

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RICARDO BEECHAM,

Defendant-Appellant.

UNPUBLISHED

December 29, 2005

No. 255219

Wayne Circuit Court

LC No. 01-004411

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm, MCL 750.84, one count of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to four years six months to ten years for the assault with intent to do great bodily harm conviction, to be served concurrently with his sentence of 135 months to 40 years for the armed robbery conviction. Defendant was sentenced to two years in prison for the felony-firearm conviction, to be served preceding and consecutively to his concurrent sentences for assault with intent to do great bodily harm and armed robbery. We affirm.

I

Defendant's convictions arose from events occurring on January 20, 2001, involving Alicia Stevenson, a retired police officer, and her mother, Barbara Merriweather. While Stevenson backed her car out of the driveway, Merriweather waited on the sidewalk. Defendant approached Merriweather from behind, aimed a gun in her direction and demanded her purse. He then jumped into the rear passenger seat of Stevenson's car. Stevenson grabbed her purse and jumped out of the car. Stevenson ran and defendant followed her. After grabbing her purse, defendant shot Stevenson in the leg. Stevenson attempted to pursue defendant until he entered into an SUV and drove away.

When defendant was arrested in March 2001, Stevenson and Merriweather attended separate corporal lineups. Stevenson attended the first lineup and identified another person as the robber. Merriweather attended a lineup the next day and identified defendant as the robber.

After Merriweather identified defendant, Stevenson was informed by a detective that she had selected someone other than defendant. The detective also told Stevenson defendant's position in the lineup from the previous day. A *Wade*¹ hearing was held relating to Merriweather's lineup, and the trial court found both that the lineup was not unduly suggestive, and that Merriweather had an independent basis for her identification of defendant.

At trial, Merriweather and Stevenson identified defendant as the robber and he was convicted. On January 28, 2004, this Court granted defendant's motion to remand for a *Ginther*² hearing.³ At the conclusion of the hearing, the trial court denied defendant's motion for a new trial. Defendant now appeals.

II

A trial court's decision whether to admit evidence is generally reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, a trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

The determination whether circumstances sufficiently establish the trustworthiness of a statement against penal interest depends, in part, on the trial court's findings of fact and, in part, on its application of the legal standard to those facts. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280, cert den, 519 US 945; 117 S Ct 333; 136 L Ed 2d 246 (1996). Accordingly, this Court uses a clearly erroneous standard in reviewing the trial court's findings of fact and an abuse of discretion standard in reviewing the trial court's decision to exclude the statement. *Id.*

This Court reviews the trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion "exists where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

On appellate review, "effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

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

³ *People v Beecham*, unpublished order of the Michigan Court of Appeals, entered January 28, 2004, Docket No. 244456

III

We first address whether the trial court abused its discretion by not allowing defendant's girlfriend, Raven Harris, to testify at the *Ginther* hearing. Defendant claims Harris would have provided exculpatory evidence that a person named Richard Baker confessed to her that he committed the crime. The trial court excluded Harris from testifying on the ground that her testimony was irrelevant to the issue of whether trial counsel was ineffective. We find no reversible error.

Harris' proposed testimony was cumulative to the testimony elicited from trial counsel at the *Ginther* hearing. MRE 403 allows the trial court to exclude relevant evidence if "its probative value is substantially outweighed by . . . the needless presentation of cumulative evidence." Trial counsel conceded that he did not speak with Harris directly. Nevertheless, he was familiar with the testimony Harris gave regarding Baker's alleged confession pursuant to an investigative subpoena before trial, and he followed up with Baker in an effort to determine the veracity of Harris' statement. Because Harris' proposed testimony was a matter of record, assuming but not deciding that there was error in excluding Harris from testifying at the *Ginther* hearing, such error was harmless. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant next raises several claims of ineffective assistance of counsel. For the reasons discussed below, we conclude defendant has failed to overcome the strong presumption that trial counsel's actions were sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

To establish a denial of effective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* An appellate court will not second-guess counsel in matters of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003).

Defendant argues that trial counsel's decision to focus on Merriweather and Stevenson's potential misidentification rather than present his alibi witnesses deprived him of a substantial defense, and also argues that trial counsel was ineffective for failing to call Harris as a witness at trial. We disagree.

The decision to present or omit evidence is presumed to be matters of trial strategy. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).

Here, defendant cannot show that he was deprived of a substantial defense. Trial counsel testified at the *Ginther* hearing that his decision to focus on the potential misidentification of defendant by the prosecution witnesses rather than present the alibi witnesses, was based in part on the fact that, after he interviewed them individually, the alibi witnesses did not appear

credible and further gave conflicting accounts regarding defendant's whereabouts. Defense counsel's preference to have the jury focus on his theory of misidentification and not the credibility of defendant's alibi witnesses is an insufficient basis to claim ineffective assistance of counsel. A particular strategy does not constitute ineffective assistance of counsel simply because it does not work. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Moreover, Harris' testimony would have been inadmissible at trial, and thus counsel was not ineffective for failing to interview Harris and call her as a witness at trial. Given the circumstances under which Baker allegedly confessed to Harris that he and not defendant had committed the armed robbery, we conclude that Baker's alleged statement to Harris was lacking in trustworthiness and was insufficiently corroborated, and therefore inadmissible, pursuant to MCR 804(b)(3). *People v Barrera*, 461 Mich 261, 272-274, 278-280; 547 NW2d 280 (1996).

Nor was defendant denied a substantial defense when trial counsel chose not to submit into evidence photographs purportedly depicting defendant with facial hair at the time of the offense to refute Merriweather and Stevenson's statements at the scene indicating he was clean-shaven. Defendant contends that the defense strategy to focus on defendant's appearance in the corporal lineup was not an appropriate strategy to use since whether or not defendant had facial hair at the time of the lineup was not relevant. We find no error.

We reject defendant's claim that the photographs depicting defendant with a goatee was the "single most significant evidentiary item" trial counsel could have submitted on behalf of his client. The photographs were undated. As such, the photographs lacked any objective foundational references to affirmatively establish that, at the time of offense, defendant had facial hair. We will not second-guess trial counsel's stated strategy and preference to have the jury determine focus on the reliability of Merriweather's and Stevenson identifications at the corporal lineups. Given that the record shows the jury's initial inability to reach a verdict, it is clear that the jury gave substantial consideration to the defense theory as presented.

We also find unpersuasive defendant's claim that trial counsel deprived him of his fundamental right to testify. Advising a defendant whether to testify on his or her own behalf is a matter of trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

We note that defendant never asserted his right to testify on the record. Moreover, defendant conceded at the *Ginther* hearing that he failed to inform trial counsel of his wish to testify. Under these circumstances, defendant has not overcome the strong presumption that he received effective assistance of counsel. The trial court's denial of defendant's motion for a new trial was not an abuse of discretion.

We next address defendant's claims of ineffective assistance of counsel raised in his standard 11 brief. Because these issues exceed the scope of this Court's order to remand, these issues were not raised at the *Ginther* hearing. Accordingly, this Court's review is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant argues counsel was ineffective for failing to object to Stevenson's in-court identification. Defendant claims he was prejudiced because Stevenson's in-court identification only occurred as a result of the unduly suggestive conduct on the part of the police following Stevenson's misidentification at the corporal lineup. We disagree.

“An identification procedure violates a defendant’s right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004), citing *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An unduly suggestive identification procedure may result in suppression of the in-court identification unless there is an independent basis for its admission. *Id.* at 114 n 8, citing *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), rev’d on other grounds 470 Mich 602 (2004); see also *People v McMillen*, 126 Mich App 211, 219; 336 NW2d 895 (1983).

Even if we assume that counsel’s conduct in failing to object to Stevenson’s in-court identification was unreasonable, defendant cannot establish that counsel’s error was outcome determinative. Merriweather positively identified defendant on two occasions. Given evidence that Merriweather’s initial description matched defendant’s general physical characteristics, any error involving defense counsel’s failure to object to the admission of Stevenson’s testimony regarding defendant’s identification did not prejudice defendant such that it deprived him of a fair trial.

Defendant next argues that the trial court erred in its determination that Merriweather’s corporal line-up was not suggestive and that she had an independent basis for the identification was not suggestive following a hearing. We find no error.

We conclude the pretrial identification procedure was not so suggestive that it led to a substantial likelihood of misidentification. *Kurylczuk, supra* at 302. Our review of the evidence shows that the lineup participants ranged in age between twenty-one-years-old and forty-eight-years-old. The participants’ height ranged between 5’7” and 6’3” and weighed between 145 pounds and 225 pounds. At twenty-four-years-old and 5’9”, defendant was not uniquely identifiable on the basis of height, age, weight or complexion. We also reject defendant’s assertion that because Merriweather was aware that the perpetrator of the crime was in the line-up, the line-up was unduly suggestive. Even where the defendant offers evidence that the complainant was told that the perpetrator was in the lineup, this factor alone does not render the line-up unduly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Nor do we find the three-month delay between the offense and the identification a basis for reversal, where “delays as long as eighteen months after a crime do not invalidate an eyewitness identification.” *Kurylczuk, supra* at 307.

The trial court also did not err in determining that Merriweather had an independent basis for making her identification. Merriweather testified that she was within a few feet of defendant, it was daylight when the robbery occurred, and she had sufficient time to observe defendant’s face. Given this testimony, defendant has not established clear error.

Defendant next argues defense counsel was ineffective for failing to object to the prosecution’s comments during closing arguments. Defendant first contends the prosecutor improperly commented on defendant’s exercise of his right to remain silent.

An accused criminal has the right to remain silent when arrested and faced with accusation, and his exercise of that right under most circumstances may not be used as evidence against him. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A

defendant's silence is not permitted for use as substantive evidence of guilt. *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973).

In this case, although the prosecutor asked two successive open-ended questions: "And what happened then? What was the answer?", we see no evidence to indicate that the prosecutor was aware that the officer would volunteer information that defendant terminated the interrogation by invoking his right to remain silent. Further, reading the prosecution's follow-up question in context, we conclude that the prosecution's brief reference to defendant's exercise of his constitutional rights was not used as substantive evidence of guilt. Instead, the question pertained to the validity of the procedures used by the police in the course of the investigation. Our conclusion is further supported by the next line of questions pertaining to the procedures used in Stevenson's corporal line-up. Accordingly, we conclude that the prosecutor's line of questioning did not constitute plain, outcome-determinative error affecting defendant's substantial rights, and trial counsel's failure to object does not constitute ineffective assistance of counsel.

Defendant also claims the prosecutor impermissibly commented on his right to remain silent during closing argument. We disagree. The prosecutor's statement, that Merriweather's identification of defendant was not challenged, was not a comment on defendant's right to remain silent, but rather a comment emphasizing the weaknesses in defendant's theory as argued by defense counsel. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995) (a prosecutor may comment that the evidence against the defendant is "uncontroverted" or "undisputed," even if defendant is the only one who could have contradicted the evidence). Accordingly, trial counsel was not ineffective for failing to object.

Defendant next argues that defense counsel was ineffective for failing to object to Officer Wight's verbatim reading of the unsigned preliminary complaint report wherein defendant admitted guilt. Defendant claims he was prejudiced in that the report was inadmissible without a proper foundation. Although the report was improperly admitted, we find no prejudice requiring reversal.

MRE 803(8) allows for the admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant. *People v McDaniel*, 469 Mich 409, 413; 670 NW2d 659 (2003), citing *People v Stacy*, 193 Mich App 19; 484 N.W.2d 675 (1992); see also *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995) (reversible error for the trial court to allow a police officer to read verbatim a witness' signed statement on the record).

Here, Officer Wight's report was undeniably adversarial as it was intended to record defendant's admission of guilt. However, because this was not the only evidence against defendant, we conclude the error was harmless. *McDaniel*, *supra* at 413; see also MCL 769.26.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder