

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE BARTOLOMUCCI, JR.,

Defendant-Appellant.

UNPUBLISHED

August 30, 2002

No. 231701

Oakland Circuit Court

LC No. 00-173061-FH

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to seven to twenty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial by the prosecutor's use of a photographic lineup rather than a corporeal lineup. This issue was not preserved for our review because defendant failed to object at trial to the admission of the photographic display identification or the witness' in-court identification of defendant, and did not request a *Wade*¹ hearing. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Therefore, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A photographic lineup should not be used for identification "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *People v Kurylczyk*, 443 Mich 289, 298, n 8; 505 NW2d 528 (1993) (Griffin, J.); see also *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Here, because defendant was not in custody or under arrest at the time of the photographic identification, he could not be compelled to participate in a corporeal lineup. *Id.* We also note that there is no indication that the photographic display was impermissibly suggestive so as to give rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *Kurylczyk*, *supra* at 302.

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Accordingly, defendant has not demonstrated that the use of a photographic lineup was plain error.

II

Defendant argues that he was entitled to counsel at the photographic lineup. Because defendant failed to raise this issue at trial, our review is limited to plain error that affected defendant's substantial rights. *Carines, supra*. "In the case of photographic identifications, the right of counsel attaches with custody." *Kurylczuk, supra* at 302; see also *McCray, supra* at 639. Because defendant was not in custody at the time of the photographic lineup, the right to counsel had not attached.² Accordingly, defendant has not demonstrated plain error on this basis.

III

Defendant next argues that the trial court abused its discretion in allowing the prosecutor to impeach him with his prior convictions for receiving and concealing stolen property over \$100, and uttering and publishing. We need not address this argument because defense counsel conceded the issue at oral argument.

IV

Defendant asserts, in a cursory manner, that he was denied his due process rights when he was sentenced as an habitual offender because he did not receive notice of the prosecutor's intent to seek a sentence enhancement until the day of sentencing. Whether the prosecutor's actions satisfied statutory requirements constitutes a question of law that we review de novo. See *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Due process generally requires reasonable notice of a charge and an opportunity to be heard. See *People v Eason*, 435 Mich 228, 233-234; 458 NW2d 17 (1990). MCL 769.13 provides that a prosecutor must file a notice of intent to seek an enhanced sentence within twenty-one days of the arraignment or the filing of the underlying charge, as well as a written proof of service. MCL 769.13(1) and (2). Failure to timely file a proof of service of the notice can be harmless error. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999).

Here, the notice of intent was filed with the court within twenty-one days of defendant's waiver of arraignment. Although no proof of service is contained in the lower court record, defendant has failed to demonstrate that he is entitled to a reversal of his conviction. Defendant's sentencing memorandum, which is dated seven days before the sentencing date, belies his claim that he was unaware of the prosecutor's intent to seek a sentence enhancement until the day of sentencing. In the memorandum, defense counsel acknowledged defendant's status as a fourth-offense habitual offender, and urged the court to consider the nonviolent nature of his prior crimes, as opposed to mere recidivism. Accordingly, defendant has failed to

² We also note that defendant has failed to assert any "unusual circumstances" that would require the presence of counsel during the photographic identification procedure. See *People v Cotton*, 38 Mich App 763, 769-770; 197 NW2d 90 (1972), and *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994).

demonstrate that he was denied reasonable notice, or that he was otherwise prejudiced in any way. Thus, defendant is not entitled to relief on this basis.

V

Finally, defendant argues that he is entitled to a new trial because defense counsel was ineffective by failing to object to the admission of the results of the photographic lineup, to move for a *Wade* hearing,³ to request an evidentiary hearing to challenge the amount of restitution and his ability to pay, and to object to the lack of notice of the habitual offender enhancement. We disagree.

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing 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 Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Effinger, supra*.

Having considered each of defendant’s contentions, we find that none presents a cognizable claim for relief. First, as previously discussed, use of a photographic lineup was not improper, and defense counsel is not required to make meritless objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Further, defendant has not demonstrated that a motion for a *Wade* hearing would have been meritorious where defendant has presented no evidence, and it is not apparent from the record, that the identification was tainted by suggestive and impermissible pretrial procedures. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims[.]” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Likewise, defendant has failed to present any evidence to support his challenges regarding the amount of restitution or his ability to pay and, thus, there is nothing to indicate that defense counsel should have moved for an evidentiary hearing on the matter. Finally, because the record demonstrates that defendant had notice of the prosecutor’s intent to seek a fourth-offense habitual offender sentence enhancement, any objection regarding lack of notice would have been frivolous. *Darden, supra*. Accordingly, defendant has failed to establish that defense counsel was ineffective during trial. *Pickens, supra; Effinger, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

³ See n 1, *supra*.