

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DANA WENMAN,

Defendant-Appellant.

UNPUBLISHED

April 8, 2008

No. 269838

Jackson Circuit Court

LC No. 05-007037-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felony murder, MCL 750.316(1)(b), and assault with intent to rob while armed, MCL 750.89. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life in prison on each count. We affirm.

Defendant's convictions arose from an August 8, 2005, murder at a Walgreens drug store in Jackson, Michigan. Earlier on the same day, an attempted robbery occurred at a nearby Felpausch grocery store. Both crimes were recorded on the stores' respective videotape surveillance cameras. According to testimony at trial, the videotapes depict the perpetrator as a pony-tailed man wearing a baseball cap with conspicuous tattoos on his forearms. The Felpausch cashier identified defendant as the perpetrator in a photographic lineup and at trial. There were no eyewitnesses to the Walgreens murder. However, the trial testimony indicated that Walgreens videotape depicts the victim being stabbed by the pony-tailed man. When shown the Walgreens videotape at trial, defendant's girlfriend identified defendant as the man with the ponytail. During jury deliberations, the jury requested to view the tapes again, and asked to see defendant's tattoos. Shortly after viewing the tapes and the tattoos, the jury returned a guilty verdict.

Defendant first argues that his Sixth Amendment¹ right to counsel was violated when the Felpausch cashier testified about the photographic lineup. Defendant also asserts that the photographic lineup was unduly suggestive based on the clothing defendant was wearing in the photograph. The trial court's ultimate decision on a motion to suppress is reviewed by this Court

¹ US Const, Am VI.

de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). We also review de novo whether defendant was denied his constitutional right to counsel. See *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002). We will not reverse a trial court's decision to admit identification evidence unless we find the decision was clearly erroneous. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Defendant contends the photographic line-up was unduly suggestive because he was wearing an orange prisoner jumpsuit or shirt. This Court has previously indicated “physical differences among lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from other lineup participants.” *Hornsby*, *supra* at 466. Additionally, “physical differences generally relate only to the weight of an identification and not to its admissibility.” *Id.* The witness had no difficulty in identifying defendant as the individual that attempted to rob her. When questioned, the witness did not recall how defendant was dressed in the lineup photograph, believing the photographs in the array provided were black and white, and denied being influenced by how defendant was dressed. We find that “[n]othing in the record supports a conclusion that there was a substantial likelihood of misidentification at the photographic array as a result of any suggestive influences.” *People v Kurylczyk*, 443 Mich 289, 310; 505 NW2d 528 (1993).

Next, defendant asserts the photographic lineup was improperly conducted because he was in custody and not provided an attorney. At the time of the photographic lineup, defendant was in custody as a parole absconder and was identified as a suspect in the Walgreens murder. Our Supreme Court has stated “[i]n the case of photographic identifications, the right of counsel attaches with custody.” *Kurylczyk*, *supra* at 302. We agree that counsel should have been appointed to represent defendant during the photographic lineup.

Although we concur that the trial court erred in admitting the lineup identification, the error was harmless given the testimony by witnesses that identified defendant as the perpetrator based on their independent observations of the surveillance tapes and, in the case of defendant’s girlfriend, her close relationship to defendant. The prosecutor played the Felpausch videotape while the Felpausch cashier was testifying, and she identified the individual shown on the videotape as defendant. The witness waited on defendant at the drug store counter and had the opportunity to observe him at close range for several minutes without anything to obstruct her ability to view him. Her photographic identification of defendant occurred only days after the murder. The witness also provided a sufficient description of the perpetrator for a forensic artist to construct a sketch and she independently recalled certain features, such as defendant’s wearing of eyeglasses, despite their absence in the photograph used for the identification. At no time did this witness waiver in her identification of defendant as the perpetrator that she observed firsthand and on the store’s surveillance videotape. Consequently, this witness had a sufficient independent basis for her in-court identification of defendant. *People v Anderson*, 166 Mich App 455, 478; 421 NW2d 200 (1988). Further, defendant’s girlfriend identified the perpetrator in both surveillance tapes as defendant. Given the extensive and consistent nature of the identification testimony, a sufficient independent basis existed for the in-court identification of defendant by these witnesses.

Defendant next argues that the trial court's voir dire was insufficient to determine whether the potential jurors understood and accepted the core principles governing the presumption of innocence. The trial court conducted a relatively brief voir dire, and excused several jurors who indicated that they might have difficulty treating both parties fairly. In addition to the jurors excused by the court, defendant excused several other jurors using some, but not all, of his peremptory challenges.² When the trial court asked whether defendant would exercise any additional peremptory challenges, defendant's counsel responded, "We have a jury, Judge." By way of this statement, defendant's counsel expressed satisfaction with the jury, thereby waiving any challenge to the manner by which voir dire was conducted. *People v Hubbard*, 217 Mich App 459, 466; 552 NW2d 493 (1996); see also *People v Jenkins*, 23 Mich App 39, 41; 178 NW2d 103 (1970).

Further, we note that the trial court did question the jurors, en masse, regarding their ability to be impartial and fair. After instructing the jury in detail on the burden of proof and presumption of innocence, the trial court specifically queried the panel regarding their ability to follow these legal precepts. "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996), citing *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973). It is recognized that a trial court "has considerable discretion in both the scope and conduct of voir dire" and that "trial courts must be allowed wide discretion in the manner they employ to achieve the goal of an impartial jury." *Sawyer, supra* at 186-187 (emphasis in original, internal citations and quotation marks omitted). Consequently, given the content and scope of the trial court's questioning of the jury panel regarding their ability to be fair and impartial and to follow the trial court's instructions, defendant has failed to demonstrate that the manner of inquiry used by the trial court was deficient.

Defendant next contends the trial court erred by allowing the prosecutor to use defendant's silence during interrogation as substantive evidence of guilt. Defendant initially filed a motion to suppress any evidence arising from the interrogation. At trial, the prosecutor sought to introduce testimony from a detective regarding defendant's failure to respond to repeated accusations that he committed the crimes during his interrogation. We note that defense counsel indicated, after consulting with defendant, that he would allow the detective to be questioned regarding his post-Miranda silence in response to accusations that he committed the crimes. Before the trial court allowed the jury to hear the proposed testimony, it required the prosecutor to elicit the testimony outside the jury's presence. Defendant did not offer any objection after hearing the preliminary testimony. Consequently, "review is foreclosed unless the prejudicial effect of the comments was so great that it could not have been cured by an appropriate instruction, or a failure to review the issue would result in a miscarriage of justice." *People v Rice*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

² We note that in order to preserve a jury selection issue for appellate purposes, a party must generally exhaust its peremptory challenges. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992).

In this case, the trial court first reviewed the taped interrogation of defendant, finding that he voluntarily and knowingly waived his Fifth Amendment privilege against compelled self-incrimination. Defendant spoke and conversed with police, but did not respond verbally when faced with accusations regarding his involvement in these crimes. “This is a case of a defendant who did not respond to some questions while responding to others during the period of time in which the trial court found that the state had carried the heavy burden of proving that defendant had waived his rights.” *People v McReavy*, 436 Mich 197, 212; 462 NW2d 1 (1990). Having found a voluntary waiver of his Fifth Amendment rights, “[w]e are convinced that in the totality of these circumstances, the trial court correctly concluded that defendant did not invoke his . . . right to remain silent.” *Id.* at 211. When defendant did request the presence of counsel, questioning by police immediately ceased. Consequently, neither the officer’s testimony, pertaining to defendant’s nonverbal conduct when confronted with accusations during the custodial interrogation, nor the prosecutor’s reference and elicitation of the officer’s testimony comprised improper conduct. *Rice, supra* at 437.

Next, defendant argues that the trial court erred by refusing to appoint an expert to testify about the difficulties inherent in eyewitness testimony. We review this allegation of error for abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).

A trial court must appoint an expert if a defendant demonstrates “a nexus between the facts of the case and the need for an expert.” *Tanner, supra* at 442-443. The burden is on the defendant to demonstrate with specificity the manner in which the expert’s testimony would assist the defendant’s case. *People v Lueth*, 253 Mich App 670, 688-689; 660 NW2d 322 (2002). If the defendant does not fulfill the burden, the trial court need not appoint an expert. *Id.* See also MCL 775.15.

Defendant cites to scientific studies pertaining to the fallibility of eyewitness testimony, and argues that expert testimony was necessary to explain these studies to the jury. However, defendant fails to make the requisite connection between the studies he cites and the evidence presented at trial. Our Supreme Court has recognized that under certain circumstances, eyewitness testimony can be problematic due to the witnesses’ perception, their ability to recall, and their suggestibility. *People v Anderson*, 389 Mich 155, 210-218; 205 NW2d 461, overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 461 (2004). Those concerns are inapplicable where, as here, there were surveillance videotapes that enabled the jurors to discern for themselves whether defendant was the individual depicted in the tapes. The proposed expert testimony is neither necessary nor relevant based on the ability of the jurors to determine whether defendant is the individual seen in the surveillance videos based on their own observation of this evidence. Accordingly, defendant has failed to demonstrate the necessity of expert testimony for his defense.

Defendant next argues that his trial counsel was ineffective. Specifically, defendant asserts that counsel’s performance was inadequate because counsel (1) had a conflict of interest regarding defendant, (2) should have objected to the voir dire, (3) should have objected to the testimony and argument concerning the interrogation, and (4) should have presented an alibi

instruction.³ Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This constitutional right includes the requirement that counsel present a reasonable defense. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). A defendant seeking relief from a judgment on the ground that counsel was ineffective must demonstrate that “counsel’s performance fell below an objective standard of reasonableness.” *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Even if counsel’s performance fell below the requisite standard, reversal is warranted only if the defendant can show that the trial result was unreliable, and that there is a reasonable probability the result would have been different but for counsel’s errors. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Based on our determination, *supra*, that no error occurred in voir dire, error cannot be ascribed to counsel’s failure to raise objections during this procedure. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (counsel is not required to make a futile objection). In addition, we note that defendant did not present any argument in his motion for a *Ginther* hearing regarding his assertion on appeal that the failure to object to testimony pertaining to his post-*Miranda* silence constituted the ineffective assistance of counsel. Accordingly, defendant has forfeited this assertion of error, and we review it only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1990). Having already determined that the detective’s testimony was admissible, there was no error in counsel’s failure to object. *Fike*, *supra* at 182.

Defendant next asserts counsel was ineffective due to the existence of a conflict of interest. Notably, defense counsel’s law partner was assigned to represent defendant’s father in a competency hearing on October 6, 2005. However, the matter was withdrawn on October 25, 2005, before the law partner met defendant’s father or any hearings were held. Although arrested on August 11, 2005, counsel was not the original attorney assigned to represent defendant. It was not until November 2005, that defense counsel was assigned by the court to represent defendant because of the withdrawal of his initial counsel. Consequently, defense counsel and his law partner did not concurrently provide legal representation for defendant and his father. Counsel for defendant and his law partner both testified that they did not have extended conversations pertaining to defendant’s father, that neither perceived the existence of a conflict, and that defense counsel would have done nothing different in his questioning of defendant’s father at trial. Neither the fact that his father subsequently gave inculpatory testimony at defendant’s trial nor the law partner’s subsequent reassignment to represent defendant’s father after defendant’s sentencing had been completed is sufficient to support a claim regarding the existence of a conflict of interest. See *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

We also agree with the trial court that the decision not to request or provide an alibi instruction comprised a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523

³ The trial court held a *Ginther* hearing regarding defendant’s claim of the existence of a conflict of interest, improper voir dire and failure to present an alibi instruction. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

NW2d 830 (1994). Defendant did testify that he was out-of-town when the murder occurred. Defense counsel procured a detective to investigate defendant's alibi. The detective could not locate the individual defendant alleged he was with at the time of the murder and all of the locations identified by defendant were determined by the detective to be vacant and/or abandoned buildings. Defense counsel determined that presenting the alibi instruction would only highlight the inconsistencies between defendant's testimony and the testimony of his father and his girlfriend concerning defendant's whereabouts at the time of the crimes. Further, defense counsel was unable to procure any substantiation or evidence to support defendant's proffered alibi. Our Supreme Court has previously held that defense counsel's failure to present an alibi defense and related instruction does not constitute ineffective assistance of counsel where the alibi evidence is weak or non-existent. *People v Esters*, 417 Mich 34, 56; 331 NW2d 211 (1982). Consequently, defense counsel's decision to not present an alibi instruction comprised legitimate trial strategy, which cannot establish ineffective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In addition, at the *Ginther* hearing defense counsel acknowledged that although he believed he could ethically permit defendant to testify concerning the alleged alibi based on the internal consistency of defendant's testimony, he did not personally believe the alibi testimony. Defense counsel's ethical concern regarding defendant's veracity in the presentation of his alibi supports his decision to not present an alibi instruction. The refusal of an attorney to knowingly facilitate or assist in the presentation of perjured testimony or a similarly false claim is consistent with his ethical obligations and, therefore, does not constitute ineffective assistance of counsel. See *People v Toma*, 462 Mich 281, 303 n 16; 613 NW2d 694 (2000).

Finally we reject defendant's final argument that cumulative errors in the trial warrant reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). The only error noted is the failure of defendant to have counsel during the photographic lineup. However, that error was harmless in light of the evidence adduced at trial. There exist no additional or other errors to aggregate to support defendant's argument for reversal. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto