

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TITUS CURTIS WILLIS,

Defendant-Appellant.

---

UNPUBLISHED

August 17, 2004

No. 246364

Macomb Circuit Court

LC No. 2001-003180-FC

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

A jury convicted defendant of two counts of armed robbery.<sup>1</sup> The trial court sentenced defendant as a fourth habitual offender<sup>2</sup> to ten to twenty years in prison for each armed robbery conviction. Defendant appeals his convictions and sentences, and we affirm.

I

On May 21, 2001, at approximately 3:00 p.m., a man entered a Rite-Aid Pharmacy in Eastpointe with a gun, and demanded that Rite-Aid employees Julia LaMarca and Chris Papadimitriou give him all of the money in the store's cash register. LaMarca began arguing with the gunman, but eventually handed him the money from the cash register when the gunman cocked the weapon and she feared that the gun might be loaded. Meanwhile, a second man, defendant, who was holding a plastic garbage bag, approached Papadimitriou, and told him to fill the bag with cartons of cigarettes. Papadimitriou complied. After taking the money and cigarettes, the two men left the store after being joined by a third man, who apparently served as a lookout.

LaMarca and Papadimitriou later went to the Eastpointe police station to view a photographic lineup. Before viewing the lineup, both victims read and signed a letter, drafted by the police, that stated that the lineup did not necessarily include a picture of the person who committed the crime, and that one viewing the lineup was not required to identify anyone from

---

<sup>1</sup> MCL 750.529

<sup>2</sup> MCL 769.12

the lineup. Papadimitriou viewed the lineup, followed by LaMarca; the two did not talk to each other between viewings. Both Papadimitriou and LaMarca readily identified defendant as the man who carried the garbage bag and demanded that Papadimitriou fill it with cigarettes.

Prior to the preliminary hearing, defendant moved to suppress LaMarca's and Papadimitriou's photographic lineup identifications on the ground that the lineup was unfairly suggestive. The trial court disagreed with defendant, as we do, and denied the motion.

## II

Defendant argues that the trial court erred when it denied (1) his motion to suppress the results of what defendant claims was an unduly suggestive photographic lineup; and (2) his motion for new trial that addressed both the photographic lineup and the "pretrial confrontation procedure" of the preliminary examination, which defendant claims was also unduly suggestive.

### A. Motion to Suppress Evidence<sup>3</sup>

Under Michigan law, a photographic identification procedure may not be so suggestive that it deprives the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "[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." *People v Kurylczuk*, 443 Mich 289, 306; 505 NW2d 528 (1993). The fairness of an identification procedure is evaluated in light of the total circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974).

Our Supreme Court has held that generally a "photographic spread" is not impermissibly suggestive if it contains photographs, other than the defendant's, that are fairly representative of the defendant's physical features. *Kurylczuk, supra* at 304-305. In *Kurylczuk*, 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. *Id.* at 303.

Here, defendant asserted that the photographic array was unduly suggestive because defendant's photo was brighter than the others included in the array and because it was taken from a closer angle than the other pictures, thus making defendant's head bigger than those of the other five men pictured. This fact, if true, does not make the photographic display unduly suggestive. Moreover, at the hearing, the prosecution presented testimony from the relevant police officer that he (1) provided both victims with extensive cautionary instructions before individually showing them the photographic array; (2) advised them that a suspect may or may not have been included in the lineup; and (3) did not encourage them to pick a suspect out of the

---

<sup>3</sup> This Court reviews a trial court's ruling on a motion to suppress evidence for clear error. *People v Oliver*, 464 Mich 184,191-192; 627 NW2d 297 (2001). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

lineup, offer them a reward for doing so, or tell them that it was important to the city of Eastpointe that they identify a subject from the lineup. Furthermore, he testified that both victims identified defendant from the lineup, and LaMarca and Papadimitriou advised him that defendant strongly resembled one of the men who had participated in the robbery. Further, there were a number of photographs in the display that made the identification procedure fair and thus, the procedure did not create a risk of misidentification.

We conclude that the trial court correctly found that the photographic lineup was not impermissibly suggestive. Therefore, we hold that the court did not clearly err in denying defendant's motion to suppress.

### B. Motion for New Trial

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). As we have already held, the court correctly found that the photographic lineup was not impermissibly suggestive. Furthermore, at trial, both victims clearly identified defendant as the person holding the bag during the robbery.

Moreover, we conclude that the identification procedure of the preliminary examination also was not unduly suggestive. Our Supreme Court has recognized that under certain circumstances a one-on-one confrontation between a witness and the accused at a preliminary examination may constitute a suggestive identification procedure.<sup>4</sup> In such cases the test, as in any case where a pretrial identification procedure is challenged, is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification.<sup>5</sup>

Here, the prosecution does not contest defendant's assertion that he was brought into the preliminary examination in shackles and jail garb, nor that defendant was seated next to a codefendant whom LaMarca, the only witness at the preliminary examination, had already positively identified as having been involved in the robbery giving rise to this case. However, LaMarca testified at the hearing that she had observed the robber in question for approximately five minutes during the course of the robbery and stated that the photographic lineup took place a mere eight days after the robbery. Further, while LaMarca admitted that she was not absolutely positive at the photographic lineup that the man she picked was the person who participated in the robbery, at the preliminary examination she testified that defendant was, in fact, the person who participated in the robbery, and pointed to the fact that defendant's facial features, specifically his nose, his mouth, and his eyebrows, were the same as the robber in question's as her basis for identifying defendant. Therefore, we conclude that the trial court correctly found that the one-on-one confrontation between the victim and defendant at the preliminary examination was not impermissibly suggestive. Further, taking all facts and circumstances into account, it is clear that neither procedure resulted in misidentification of the defendant.

---

<sup>4</sup> *People v Solomon*, 391 Mich 767, 767; 214 NW2d 60 (1974), adopting the dissenting opinion of Chief Judge Lesinski in this Court's previous consideration of the case, *People v Solomon*, 47 Mich App 208, 217; 209 NW2d 257 (1973).

<sup>5</sup> *Solomon*, *supra* 47 Mich App at 218-219.

Defendant has also suggested that the photographic identification procedure, as it pertains to LaMarca, was unduly suggestive because a police officer allegedly told her, before she viewed the lineup, that a picture of a suspect was included in the array. For this reason, defendant argues that the trial court erred in permitting evidence of that victim's identification of defendant at the photo array to be presented at trial. Because defendant raises this argument for the first time on appeal, this Court's review is for a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has not established that the police officer actually made the challenged remark. While LaMarca stated at the preliminary examination that the officer had informed her that a suspect was included among the men pictured in the lineup, at trial she clarified that although she had been told that a suspect was included among those pictured in the array, she could not remember if she was told this before or after she viewed the array. Further, the officer insisted, both at the suppression hearing and at trial, that he did not tell either of the victims that a suspect was included among the men pictured in the array. Furthermore, even if the officer did inform one of the victims that the lineup contained a suspect, this Court has held that the fact that a victim is told that a lineup contains a suspect does not render that lineup unduly suggestive. *People v Smith*, 108 Mich App 338, 343-344; 310 NW2d 235 (1981). Thus, we find that the trial court did not commit a plain error that affected defendant's substantial rights when it permitted evidence of one of the victims' identification of defendant at the photo array to be presented at trial.

Accordingly, we hold that the trial court did not abuse its discretion when it denied defendant's motion for new trial.

### III

Defendant says that the trial court abused its discretion when it denied defendant's motion for an expert witness on the issue of misidentification. We review a trial court's denial of a motion requesting the appointment of an expert witness for an abuse of discretion. *In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990).

MCL 775.15 requires that a trial court provide funds for an expert witness on behalf of an indigent criminal defendant if that defendant can show that he needs the expert for a fair trial. Our Supreme Court has interpreted this statute to mean that the defendant must show that a nexus exists between the facts of the case and the need for an expert, and that expert testimony would likely benefit the defense. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). However, even if such a showing is made, denial of a court-appointed expert does not warrant a reversal unless it results in a fundamentally unfair trial. *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997).

Here, none of these elements were met. Defendant sought the use of an expert for the purpose of undermining the reliability of the victims' eyewitness identifications. Yet, defendant was able to call these identifications into question, and did so vigorously, during cross-examination and closing argument. Moreover, jury instructions on the credibility of witnesses and on identification were read to the jury. Because defendant was able to attack the credibility of the eyewitness identifications without expert testimony, defendant has failed to demonstrate the need for an expert. Furthermore, precisely because defendant already was able to attack the reliability of the victims' identifications, defendant has also failed to show that the expert's testimony would likely have benefited defendant. Because defendant had the opportunity to

cross-examine the victims who had identified him as a participant in the crime because he was able to, and in fact did, vigorously challenge the basis of those eyewitnesses' identifications, and because defendant requested, and the court read, jury instructions on the credibility of witnesses and on identification, the trial court's denial of defendant's motion did not result in a fundamentally unfair trial. Further, defendant failed to show how an expert could introduce any relevant testimony on the misidentification issue.

Therefore, we hold that the trial court did not abuse its discretion when it denied defendant's motion for an expert witness.

#### IV

Defendant claims that trial counsel was ineffective in failing to move for the suppression of one of the victims' in-court identification of defendant at the preliminary examination hearing and in failing to subpoena the victims to testify at the suppression hearing held in this case.

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's substandard performance substantially prejudiced defendant. *People v Sabin (On Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). There exists a "strong presumption" that counsel's assistance was effective. *Id.*

Defendant asserts that trial counsel was ineffective when he failed to move to suppress LaMarca's identification of defendant at the preliminary examination. This Court has held that counsel's decision not to move for suppression of identification testimony is a matter of trial strategy. *People v Wilki*, 132 Mich App 140, 145; 347 NW2d 735 (1984). We will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). For this reason, trial counsel's failure to move for suppression of the in-court identification cannot form the basis of an ineffective assistance of counsel claim. Furthermore, as discussed above, the circumstances of the preliminary examination were not unduly suggestive. As a result, there was no basis for suppression of the identification made at that proceeding. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).<sup>6</sup>

We hold that there is no support for defendant's claim of ineffective assistance of counsel.

---

<sup>6</sup> Defendant also maintains that trial counsel erred in failing to subpoena the victims to testify at the hearing on his motion to suppress the results of the lineup. However, defendant has not provided any explanation or support for this claim. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Leonard*, *supra* at 588, nor may he give issues cursory treatment with little or not citation of supporting authority, *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Henry William Saad