instructions do not require us to reverse a defendant's conviction as long as the instructions "fairly presented the issues for trial and sufficiently protected the defendant's rights."[8] "To pass scrutiny, a reasonable doubt instruction . . . must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt."[9] As this Court explained in *People v Jackson*:[10]

> An instruction defining reasonable doubt may not shift the burden of proof by requiring the jurors to have a reason to doubt the defendant's guilt. Rather, the instruction must convey to the jurors that a reasonable doubt is an honest doubt based upon reason. It is a state of mind that would cause the jurors to hesitate when acting in the graver and more important affairs of life.

To be sure, however, reasonable doubt instructions do not contain "magic" words. As the United States Supreme Court noted:

> [S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson v Virginia*, 443 US 307, 320, n 14; 99 S Ct 2781; 61 L Ed 2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof."[11]

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[6] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[7] *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

[8] *Id.*

[9] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

[10] *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988) (citations omitted).

[11] See *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

Freeman does not contend that the trial court impermissibly shifted the burden of proof to him from the prosecutor in this instruction. Indeed, the instruction plainly indicates that the trial court informed the prospective jurors that it was always the prosecutor's duty to prove Freeman's guilt beyond a reasonable doubt. Nor does Freeman fault the trial court for failing to emphasize which formal standard applies in a criminal case because the trial court mentioned numerous times that the standard was "beyond a reasonable doubt." Rather, the crux of Freeman's argument is that the trial court erred in describing the nature of this standard, making it easier for the prosecutor to prove his guilt than the reasonable doubt standard requires.

As Freeman points out in his appellate brief, the reasonable doubt standard is fairly difficult to describe and efforts to describe it often only create more confusion.[12] Nevertheless, the critical flaw to his argument is that Freeman takes snippets of the trial court's instructions out of context. In actuality, not only does this depart from the way we view jury instructions,[13] it misrepresents what the prospective jurors heard from the trial court.

For instance, the trial court did not tell the prospective jurors that the standard of proof in a criminal case is only "a little steeper" than the standard in civil cases, as Freeman would have us believe. In fact, the trial court stated that the standard in civil cases is "a slight tipping of the scales one way or another, 50 plus determined the outcome." In contrast, the trial court noted, "In this case I've indicated to you that since this is a criminal case, *that the standard is much more*. I've indicated that the standard is beyond a reasonable doubt."[14] Speaking metaphorically, the trial court said that this standard of proof presents "a little steeper mountain to climb." The image of scaling a mountain to meet the standard of proof illustrates the daunting task any party with a burden of proof must satisfy. By using the "steeper" language, though modified with the adjective "little," the trial court clarified that the prosecutor's burden of meeting the standard was even harder because this was a criminal trial.

Though lengthier than the mountain climbing analogy, the trial court's illustration of what would constitute a reasonable doubt by distinguishing between two different circumstances a home buyer might encounter was also directly related to the trial court's suggestion that a reasonable doubt might be "something substantial, something that using common sense makes you hesitate." In fact, the United States Supreme Court has approved of similar reasonable doubt formulations emphasizing both substantiality and hesitation.[15]

The instructions in this case, considered as a whole, explicitly and sufficiently conveyed that the prosecutor had the burden of proving the case beyond a reasonable doubt. The trial court specifically indicated that the "responsibility or burden of proving the case rest[s] with the prosecuting attorney," that the "prosecuting attorney has the responsibility to prove each and every element of the offense that is being charged here beyond a reasonable doubt," and that

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[12] See, e.g., *Holland v United States*, 348 US 121, 140; 75 S Ct 127; 99 L Ed 150 (1954).

[13] See *Canales*, *supra*.

[14] Emphasis added.

[15] *Victor*, *supra* at 20-21, citing *Holland*, *supra* and *Taylor v Kentucky*, 436 US 478, 485-486; 98 S Ct 1930; 56 L Ed 2d 468 (1978).

"responsibility starts with the prosecuting attorney, that responsibility stays with the prosecuting attorney, that responsibility does not shift to the defense." The trial court also repeatedly indicated that any doubt must be based on reason. Furthermore, the trial court clarified that the proper standard was not beyond "all doubt," or "beyond a shadow of a doubt," but rather, beyond a reasonable doubt. Unlike the situation in *Cage v Louisiana*,[16] the trial court in this case did not instruct the prospective jurors that a reasonable doubt is a doubt that would give rise to a "grave uncertainty," nor that it was similar to a "moral certainty." Consequently, in this case, we do not have cause to share the concern the United States Supreme Court expressed in *Cage* "that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause."[17] We are satisfied that the instructions as a whole did not constitute plain error affecting Freeman's substantial rights.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Freeman contends that the pretrial lineup procedure in which Brooks identified him was unduly suggestive, thereby affecting the integrity of Brook's in-court identification. Relying on this conclusion, Freeman argues that his trial counsel did not provide him the effective representation to which he is entitled under the Sixth Amendment when defense counsel failed to ensure that there was a *Wade* hearing or otherwise challenge the lineup procedure before or during trial. We review constitutional questions de novo,[18] a standard that is particularly relevant in this case because the legal test we apply to ineffective assistance of counsel issues does not require us to defer to the trial court to any extent.

B. Ineffective Assistance Of Counsel In The Context Of The Lineup

As this Court explained in *People v Knapp*,[19]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991),

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[16] *Cage v Louisiana*, 498 US 39, 41; 111 S Ct 328; 112 L Ed 2d 339 (1990), overruled in part on other grounds in *Estelle v McGuire*, 502 US 62, 72, n 4; 112 S Ct 475; 116 L Ed 2d 385 (1991).

[17] *Cage*, *supra*.

[18] See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

[19] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Because Freeman failed to raise his claim of ineffective assistance of counsel in the trial court in a motion for a new trial or an evidentiary hearing, and because this Court denied his motion for such an evidentiary hearing, our review of this issue is limited to errors apparent on the record.[20]

Pretrial identification procedures are unconstitutional if they are so unduly suggestive they indicate, under the totality of the circumstances, that a "'substantial likelihood of irreparable misidentification'" exists.[21] Freeman bears the burden of showing that the lineup was impermissibly suggestive because he was represented by counsel at that time.[22]

Freeman contends that the lineup was unnecessarily suggestive because he had a darker complexion, was taller and heavier, and stood apart from the four other men in the lineup. Freeman claims that these differences are depicted in the photograph taken of the lineup. It is not apparent from the photograph that there was a substantial difference in skin tone between Freeman and the other men in the lineup. Moreover, Freeman was neither the tallest nor the shortest man in the lineup; one of the men was an inch taller than defendant and other men were just an inch or two shorter than defendant. Likewise, although Freeman was slightly heavier than the other men, several of the men in the lineup had similar builds. In all, there was no substantial disparity in the physical appearance of the men in the lineup that would suggest to Brooks which individual to identify as his assailant contrary to Brooks' own recollection. To the extent that their appearances differed slightly, case law makes clear that physical differences between a suspect and other lineup participants generally are relevant as to the weight of an identification, not as to its admissibility.[23] Moreover, that Freeman stood at the end of the line of men, just slightly separated from them but definitely appearing to be a member of the group, did not render the lineup impermissibly suggestive.[24]

Freeman has failed to sustain his burden of showing that the pretrial lineup was so unduly suggestive it tainted Brooks' pretrial and in-court identifications. Because the lineup was not unduly suggestive, defense counsel was not deficient for failing to challenge the lineup before, including in the context of a *Wade* hearing, or during the trial.[25] Having failed this first step of

[20] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[21] See *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2000), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

[22] *People v Barnes*, 107 Mich App 386, 389; 310 NW2d 5 (1981).

[23] See *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997); see also *People v Barnes*, 107 Mich App 386, 389-390; 310 NW2d 5 (1981) (though defendant was among two shortest people in the lineup, lineup was not unduly suggestive); *People v Gunter*, 76 Mich App 483, 490; 257 NW2d 133 (1977) (lineup was not unduly suggestive even though defendant had lightest complexion); *People v Taylor*, 24 Mich App 321, 323; 180 NW2d 195 (1970) (lineup was not unduly suggestive even though only two lineup participants roughly matched defendant's physical characteristics and defendant had darkest complexion).

[24] See *People v Currelley*, 99 Mich App 561, 568; 297 NW2d 924 (1980).

[25] *Currelley*, *supra* at 568-569.

the test for ineffective assistance of counsel focusing on defense counsel's conduct, it is not necessary to determine whether any supposed deficient representation prejudiced Freeman.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.