STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2004
v	No. 242382 Wayne Circuit Court
TITUS C. WILLIS, Defendant-Appellant.	LC No. 01-008262

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the robbery of a CVS Pharmacy store. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of forty to sixty years for the armed robbery conviction and forty to sixty months for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

I

Defendant alleges that the trial judge erred in allowing Officer Hunter to testify that he believed defendant was the person depicted in the store surveillance videotape. We disagree. We review a trial judge's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). We disagree with defendant's claim that the testimony constituted inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). Hunter's testimony does not fall under MRE 801(c). Hunter was not testifying about anything he or another person said, but about an observation he made and the conclusion he drew from it. See *Hoffman v Hoffman*, 119 Mich App 79, 84; 326 NW2d 136 (1982).

The real substance of defendant's argument is that Hunter should not have been allowed to testify about his observation and conclusion because a jury might defer to his professional expertise as a police detective and accept his conclusion that defendant was the person depicted in the videotape. This argument implicates the rules on opinion testimony and relevance.

MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Hunter's testimony clearly falls within the scope of MRE 701. His opinion that the individual depicted in the videotape and defendant's Secretary of State photograph were the same person was rationally based on his perception. It was also helpful to a clear understanding of his testimony, because it explained how he designed the photo array for Rodney Harrison's identification.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2002). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Aldrich, supra*. Defendant seems to be arguing that Hunter's testimony was unfairly prejudicial because the jurors were likely to be swayed by his testimony, because he was a police officer, and therefore accept his determination instead of making their own. We disagree. The jury had sufficient opportunity to observe defendant's appearance in the courtroom and compare him to the photographs taken from the videos. This process did not involve any skill or experience that elevates a police officer above civilian citizens. Accordingly, there is no apparent reason why the jury would abdicate its own fact-finding responsibility and simply defer to Hunter's determination of the robber's identity.

Moreover, Hunter's testimony did not involve a judgment of defendant's guilt or innocence, or an opinion of how the jury should interpret the evidence. At most, the photographs established that defendant was present in the store. The prosecution never contended that the photographs established anything more. Hunter admitted that he had no personal knowledge whether a robbery was actually committed. To convict defendant, the jury would have to believe Harrison's testimony that defendant robbed him. Consequently, Hunter's testimony did not impinge on the jury's primary inquiry.[1] Defendant's challenges to Hunter's testimony are therefore without merit.

II

Defendant argues that the trial judge erred in denying his motion for a mistrial after Hunter referred to a fingerprint report from a different robbery investigation. We review a trial

[1] In contrast, the case on which defendant relies, *Carson Fisher Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1995), involved a trial court that improperly assigned an expert witness to draw factual conclusions from the evidence, which usurped the trier of fact's function. That did not occur in this case.

judge's denial of a motion for mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial should be granted only where an irregularity is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial. *Id.*

Generally, a witness' unresponsive, gratuitous answer to a prosecutor's question is not grounds for a mistrial unless the prosecutor knows that the witness will give the highly prejudicial testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). "[N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, 'an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). However, this Court has recognized that in some circumstances, a witness' interjection of irrelevant and prejudicial testimony can constitute grounds for a mistrial. *People v O'Brien*, 113 Mich App 183, 209; 317 NW2d 570 (1982). This is especially true where the witness is a police officer who improperly refers to the defendant's prior criminal charges or convictions. *Id.*

Defendant asserts that Hunter improperly interjected a reference to another robbery investigation, and this deliberate injection of irrelevant testimony warrants reversal. We disagree. This case does not involve the circumstance where a prosecution witness provided an unresponsive answer to a prosecutor's question. Rather, Hunter gave a *responsive* answer to defense counsel's question. Defense counsel began to question Hunter about a fingerprint report, and Hunter replied that the report was for a different robbery. Viewed in isolation, Hunter's answer might seem to be an unresponsive interjection, but in the context of the case, it was not. Defense counsel had already established that no fingerprint examination was made in connection with the charged robbery because the crime scene had not been secured. Consequently, any question regarding a fingerprint report could pertain only to another investigation. Defense counsel could have expected Hunter to clarify this when presented with a fingerprint report. If Hunter had not given the explanation, the prosecutor would have been entitled to elicit it to prevent jury confusion.

Granting a mistrial on the basis of a witness' responsive answer to a defense counsel's question would be inconsistent with the general rule that a defendant may not harbor error as an appellate parachute by claiming an appeal to a course of conduct his own counsel deemed proper at trial. *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002). A defendant cannot complain of admission of testimony which he invited or instigated. *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982). Accordingly, this case does not raise the same potential for unfair prejudice that arises when a prosecutor deliberately elicits an improper reference to another offense, or when a police witness gratuitously interjects such a reference.[2]

[2] Defendant relies on *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). Although the Court in *Holly* concluded that the police officer gave a gratuitous, unresponsive answer to a defense counsel's question that was prejudicial, the Court's recital of the facts actually reveals that the officer's statements were responsive to the defense counsel's questions. *Holly* was decided before November 1, 1990, and thus is not binding precedent. MCR 7.215(I)(1). To the extent *Holly* is supportive of defendant's argument, we decline to follow it.

III

Defendant raises several claims of instructional error. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). "Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000); *Gonzalez, supra*.

The trial judge denied defendant's request for a jury instruction that an adverse inference could be drawn from the prosecution's failure to play the entire surveillance videotape for the jury. In *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993), this Court set forth three considerations for deciding whether such an instruction is warranted when the prosecution fails to produce key evidence:

> A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. . . . Where evidence is suppressed, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. [Citations omitted.]

Here, none of these considerations weigh in favor of defendant. Defendant failed to show that the alleged suppression was deliberate. Indeed, defendant has not even shown that any evidence was suppressed. The viewing equipment was not evidence, it was only the means of presenting the videotape, which the prosecution ultimately produced. Defendant has not explained why he could not have made his own arrangements to bring proper equipment to the courtroom had he desired to present the entire videotape. He also has not shown that he requested that the prosecution bring the equipment. Thus, he has failed to satisfy the first two considerations, whether the suppression was deliberate and whether the evidence was requested. *Davis*, *supra* at 514.

Defendant also has failed to show that the defense could have significantly used the evidence. *Id.* Hunter testified that he twice viewed the videotape with defense counsel, and defense counsel never denied this. Nor has defendant asserted that anything in the videotape was exculpatory. The circumstances of this case do not allow for any reasonable inference that the videotape could have been exculpatory. The prosecution has always conceded that the videotape did not depict the weapon, transfer of money, or any other visual proof that a robbery occurred. The prosecution never asserted that the still photographs from the videotape proved anything more than that defendant was in the store at Harrison's cash register at the time Harrison testified he was robbed. Defendant has never explained how the videotape could undermine the prosecution's case against him. Accordingly, there is no basis for concluding that the videotape could have assisted the defense.

In his second claim of instructional error, defendant argues that the trial judge failed to define the term "firearm" for purposes of the felon in possession charge, and erroneously gave the jury the impression that it could find him guilty of this offense even if he did not use an

actual firearm in the robbery. This issue is based on the trial judge's original instructions, and also on the supplemental instructions given in response to the jury's inquiry. There was no error. The supplemental instruction was responsive to the jury's question, and it was not misleading. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003). Although a misunderstanding occurred when the jurors first asked for clarification on this point, the trial judge eventually gave the clear explanation that the felon in possession charge required proof of a real firearm, not an object fashioned to appear as a firearm.

In response to defendant's third claim of instructional error, we conclude that the trial judge properly instructed the jury on reasonable doubt. Defendant claims that the instruction was misleading because it did not explicitly state that a reasonable doubt could arise from a lack of evidence. In *People v Allen*, 466 Mich 86, 92; 643 NW2d 227 (2002), our Supreme Court held that while an "affirmatively misleading definition" precluded the presumption that the jury did, in fact, find guilt beyond a reasonable doubt, this presumption was not overcome where the definition was omitted altogether. Consequently, "[t]he failure to define reasonable doubt is not a structural error, or any error for that matter, because it is not necessary to define this commonly understood phrase." *Id.* Because the jury was instructed "that the prosecutor had the burden of proving beyond a reasonable doubt every element of the crime with which the defendant was charged," defendant "was not deprived of a basic protection," and there was no error. *Id.*

In the instant case, the trial judge did not give a misleading or defective definition of reasonable doubt. Omission of the phrase "reasonable doubt may arise from the lack of evidence" did not raise the threshold of doubt necessary to establish reasonable doubt. Nor did it suggest to jurors that they had to convict defendant if the evidence established a probability of guilt unless they harbored the most serious of doubts. At worst, the omission of the phrase "may arise from the lack of evidence" made the definition incomplete, but it did not make it deficient or defective. Because the problem is one of incompleteness, the reasoning of *Allen*, *supra* at 86, applies. The *Allen* Court reasoned that because the phrase "reasonable doubt" is commonly understood, error arises when the instructions distort that common understanding, not when an instruction is omitted. Here, the trial judge's instructions did not distort the phrase; they merely left out the obvious, namely, that jurors can reasonably doubt defendant's guilt if the prosecution fails to prove guilt. Nothing in the instructions suggested that the jurors could or should convict defendant if the evidence was unpersuasive. Consequently, there was no error.

Defendant also argues that the trial judge erred in instructing the jurors that reasonable doubt cannot be based on emotional reasons, contrary to *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). However, the *Lemmon* Court discussed subjective factors that help jurors assess credibility, not emotional reasons. *Id*. at 646. The trial judge's instructions were not inconsistent with *Lemmon*. The trial judge did not tell the jurors that reasonable doubts had to be based on objective reasons or empirically valid reasons, only that they could not be based on emotional or capricious reasons.

IV

Defendant argues that the trial judge improperly cut off his closing argument when he tried to argue that DNA evidence has often disproved crime victims' eyewitness identification of perpetrators. The trial judge disallowed this line of argument because it raised facts not in evidence. A trial judge has wide, but not unlimited, discretion and authority in the matter of trial

conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The trial judge did not abuse his discretion here when he prevented defendant from arguing facts not in evidence.

V

Defendant contends that the trial judge erred in denying his motion to appoint an expert on eyewitness identification. Unfortunately, it is not clear from the lower court record whether or how the trial judge ruled on defendant's motion. The prosecutor asserts that the motion was granted, but that defendant opted not to call the witness. Defendant maintains that the motion was denied.

Assuming arguendo that the motion was denied, there was no error. A defendant may be entitled to appointment of an expert witness if he "cannot safely proceed to a trial" without the expert's assistance. *People v Herndon*, 246 Mich App 371, 399 n 6; 633 NW2d 376 (2001), quoting MCL 775.15. A defendant must show a nexus between the facts of the case and the need for an expert. *People v Tanner*, ___ Mich ___; 671 NW2d 728 (2003), slip op at 7; *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997). Defendant failed to establish the need for an expert based on this criteria. He has not shown that the defense of mistaken identification involved any complicated arguments that require expert assistance. His claim that individuals are prone to error in recognizing a stranger they have only seen once before is well within the understanding of lay persons. Even if this defense did involve arguments beyond an ordinary person's understanding, his claim would still fail because he has not shown a nexus between the facts of this case and the need for an expert. Harrison's eyewitness identification was not the only evidence establishing defendant as the perpetrator. The prosecution also introduced the surveillance photographs of the person it claimed robbed Harrison, which allowed the jurors to judge for themselves whether Harrison correctly identified defendant.

VI

Defendant's claim of error regarding the trial court's calculation of the sentencing guidelines is without merit. Offense variable 13 ("OV 13") requires the sentencing court to score twenty-five points when there is a continuing pattern of violence involving three or more felonies against a person, including the sentencing offense, within a five-year period. MCL 777.43(1)(b). Defendant's presentence report shows that charges were pending against defendant in the Macomb Circuit Court for armed robberies committed on May 21, 2001, and October 11, 2001, and in the Wayne Circuit Court for an armed robbery committed on June 29, 2001. Thus, in addition to the sentencing offense, there were three or more other felonies against a person within the five-year period.[3] This supports the trial court's score of twenty-five points for OV 13, irrespective of the circumstances surrounding the disputed 1988 murder conviction. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[3] Because the murder conviction occurred more than five years before the CVS robbery, it should not have been considered, regardless of its subsequent procedural history. This Court will not reverse a trial court's decision if it reached the correct result, albeit for the wrong reason. *People v Wilson*, 257 Mich App 337, 359; 668 NW2d 371 (2003).

VII

Defendant argues that both of his appellate attorneys have been ineffective because they failed to obtain a *Wade*[4] hearing transcript and failed to move for a remand for various evidentiary hearings. The test for ineffective assistance of appellate counsel is the same as that for trial counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

A. *Wade* Hearing Transcript.

Defendant avers that the trial judge held a *Wade* hearing on his motion to suppress Harrison's identification, and that neither of his appellate attorneys obtained the transcript. He also claims that their performance was deficient because they failed to obtain trial exhibits, such as the surveillance videotape and still photographs. He also maintains that the trial judge ignored his own pro se motion to compel production of the *Wade* hearing transcript and exhibits.

Unfortunately, it is unclear from the record whether a *Wade* hearing was actually held. There is no record of such a hearing, only the trial judge's written order denying defendant's motion to suppress identification evidence. On the other hand, the trial judge verbally referred to defense motions that it had denied, without indicating whether hearings were held on the motions. Regardless, defendant has not established that any non-production of this alleged transcript is attributable to any error by either appellate counsel.

Furthermore, the existing record precludes the possibility that anything transpired during a *Wade* hearing that could entitle defendant to appellate relief. In *Hornsby*, *supra* at 466, this Court summarized the law governing exclusion of identification evidence when a defendant claims that an identification procedure was unduly suggestive:

> This Court will not reverse a trial court's decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537, 624 NW2d 575 (2001). A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169, 205 NW2d 461 (1973). The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306, 311-312 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). Physical differences among the lineup

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

> participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. *Kurylczyk, supra* at 312 (Griffin, J.), 318 (Boyle, J.). Physical differences generally relate only to the weight of an identification and not to its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

This statement of the law precludes any possibility of relief for defendant based on the allegedly erroneous admission of identification evidence. Although defendant's trial counsel vigorously cross-examined Hunter about the photographic array, he failed to elicit any support for his claim of undue suggestiveness. On the contrary, Hunter stated that he did not use defendant's Secretary of State photograph as part of the array because his smile would have distinguished him from the other subjects. Both the Polaroid photograph of the photographic array and the photographs themselves were introduced into evidence to afford defense counsel the opportunity to point out to the jury any indication of suggestiveness. Moreover, if there were suggestive physical differences between defendant and the other subjects, this would not have led to the exclusion of the identification evidence, because physical differences pertain to the evidence's weight, not its admissibility. *Hornsby, supra* at 466. Finally, the prosecution's case did not depend solely on Harrison's identification testimony; the jurors themselves had the opportunity to compare defendant to the person depicted in the surveillance photographs.

Furthermore, Harrison's unequivocal testimony that he recognized defendant based on their encounter during the robbery, and not from his photograph, would allow his identification testimony to be admitted even if the photographic array could be considered suggestive. See *People v Gray*, 457 Mich 107, 114-116; 577 NW2d 92 (1998). The facts here clearly establish that Harrison had an independent basis to identify defendant. Because the in-court identification would have been allowed even if the photographic array could be characterized as impermissibly suggestive, a *Wade* hearing could not have aided defendant. *Id*.

Because there is no indicia that the *Wade* transcript, if it exists, could contain anything that would serve as a basis for appellate relief, appellate counsel's alleged failure to obtain the transcript cannot be deemed prejudicial error. *Carbin, supra* at 599-600. Consequently, there is no basis here for a claim of ineffective assistance of appellate counsel. This reasoning also defeats defendant's argument that he is entitled to relief due to the trial judge's alleged failure to grant his post-trial motion for production of the transcript.

B. Failure to Obtain Videotape and Still Photographs

Defendant also bases his ineffective assistance of counsel claim on his appellate attorneys' alleged failure to obtain the surveillance videotape and still photographs. This claim is predicated on the assumption that the videotape would enable defendant to show that the still photographs presented to the jury somehow distorted the videotape and falsely depicted defendant as the person in the videotape.[5] This claim is entirely speculative, and thus cannot

[5] We note that in the Standard 11 brief filed by defendant, he filed an affidavit in support of his motion for remand to present evidence of a claim of ineffective assistance. Therein, defendant (continued…)

serve as an argument that either attorney committed a serious error or that failure to obtain the materials was prejudicial. Indeed, defendant's trial counsel viewed the videotape twice, but never indicated that he saw anything exculpatory.

C. *Cronic*,[6] *Strickland*,[7] and *Pearson*[8] Hearings

Defendant's appellate attorneys were not ineffective for failing to seek hearings under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), or *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). These cases both involve the right to effective assistance of counsel under the Sixth Amendment. Michigan law allows for a *Ginther*[9] hearing to establish an evidentiary record for an ineffective assistance of counsel claim. The facts of the instant case do not establish any need for a *Ginther* hearing. Defendant does not claim that either appellate counsel or trial counsel committed any error which could not be reviewed from the existing record. He does not explain why he needed an evidentiary hearing to establish his ineffective assistance of counsel claim.

People v Pearson, 404 Mich 698; 273 NW2d 856 (1979), established a procedure for holding an evidentiary hearing to determine whether a defendant was prejudiced by a prosecutor's failure to satisfy his obligations concerning res gestae witnesses. As discussed *infra*, the record does not support defendant's claim that the prosecutor failed to satisfy his obligations under MCL 767.40a. Consequently, there was no need for a *Pearson* hearing.

VIII

Defendant argues that the trial judge violated the "best evidence rule" when it permitted the prosecutor to introduce still photographs from the surveillance videotape in lieu of showing the videotape itself. The stills, however, qualify as either originals or admissible duplicates under MRE 1001, 1002, and 1003. Accordingly, the trial judge did not abuse his discretion in admitting the still photographs.

We also find no violation of the "rule of completeness." MRE 106. Throughout the trial, prosecution witnesses readily admitted that the videotape did not show the gun or any transfer of money to defendant. Defense counsel had the opportunity to view the videotape, and apparently saw nothing on it to exculpate defendant. Consequently, there was no showing that the still photographs in any way gave a false impression of the complete surveillance recording.

IX

(…continued)

stated that during his interview with Hunter, he acknowledged that he was the person in the photographs.

[6] *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

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

[8] *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979).

[9] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant claims that the trial judge's interventions and rulings during defense counsel's cross-examination of witnesses evinced bias and violated his right to confront the witnesses. This Court reviews claims of judicial misconduct to determine whether the judge's questions and comments evinced partiality that could have influenced the jury to the defendant's detriment. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). A trial judge pierces the veil of judicial impartiality where his conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Paquette, supra* at 340. This Court should review the record as a whole to determine whether the trial judge showed bias against the defendant, and should not take portions of the record out of context. *Id.* Expressions of annoyance or impatience ordinarily are not enough to establish bias and impartiality. *In re Hocking*, 451 Mich 1, 13 n 16; 546 NW2d 234 (1996), citing *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

We have reviewed the relevant portions of the transcript and cannot conclude that the trial judge either committed misconduct or abused its discretion in its rulings regarding cross-examination. The judge properly prevented defense counsel from arguing with witnesses, distorting their testimony, and reiterating questions that had already been asked and answered. Further, the judge did not prevent defense counsel from impeaching Harrison with discrepancies from his prior statements.

X

Defendant raises several issues arising from his displeasure with trial counsel.

A. Denial of Motion for Continuance and Substitute Counsel

We review a trial judge's decision regarding a defendant's motion for a continuance to allow for substitute counsel for an abuse of discretion. *People v Peña*, 224 Mich App 650, 660-661; 569 NW2d 871 (1997). We consider five factors:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial judge's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

Here, defendant failed to establish a legitimate reason for seeking substitute counsel or prejudice resulting from the trial judge's decision. Despite defendant's belief that trial counsel was unprepared, the record shows that counsel had reviewed the surveillance videotape with Hunter, reviewed Harrison's statement to the police, and was prepared to cross-examine witnesses and elicit weaknesses in the prosecution's case. His conduct at trial discloses that he was prepared to present a reasonable defense under the circumstances, and defendant has not demonstrated any way in which he was prejudiced by an alleged lack of preparation.

B. *Cronic* Claim

In *Cronic*, *supra* at 648, the United States Supreme Court recognized that under some circumstances, such as denial of counsel during a critical stage of the proceedings, effective representation is so unlikely that prejudice may be presumed from the circumstances. However, limited preparation time alone does not permit such an inference, absent actual proof of prejudice. *Id.* at 659-660, 666-667. Here, the only *Cronic*-related argument that defendant raises is that defense counsel spent inadequate preparation time on his case. Thus, he has not established a claim under *Cronic*.

C. Effective Assistance of Counsel

In addition to his *Cronic* claim, defendant alleges that trial counsel's performance was so deficient that it deprived him of his Sixth Amendment right to counsel. *Strickland*, *supra* at 668; *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

Two of trial counsel's alleged errors—the failure to waive trial on the felon in possession charge and failure to obtain equipment for showing the surveillance videotape—cannot support defendant's ineffective assistance claims because defendant has not overcome the presumption of sound strategy. Trial counsel reasonably could have believed defendant had a fair chance of acquittal of both robbery and felon in possession, especially where the primary defense at trial was misidentification. He also reasonably could have believed that playing the surveillance videotape might have hurt the defense by defeating his suggestion that the still photographs misrepresented the tape.

The other alleged errors—failure to object to judicial misconduct, failure to object to perjured testimony, and failure to object regarding res gestae witnesses—cannot establish ineffective assistance because they lack factual support. We have already discussed the judicial misconduct claim, *supra*, and will discuss the remaining issues, *infra*.

XI

Defendant claims that the prosecutor violated MCL 767.40a(1), which requires the prosecutor to notify the defendant of all known res gestae witnesses. *People v Burwick*, 450 Mich 281, 288-289, 292; 537 NW2d 813 (1995). A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Defendant claims that the prosecutor failed to notify him of other employees and customers in the store at the time of the robbery. No violation occurred because there was nothing in the record to indicate that any other person who may have been in the store witnessed an "event in the continuum" of the robbery. Harrison testified that no one else saw the robbery, and that the robber did not speak loudly enough for anyone else to hear him. Because there is no support for defendant's claim that MCL 767.40a was violated, there is no need for an evidentiary hearing under *Pearson*, *supra*. Consequently, defendant's other claims regarding the need for a *Pearson* hearing are without merit.

XII

Defendant argues that the prosecutor knowingly elicited perjured testimony when he questioned Harrison about the position of defendant's gun during the robbery. A prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). Review of the record reveals that, at the preliminary examination, Harrison stated that the surveillance video showed that something was in the robber's hand. At trial, however, he neither repeated nor contradicted this assertion. The effect of the omission is that Harrison's trial testimony left out one detail that had a slightly inculpatory effect. Inconsistencies between a witness' trial testimony and prior statements can serve as a basis for impeachment, but they do not establish prosecutorial misconduct based on the knowing introduction of false testimony. Consequently, defendant cannot support his prosecutorial misconduct claim on the minor inconsistency.

At trial, defense counsel did not object to either the allegedly perjured testimony or to the alleged failure to list res gestae witnesses. Accordingly, they are appropriately reviewed under the plain error rule of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id.* Defendant has not demonstrated any error at all, so it is unnecessary to consider the second and third requirements. Because these claims of error lack merit regardless of whether they were preserved, defendant has not demonstrated that trial counsel was ineffective for failing to preserve them.

XIII

Finally, defendant argues that he is entitled to sentence credit for the nine months spent in jail awaiting trial. MCL 768.7a(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

In *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996), our Supreme Court interpreted this provision to mean that a parolee who commits a new offense while on parole must serve the minimum of the previous offense, plus the additional time imposed for the parole violation, before the sentence for the new offense begins to run:

> We conclude that the "remaining portion" clause of § 7a(2) requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve.

Consequently, the trial judge correctly ruled that the sentences arising from the CVS robbery would run consecutively to the term defendant was serving for the parole offense, thus defeating defendant's claim that he is entitled to sentence credit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter