STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 249492 Wayne Circuit Court
NATHANIEL CHRISTON, Defendant-Appellant.	LC No. 03-001368-01

Before: Cavanagh, P.J., and Kelly and H Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529. Defendant was sentenced to 30-66 months' imprisonment. We affirm.

The victim in this case was walking on a sidewalk near her vehicle in Detroit around 11:30 a.m. on December 22, 2002 when a green minivan pulled up next to her. The passenger, who was armed with a gun, said to her, "I'm sorry, ma'am, I need your purse. It's Christmas you know." The victim gave him her purse, and the minivan drove away.

The victim got into her vehicle and called 911 from her cellular telephone. The police arrived and escorted the victim to the police station, where she described the robber to an officer who prepared a composite sketch. Two days later, the police used the sketch and identified defendant as the occupant of the passenger seat of a green minivan driving on a street in Detroit. After performing a traffic stop and speaking with defendant, the police were able to associate a name with the sketch. On December 28, 2002, the victim examined a photograph book and selected defendant's photograph from the second-to-last page. Defendant was arrested on January 8, 2003. On January 9, 2003, the victim viewed a police lineup and identified defendant as the robber.

Defendant argues that the trial court erred in denying his motion to suppress the lineup identification because the lineup was unduly suggestive. We review a trial court's decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (Griffin, J.); *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists when the reviewing court is left with a "definite and firm conviction that a mistake has been made." *Kurylczyk*, *supra* at 303; *Harris*, *supra* at 51.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Five men participated in the lineup. At the lineup, the victim overheard a police officer tell someone that the suspect was in position number two. When the officer realized that the victim overheard this statement, he rearranged the lineup participants so that defendant was in position number three. The victim identified defendant, stating that she was "pretty sure" he was the robber. The fact that a victim is told that a suspect is in the lineup does not render a lineup unduly suggestive. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). We therefore conclude that the trial court did not err in admitting the lineup identification.

Next, defendant argues that his conviction is against the great weight of the evidence. Because defendant failed to raise this issue in a motion for a new trial, we review it for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A new trial based on the weight of the evidence should be granted "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Defendant asserts that differences in the testimony of the victim and the police officer with regard to the lineup demonstrate that the verdict was against the great weight of the evidence. The victim believed that six people had participated in the lineup, but the police officer's records showed that only five men participated. There was also a discrepancy about whether the participants spoke during the lineup.

The victim described the robber as a clean-shaven African-American man thirty to thirty-five years old, "chubby" around the jaw, and having short hair and a broad chest. All five participants in the lineup were African-American men with short hair. Three or four of the participants were thick or chubby in the neck, and three had facial hair. Only defendant was over twenty years old.

The victim handed her purse to the robber in broad daylight, looking directly at his face and into his eyes. Within an hour of the robbery, she helped a police officer prepare a composite sketch, spending more than two hours on the sketch. Without viewing the sketch beforehand, she selected defendant from a book of sixty photographs. Without viewing either the sketch or a photograph in advance, she identified defendant from a lineup of five men.

Absent exceptional circumstances, issues of witness credibility are for the jury. *Lemmon, supra* at 642. We will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Thus, we conclude that the evidence does not preponderate heavily against the verdict, and a serious miscarriage of justice will not result. *Lemmon, supra* at 642.

Defendant also contends that the trial court violated his due process rights by admitting into evidence a composite sketch based on the victim's hearsay statements. Because defense counsel failed to object to the admission of the sketch, we review his claim for plain error affecting defendant's substantial rights. *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 must have occurred; (2) the error was plain; (3) and the plain error affected substantial rights, i.e., the defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings)." *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines, supra* at 763.

Before the adoption of the Michigan Rules of Evidence, this Court held that a composite sketch was admissible under the res gestae exception to the hearsay rule. *People v Bills*, 53 Mich App 339, 349; 220 NW2d 101 (1974). In *Bills*, the Court found the sketch to be more reliable than an in-court identification, which is "dimmed by lapse of time and memory." *Id.* The victim in the instant case viewed the robber up close and independently identified him from both a photograph lineup and a live lineup. We therefore conclude that the composite sketch was properly admitted because it was a statement of identification pursuant to MRE 801(d)(1)(C) and the victim was subject to cross-examination.

Defendant's final argument is that his counsel was ineffective for failing to object to the admission of the composite sketch into evidence. Because defendant failed to file a motion for new trial or request a *Ginther*[1] hearing, the issue of effectiveness of counsel has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defense counsel is not required to make futile objections, we find defendant's argument meritless. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood

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