

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD RICHARDSON,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 244068

Wayne Circuit Court

LC No. 01-008786

ON RECONSIDERATION

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carjacking, MCL 750.529a, armed robbery, MCL 750.529, resisting and obstructing arrest, MCL 750.479, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to terms of twenty to forty years for the carjacking and robbery convictions and one to two years for the resisting and obstructing conviction. Those sentences were to run concurrently to one another and consecutively to the mandatory two-year term for felony-firearm. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends¹ that trial counsel was ineffective because he failed to move to suppress the victim's identification testimony. Because defendant failed to raise this issue below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *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

¹ In his Rule 11 brief, defendant raised three issues pertaining to the victim's identification, which are interrelated and will be addressed as one.

overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted).]

The record shows that the victim identified defendant in a lineup. The subjects varied in height and weight, but defendant was not significantly different from the others in those areas. Defendant was not the shortest man in the lineup. He was one of the tallest, but another man was of equal height. Defendant was one of four who were bare-chested. Given that the decision to move for suppression of identification testimony or to request a *Wade*² hearing is a matter of trial strategy, *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985), and that the record does not show that any differences in the subjects were so substantial as to distinguish defendant from the others, *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002), we find defendant's claim to be without merit. Although there were numerous discrepancies in the witnesses' testimony regarding the description of the victim's assailant and of defendant, the credibility of identification testimony is a question of fact for the trier of fact and will not be resolved anew on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant next contends that the trial court erred in scoring Offense Variables (OV) 4 and 19 of the statutory sentencing guidelines. Because defendant did not raise this issue at or before sentencing, the issue has not been preserved for appeal. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). However, there is authority that the issue can be reviewed for plain error or ineffective assistance of counsel if a successful challenge to the guidelines would have altered the guidelines under which the defendant was sentenced. *People v Wilson*, 252 Mich App 390, 394, 396-397; 652 NW2d 488 (2002); *People v Kimble*, 252 Mich App 269, 276-280; 651 NW2d 798 (2002).

The trial court's scoring of OV 4, psychological injury to the victim, MCL 777.34, was supported by the victim's impact statement read into the record at sentencing. Therefore, the trial court did not abuse its discretion in the scoring of that variable, *Hornsby*, *supra* at 468, and counsel was not ineffective for failing to challenge the scoring. Assuming without deciding that OV 19, interference with the administration of justice, MCL 777.49, was improperly scored, see *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), and defendant's offense variable score were reduced by fifteen points, his classification within the sentencing grid would not change. MCL 777.62. Because defendant's minimum sentence was within the appropriate guidelines range, any error was harmless, *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993); *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993), and his sentence must be affirmed. MCL 769.34(10).

Affirmed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens

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