STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 7, 2004
v	No. 244910 Wayne Circuit Court
KEVIN L. WALDEN, Defendant-Appellant.	LC No. 01-001034

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 18 to 30 years in prison for the armed robbery convictions, to run consecutive to concurrent terms of two years in prison for the felony-firearm convictions. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel did not move to suppress the pretrial identification of defendant by one of the victims. We disagree. Because defendant failed to move for a *Ginther*[1] hearing or a new trial on the basis of ineffective assistance of counsel, our review of this issue is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

"To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *Id*. at 714. "Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *Id*. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id*.

Defendant argues that his trial counsel was ineffective for failing to move to suppress his pretrial identification by one of the victims on the basis that the pretrial lineup was unduly suggestive, thereby rendering the identification irreparably unreliable. See *People v Hornsby*,

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

251 Mich App 462, 466; 650 NW2d 700 (2002). Specifically, defendant argues that the pretrial identification was inadmissible because only one other person in the lineup had braids in his hair, and because he was the oldest person in the lineup. But "'physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness . . . .'" *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993), quoting *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903; 453 NW2d 681 (1990). Instead, "[d]ifferences among participants in a lineup 'are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up . . . .'" *Kurylczyk*, *supra* at 312, quoting *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988; 469 NW2d 294 (1991).

We find nothing in the record to support defendant's assertion that the pretrial lineup was impermissibly suggestive. The investigator who organized and conducted the lineup testified that it occurred six days after the robbery, and that an attorney was present to monitor the lineup to ensure that it was not unduly suggestive. The investigator testified that of the five men in the lineup, two of them had braids in their hair, including defendant. The investigator also testified that while the other men in the lineup were younger than defendant, he selected individuals for the lineup based on their apparent age rather than their actual age. Further, both the investigator and the identifying victim testified that she immediately identified defendant in the lineup without hesitation. Accordingly, we find that the victim's pretrial identification of defendant was properly admitted at trial. And because trial counsel is not ineffective for failing to bring a futile motion, defendant's trial counsel was not ineffective for failing to move to suppress the victim's pretrial identification of defendant. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also argues that the trial court erred in failing to specifically define the term "firearm" when instructing the jury on the felony-firearm charges. Because defense counsel expressly approved the jury instructions, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, even if the issue had been preserved, we find that the trial court's failure to define "firearm" did not constitute error. It is not incumbent on a trial court to define the term "firearm" in a felony-firearm instruction where there has been no dispute that the object in question is a firearm, and defendant never argued that the weapon at issue was not a firearm. *People v Hunt*, 120 Mich App 736, 742; 327 NW2d 547 (1982). Further, although the definition of "firearm" is included in CJI2d 11.34(7), the use of that instruction is not mandatory. *People v Stephan*, 241 Mich App 482, 495 n 10; 616 NW2d 188 (2000). Accordingly, defendant is not entitled to relief on this basis.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter