

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY JOSEPH FOSTER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2002

No. 228266

Oakland Circuit Court

LC No. 2000-171926-FC

ON REHEARING

Before: Kelly, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, he was convicted of felonious assault, MCL 750.82, armed robbery, and two counts of felony-firearm. He was sentenced to fifteen to thirty years' for the robbery conviction, three to eight years' for the assault conviction, and the mandatory two years' for felony-firearm. He appeals by right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that the trial court erred in admitting a composite sketch of him because it constituted inadmissible hearsay. Evidentiary rulings are generally reviewed for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). Defendant failed to preserve this issue because he did not specify the same ground for the objection as raised on appeal. *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Therefore review is precluded unless defendant establishes a plain error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Prior to the adoption of the Michigan Rules of Evidence, this Court ruled that composite sketches were admissible under the res gestae exception to the hearsay rule. *People v Bills*, 53 Mich App 339, 349; 220 NW2d 101 (1974), rev'd in part on other grounds 396 Mich 802, 819 (1976). Other courts which have addressed the issue have found composite sketches admissible, some on the ground that they are not hearsay under rules of evidence similar to MRE 801(d)(1)(C) because they are made from statements of the victim relating to identification of his or her assailant after perceiving him or her. See, e.g., *People v Ciccio*, 236 Ill App 3d 265, 273-274; 603 NE2d 687 (1992), and *State v Motta*, 66 Hawaii 254, 260-262; 659 P2d 745 (1983). Further, some were admissible on the ground that they are not hearsay because, like photographs, they are not statements under rules of evidence similar to MRE 801(a). See, e.g., *State v*

Patterson, 332 NC 409, 416-418; 420 SE2d 98 (1992), and *Harrison v Commonwealth*, 9 Va App 187, 189-190; 384 SE2d 813 (1989). Accordingly, we find that defendant has not shown that plain error occurred. Even if the trial court did err in admitting the sketch, it is unlikely that its admission affected the outcome of the trial because defendant's identification was established by other competent evidence. See *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988).

Defendant next contends that he was denied effective assistance of counsel because his trial attorney failed to object to admission of the sketch on hearsay grounds. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted).]

Defense counsel did seek to exclude the sketch, albeit on different grounds. As discussed above, defendant has not established that the sketch was inadmissible on hearsay grounds and thus counsel would have been no more successful in precluding admission of the sketch had she asserted hearsay as the basis for her motion. Given that counsel did object to admission of the sketch and the trial court did not err in admitting it, counsel was not ineffective. See *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992).

Finally, we have considered the additional issues raised in appellant's pro per supplemental brief.¹ After review, we find them to be without merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh

¹ Administrative Order 1982-7, Standard 11.