

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD HART,

Defendant-Appellant.

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UNPUBLISHED

April 29, 2008

No. 272910

Wayne Circuit Court

LC No. 06-003462-01

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of unarmed robbery, MCL 750.530. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, complainant maintained that defendant robbed him outside a mini mart in Detroit on March 1, 2006. Complainant saw defendant talking to the store manager. Complainant then paid for his groceries and left the store. Defendant approached him outside and asked him if he wanted to purchase some tapes. As complainant was removing a bill from his money, defendant took the remainder of complainant's money. Complainant swore at defendant and hit him in the head. Defendant's hat flew off, but the complainant retrieved it. Defendant escaped with approximately \$200.

Police officers corroborated complainant's identification of defendant. Two officers arrived at the mini mart shortly after the robbery, and spoke with the store manager and complainant. The officers and complainant viewed a store surveillance recording. The video depicted defendant and complainant making purchases at the front counter. An officer stated that the video showed defendant for "minutes" and that the quality of the recording was good. Complainant pointed out defendant as the person who had robbed him. He also gave the officers defendant's hat, which the officers' maintained was clearly depicted on the video recording.<sup>1</sup>

Before the preliminary examination, defense counsel requested that defendant be permitted to sit in the spectator section of the courtroom to force complainant to make an in-court identification of defendant. Because of security concerns, the district court denied

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<sup>1</sup> The digital recording was subsequently destroyed when the machine automatically deleted it.

defendant's request. Complainant identified defendant at the examination as the person who robbed him. During trial, complainant identified defendant as the person in the video and as the man who robbed him. Complainant also testified that he was shown a photographic array of possible suspects on March 10, 2006. He could not choose between two of the photographs, but stated that he did not have his reading glasses with him when he was shown the photographs.

Defendant first argues that his trial counsel was ineffective for failing to object to the introduction of the in-court identification of defendant. He maintains that counsel should have objected to the introduction of this evidence because complainant could not positively identify defendant in a photographic lineup and because the identification during the preliminary examination was improperly suggestive. Defendant also contends that the subsequent trial identification was not based on a sufficiently independent basis to purge the taint of the earlier improper identification procedures. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or otherwise make a testimonial record in the trial court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of his ineffective assistance claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "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). We review questions of constitutional law de novo. *Id.*

We presume counsel's performance was constitutionally sufficient, and a defendant bears a heavy burden of showing "that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). In addition, a "defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* at 663-664.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). "The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). The relevant factors for evaluating the totality of the circumstances include:

the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. [*Id.* at 304-305.]

If a trial court finds that a pretrial procedure was impermissibly suggestive, then evidence concerning that identification is inadmissible at trial, and the witness' in-court identification is

allowed only if the prosecution “shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification.” *Id.* at 304, citing *People v Kurylczuk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). The trial court’s decision to admit in-court identification will not be reversed on appeal unless it is clearly erroneous. *Colon, supra* at 304.

In this case, defendant asserts that the identification at the preliminary examination was impermissibly suggestive, but he fails to support this assertion by meeting the relevant factors. Defendant states only that the identification was highly suggestive because defendant was presented as one of the accused at the defense table. Merely because an identification procedure was suggestive does not mean that it is constitutionally defective. *Id.* Although a confrontation at a preliminary examination may be unduly suggestive, *People v Leverette*, 112 Mich App 142, 154; 315 NW2d 876 (1982), this Court has repeatedly indicated that not all confrontations at a preliminary examination are impermissibly suggestive. *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984); *People v Flinnon*, 78 Mich App 380, 389-390; 260 NW2d 106 (1977).

Here, the preliminary examination proceeding could fairly be seen as a suggestive atmosphere. The complainant, however, testified that he had observed defendant for several minutes while the two of them were in the store. He also reviewed the store’s video immediately after the incident, which he described as clear. Complainant was able to identify defendant from the video, as well as to provide the police with defendant’s hat, which was depicted on the video. Complainant was paying attention to defendant before and during the robbery. In addition, the preliminary examination occurred on March 23, 2006, slightly more than three weeks after the robbery. This relatively short time between the offense and the preliminary examination identification “does not reduce the reliability” of the identification. See *Kurylczuk, supra* at 307-308. Under the totality of the circumstances, we find that defendant has failed to show that there was a substantial likelihood of misidentification, even given complainant’s earlier indecision concerning the photograph showup. His failure to identify defendant during the photographic showup was instead properly presented as a credibility issue for the jury to determine. See *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). Defendant has failed to establish plain error with regard to the preliminary examination identification and therefore has also failed to show plain error with regard to the subsequent courtroom identification at trial. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988).

As such, defendant cannot show that the trial court would have disallowed the introduction of the in-court identification if defense counsel had challenged it. Thus, defendant has not shown that but for counsel’s performance there is a reasonable probability that the trial outcome would have been different. *Solmonson, supra* at 663-664.

Defendant also argues that trial counsel was ineffective when he failed to obtain an expert witness to testify about the unreliability of eyewitness identifications. We reject defendant’s claim that defense counsel was ineffective for failing to secure an expert witness to testify about eyewitness identifications. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d (1999). Because our review limited to the existing record, *Cox, supra* at 453, we find that defendant has not overcome the presumption that counsel may have declined to request an expert witness on identification as a matter of trial strategy. This Court has held that a decision to not present such expert testimony might be strategic because “counsel may

reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate.” *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

In addition, defendant cannot show that the alleged failure to present expert testimony deprived him of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defense counsel was able to pursue other available methods for attempting to discredit complainant’s identification testimony, including vigorous cross-examination. In contrast, defendant’s assertions on appeal about the necessity of an expert witness are largely speculative, pertaining to the weaknesses of eyewitness testimony generally. He asks this Court to assume that expert testimony would have been so beneficial to the defense that it would have resulted in a different outcome at trial. We decline to do so.

Because defendant has not met his burden of establishing the factual predicate for his claim of ineffective assistance of counsel, he is not entitled to relief. *Rockey, supra* at 76-77.

We affirm.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey