

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK CHRISTOPHER CATO,

Defendant-Appellant.

UNPUBLISHED

March 18, 2008

No. 266323

Macomb Circuit Court

LC No. 2005-000081-FC

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and interfering with a crime report, MCL 750.483a(2)(a). He was sentenced as a third habitual offender, MCL 769.11, to 10 to 22-½ years' imprisonment for the armed robbery conviction and to 267 days' imprisonment for the conviction for interfering with a crime report. He appeals as of right. We affirm.

On December 18, 2004, Angela Smith and Crystal Griffith were working at a Tubby's Submarine shop in the city of Warren. At approximately 11:00 a.m., a man later identified as defendant walked into the restaurant and asked to use the restroom. After using the restroom, defendant approached the counter and announced a robbery. His right hand was positioned in his waistband as if he had a gun. He demanded money, which Smith turned over to him. He then took the telephone handset off the wall, told the employees not to move or call anyone for ten minutes, and walked out of the restaurant. Smith and Griffith observed him driving away in a white minivan and Smith wrote down the license plate number, which she provided to police. Approximately one hour after the robbery, Smith identified defendant as the robber at a photographic lineup. Griffith was unable to identify any of the lineup participants as the perpetrator. Defendant's theory of defense was misidentification, and he presented an alibi defense at trial.

Defendant first argues that the trial court erred by denying his motion to suppress testimony regarding Smith's pretrial identification of him, and to preclude her in-court identification, because the photographic lineup was unduly suggestive. We disagree. Absent clear error, this Court will not reverse a trial court's decision admitting identification evidence. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists if we are left with a definite and firm conviction that a mistake was made. *Id.* To the extent that defendant argues that the trial court's admission of the identification evidence denied him his right to due

process, we review constitutional issues de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

“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.” *Harris, supra* at 51. The relevant inquiry is whether the lineup was unduly suggestive in light of all the circumstances surrounding the identification. *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994). A lineup may be unduly suggestive if a witness is shown a group of people but one person is singled out in some way. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

Defendant argues that the lineup was unduly suggestive because the background of his photograph was different from that of the other five photographs, the lighting was brighter in his photograph, and he was standing closer to the camera lens than the other lineup participants. He contends that these factors impermissibly “spotlighted” his photograph. Defendant’s argument lacks merit.

Although the background of defendant’s picture was lighter and he was somewhat further away from the camera than the other lineup participants, the lineup was not unduly suggestive in light of all the circumstances surrounding Smith’s identification. *Kurylczyk, supra* at 304-305. The lineup was conducted only one hour after the robbery and Smith identified defendant as the perpetrator immediately after viewing the lineup. At a *Wade*¹ hearing, Smith testified that there was no question in her mind that he was the perpetrator because she remembered his face. She maintained that she started at the top left of the photo array and scanned through it. Although she admitted that defendant’s photograph had a lighter background and his face was smaller than the other participants, she testified that differences in the backgrounds did not catch her attention. She maintained that she was not looking at the participants’ clothing or the walls, but rather, she identified defendant by his face. Further, Griffith was unable to identify anyone as the perpetrator after viewing the lineup. This fact tends to refute defendant’s argument that his picture was “spotlighted.” Accordingly, considering the circumstances surrounding the identification, the lineup was not unduly suggestive, and the identification procedure did not give rise to a substantial likelihood of misidentification. *Kurylczyk, supra* at 304-305; *Harris, supra* at 51.

Defendant next argues that defense counsel’s failure to obtain an identification expert denied him the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

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

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994), reh den sub nom *People v Wallace*, 447 Mich 1202 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner*, *supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant argues that defense counsel should have hired an expert to explain to the jury the inherent unreliability of eyewitness identifications. The decision whether to present an expert witness is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Moreover, the failure to call a witness constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *Dixon*, *supra* at 398.

Here, counsel's failure to obtain an identification expert did not deprive defendant of a substantial defense. Counsel pursued the theory of misidentification and argued that someone took defendant's jacket and vehicle and committed the robbery. Counsel also questioned Smith regarding her ability to observe defendant, the length of time that she did so, and the clothing that he was wearing. He further argued that Griffith was not able to identify the perpetrator at the lineup because his photograph was not included in the array. Thus, counsel's failure to present an identification expert did not deprive defendant of a substantial defense. *Dixon*, *supra* at 398.

Moreover, had counsel moved for the appointment of an identification expert, he would have been required to show that he could not safely proceed to trial without the witness. MCL 775.15; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). A defendant must establish a nexus between the facts of his case and the need for an expert. *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). "Without an indication that expert testimony would likely benefit the defense, it [is] not error to deny without prejudice [a] motion for appointment of an expert witness." *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not sufficient that a defendant show a mere possibility that the requested expert will be of assistance. *Tanner*, *supra* at 443.

Here, defendant was able to safely proceed to trial without an identification expert, and no evidence showed that an expert would likely have benefited him. This is particularly true considering the overwhelming evidence against defendant. The car used in the robbery was registered to defendant's mother with whom defendant lived, defendant was arrested driving the vehicle, and the coat that the perpetrator wore during the robbery was recovered from defendant's basement. At most, there existed a mere possibility that an expert would have assisted defendant, which is insufficient to warrant an expert's appointment. Accordingly, any motion for the appointment of an expert would have been futile. An attorney is not ineffective for failing to bring a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that the prosecutor repeatedly engaged in misconduct that shifted the burden of proof and denied him a fair trial. We disagree. Generally, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Because defendant failed to preserve this issue for appellate review by timely objecting to the alleged instances of misconduct, however, our review is limited to plain error affecting his substantial rights. *Id.* at 451. Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). "When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Cox, supra* at 451.

Defendant contends that the prosecutor shifted the burden of proof during her direct examination of Detective Brendon Brosnan, during Brosnan's rebuttal testimony, and during closing argument. The prosecutor's questioning and remarks pertained to Brosnan's assertion that he attempted to contact defendant's alibi witnesses before trial, but they failed to respond to letters and were otherwise uncooperative. The prosecutor's questioning and remarks did not shift the burden of proof. Arguments that merely point out the weaknesses in a defendant's case, and do not burden his right not to testify or allocate to him the burden of disproving an element of an offense, do not shift the burden of proof. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995).

[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Id.* at 115.]

As such, a prosecutor may challenge the truthfulness of a defendant's alibi defense "as part of the truth-seeking process that is a criminal trial." *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002).

Defendant presented an alibi defense and argued that someone else used his mother's minivan to commit the robbery. Because he advanced this alternate theory, the prosecutor was free to explore and comment on the validity of the theory. *Gray, supra* at 48; *Fields, supra* at 112-113. Her questioning and remarks challenged the truthfulness of defendant's alibi defense. Defendant specifically takes issue with the following portions of the prosecutor's closing argument:

Ask yourselves if it makes sense that for your son or for your good friend that you wouldn't try to contact the detective so many times that the detective would know your voice by the time that he answered the phone. You wouldn't even have to say your name. That you wouldn't contact the Prosecutor's Office, that you wouldn't contact the court, that you wouldn't even contact the media to say that an injustice has been done

* * *

[A]sk yourselves would a mother not be screaming at the top of her lungs to anyone that she could almost every day to anyone who would listen that her son wasn't at the Tubby's on Nine Mile on December 18th, 2004?

When reviewed in context, the record reveals that the prosecutor was arguing that defendant's alibi witnesses were simply not credible. A prosecutor properly may comment on the credibility of an alibi witness. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant further argues that defense counsel was ineffective for failing to object to the prosecutor's questioning and comments that he alleges shifted the burden of proof. Because the prosecutor's line of questioning and remarks were proper, however, counsel's failure to object did not deny defendant the effective assistance of counsel. A defense attorney is not ineffective for failing to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next contends that the evidence was insufficient to support his armed robbery conviction. We again disagree. When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury verdict. *Id.* at 400. The elements of an offense may be proven by circumstantial evidence and reasonable inferences therefrom. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

Defendant argues that the evidence was insufficient to support his armed robbery conviction because there exists no objective evidence that he was armed. Sufficient evidence of the "armed" element of armed robbery exists if "the circumstantial evidence presented was sufficient . . . for a rational trier of fact to conclude that defendant used some article, which includes his hand, to lead [a] complainant to reasonably believe defendant had a dangerous weapon." *People v Taylor*, 245 Mich App 293, 301; 628 NW2d 55 (2001).

Here, Smith testified that after defendant told her and Griffith that they were being robbed, he put his hand in the waistband of his pants underneath his coat and cupped it around something. She recalled that defendant had "done something with his body to make [them] look." In addition, Griffith testified that defendant had his hand clenched as if he was holding a gun. Accordingly, the evidence was sufficient for a rational trier of fact to conclude that defendant used his hand or another object to lead Smith and Griffith to reasonably believe that he had a gun. *Id.*

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder