

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMAN LEWIS CHEESE,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 272311

Oakland Circuit Court

LC No. 2006-208232-FC

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit armed robbery, MCL 750.89; assault with intent to do great bodily harm, MCL 750.84; possession of a firearm by a felon, MCL 750.224f; and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the assault with intent to commit an armed robbery conviction, 15 to 30 years' imprisonment for the assault with intent to do great bodily harm conviction, 5 to 10 years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for each felony-firearm conviction. We affirm.

On February 22, 2006, defendant entered a party store in Farmington Hills, Michigan, grabbed a package of beer and proceeded to the counter. After placing the beer on the counter and exchanging greetings with the clerk, a masked man entered the party store with a gun drawn. Defendant then moved around the counter, drew a gun and pointed it at the clerk, and demanded money. The clerk hit the panic button, after which defendant fired at least three shots, hitting the clerk once in the right leg and twice in the left leg. Defendant and the masked man fled empty handed. The clerk lived, but required two surgeries. Surveillance videotape captured the crimes.

Defendant contends that he suffered a deprivation of his constitutional right to counsel, because his counsel provided ineffective assistance by failing to request a live line-up following the victim's failure to positively identify defendant in a photographic array. We disagree. Where the claim for ineffective assistance of counsel is unpreserved, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. Similarly, the Michigan Constitution provides: "In every criminal prosecution, the accused shall

have the right . . . to have the assistance of counsel for his or her defense” Const 1963, art 1, § 20. It is well established that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide “effective” assistance. E.g., *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Schriro v Landrigan*, ____ US ____; 127 S Ct 1933, 1939; 167 L Ed 2d 836 (2007).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland*, which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a “heavy burden” on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Garza, supra*, at 255.¹

A trial court has discretion in granting a defendant’s motion for a line-up, *People v Maire*, 42 Mich App 32, 37-38; 201 NW2d 318 (1972); thus, a defendant is not entitled to such a line-up as a matter of right, *People v Buchanan*, 107 Mich App 648, 653; 309 NW2d 691 (1981). The record demonstrates that the victim identified two suspects (including defendant) as the potential shooter from a photographic array. However, the victim identified defendant as the shooter at the preliminary examination and at trial. Further, the victim indicated that defendant was depicted in the surveillance videotape. The victim explained that he selected two potential shooters (one of whom was defendant) via the photographic array because the photographs were black and white.² However, at the preliminary examination and trial, the victim identified

¹ Defendant filed an untimely motion for remand, which was insufficient to preserve his claim for ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000) (a defendant must move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), or a new trial in order to preserve a claim for ineffective counsel).

² There was also testimony by a police witness that defendant’s photograph was from his driver’s license which had a distinctive blue background. The photographic array used black and white copies of photographs so that all of the photographs appeared the same. The police witness indicated that this was done so defendant’s photograph would not stand out from the other
(continued...)

defendant. At trial, the victim's identification was unequivocal, because defendant was right in front of him and the victim remembered the shooting. Further, even if the victim was unable to identify defendant as the shooter, there was other testimony that defendant was the shooter. Defendant's former girlfriend and former employer identified him from the surveillance videotape. Defendant was depicted as the shooter in that videotape. Additionally, the surveillance videotape was played at trial for the jury.

Defendant has not overcome the strong presumption that defense counsel's performance constituted sound trial strategy, nor has defendant shown that his counsel's performance fell below an objective standard of reasonableness where his counsel did not move for a live line-up before the preliminary examination. *Strickland, supra* at 690-691; *Matuszak, supra* at 57-58. Here, defense counsel could legitimately have elected to forego a live line-up, and attack the victim's identification on cross-examination. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence through hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The failure of a strategy does not render counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 415-416; 639 NW2d 291 (2001). Moreover, defendant has failed to demonstrate a reasonable probability that, but for defense counsel's alleged error, the trial's outcome would have been different. *Matuszak, supra* at 58.

Next, defendant argues that the trial court provided improper jury instructions by failing to give an instruction on specific intent. At trial, defense counsel expressed satisfaction with the trial court's instructions, and thereby waived this issue. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

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potential suspects.