

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT LEE SANDERS,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 246346

Lenawee Circuit Court

LC No. 02-009782-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT LEE SANDERS,

Defendant-Appellant.

No. 246347

Lenawee Circuit Court

LC No. 02-009781-FH

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

The prosecution charged defendant Herbert Lee Sanders with second-degree home invasion, MCL 750.110a(3), in case No. 02-009782-FH; here, defendant was accused of entering the home of Yolanda Lopez without permission on November 28, 2001. The prosecution also charged defendant with one count each of first-degree home invasion, MCL 750.110a(2), and larceny from a building, MCL 750.360, in case No. 02-009781-FH, in which defendant was accused of forcing his way into Lopez's home on December 8, 2001, injuring Lopez in the process, and stealing several compact disc ("CDs") and digital video disc movies ("DVDs"). The cases were tried together before a jury that convicted defendant on all counts. The trial court sentenced defendant as a fifth habitual offender, MCL 769.12, to seventy-six to one hundred twenty months in prison for the second-degree home invasion conviction, ten to twenty years in prison for the first-degree home invasion conviction, and thirty-four to one hundred eighty months in prison for the larceny conviction, each sentence to be served concurrently with one another. Defendant appeals his convictions and sentences from both cases. We consolidated the cases for appeal, and now affirm.

Defendant argues that the trial court improperly admitted testimony from witnesses concerning their identification of defendant during a prearrest photographic lineup, because defense counsel was not present during the lineup and the lineup itself was unfairly suggestive. Defendant failed to object to the identification evidence at trial, and thus has not preserved that issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). However, we may review this issue for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). Reversal is not required unless there is plain error, defined as a "clear or obvious" error, that affected the outcome of the trial. *Id.* Reversal is required only where the plain error results in the conviction of an actually innocent defendant, or where the error seriously affects the fairness or integrity of the proceedings. *Id.* at 763.

First, defendant contends that he had a right to have counsel present during the lineup. "In the case of photographic identifications, the right of counsel attaches with custody." *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Here, as defendant himself points out, the photographic lineup occurred prior to defendant being taken into custody; hence, defendant had no right to have counsel present during the lineup.

Second, defendant contends that the photographic lineup was suggestive because, of the six photographs shown, defendant's picture was the only one in which the subject held a white placard—in the other five, the subjects held black placards. "[A] suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification." *Kurylczyk*, *supra* at 306. In *Kurylczyk*, our Supreme Court rejected the defendant's argument that the photographic lineup from which he was identified was improper because he was the only person photographed wearing clothes matching those reportedly worn by the robber in that case. *Id.* at 303. Here, viewing the totality of the circumstances, we find that to the extent the lineup may have been suggestive, it was not improperly so, as there was no substantial likelihood of misidentification.¹ We therefore hold that there was no error and, *a fortiori*, no plain error requiring reversal. However, were we to conclude that the admission of the identification evidence constituted a plain error, we would nevertheless hold that such error would not require reversal because it did not prejudice defendant.

Defendant further maintains that defendant's trial counsel's failure to object to the admission of the identification evidence at trial constituted ineffective assistance of counsel, and that the trial court erred in refusing to hold a *Ginther*² hearing regarding the matter. Defendant properly preserved this issue by timely filing a post-judgment motion in the trial court seeking either a new trial or an evidentiary hearing pursuant to *Ginther*. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); See also MCR 6.431(A)(2) and 7.208(B)(1). The trial court denied defendant's motion. A trial court's decision whether a defendant was denied the effective assistance of counsel is a mixed question of fact and law; we

¹ Indeed, as defendant points out on in his brief on appeal, Lopez identified a person other than defendant in the lineup despite its alleged suggestiveness.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

review the trial court's findings of fact for clear error, and its constitutional determinations. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant must show that his counsel's performance "was below an objective standard of reasonableness under prevailing professional norms" and that a reasonable probability exists that the outcome of the proceedings would have been different but for counsel's errors. *Sabin (On Second Remand)*, *supra* at 659. Defendant must also "overcome a strong presumption that the assistance of his counsel was sound trial strategy." *Id.* Here, though defendant's counsel did not object to the admission of the photographic lineup and the identification testimony resulting from it, he did cross-examine the police officer, who conducted the lineup, about how defendant's picture differed from the others. We therefore find that defense counsel's decision not to object to the evidence was trial strategy, and that counsel likely allowed the admission of the evidence with plans of discrediting the prosecution's witness with what defendant characterized as the suggestive nature of the array. That this strategy did not work did not render its use ineffective assistance of counsel. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Accordingly, we hold that the trial court did not err in denying defendant's motion for a new trial or a *Ginther* hearing.

Defendant also says that the trial court erred in admitting pictures of Lopez that showed her injuries, which she said that she received after defendant pushed his way into her home. Defendant maintains that these pictures were irrelevant and unfairly prejudicial, and that trial counsel's failure to admit to their admission was ineffective assistance of counsel. We review the trial court's decision to admit the evidence under the *Carines* plain error standard due to defendant's failure to object at trial. *Carines*, *supra* at 761-763. One way in which the prosecution may prove first-degree home invasion is to show that a defendant, after entering a dwelling without permission, committed an assault while another person was lawfully present in that dwelling. MCL 750.110a(2). Given Lopez's testimony that defendant had pushed her, and that she had fallen over and sustained injuries, we find that the photographs were relevant with respect to one of the elements of first-degree home invasion, and any prejudicial effect did not substantially outweigh the probative value of the evidence, MRE 401, 402, and 403, and hold that their admission did not constitute a plain error requiring reversal under *Carines*, *supra*. Furthermore, we find that defendant has not made the necessary showing to overcome the strong presumption that defense counsel's failure to object to the admission of the photographs was sound trial strategy, and hold that defendant was not denied the effective assistance of counsel. *Sabin (On Second Remand)*, *supra* at 659.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood