STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2008
v	No. 276567 Macomb Circuit Court
VINCENT FRANCIS KUNDRAT, Defendant-Appellant.	LC No. 2006-003745-FH

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 10 to 20 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in denying his motion to suppress witness Matthew Cicchini's identifications because the on-the-scene identification procedure was unduly suggestive and tainted Cicchini's subsequent identifications. We disagree. We will not reverse a trial court's decision to admit identification evidence unless it was clearly erroneous. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

To establish that an identification procedure denied him due process, a defendant must show that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.*

> When examining the totality of the circumstances, relevant factors 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. [*People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).]

The on-the-scene identification procedure used in this case occurred in a suggestive atmosphere, because defendant was the only person who was walking toward Cicchini and he was flanked by two police officers. Although only one officer was in uniform, Cicchini knew that the non-uniformed person was a police officer. However, Cicchini testified that he had viewed defendant

running through a yard for four to five seconds. He noticed defendant because he was running, but not as if for exercise. By all accounts, less than 20 minutes elapsed between the time Cicchini viewed defendant and the identification at the park. Cicchini testified that he was good with faces and had made a connection between defendant and the former fire chief. When he saw defendant at the park, he was 90 percent sure that defendant was the same person he saw running through the yard. Cicchini testified that he made the identification from his memory and felt no pressure to make an identification. Cicchini also testified that he paid no attention to the police officers near defendant, but was concentrating only on whether he recognized defendant. Additionally, defendant matched the description that Cicchini gave to a police officer about five to ten minutes prior to the identification.

Although defendant asserts that Cicchini's identification of him at the park was tainted by police radio transmissions, Cicchini did not testify that he heard any of the transmission descriptions. Cicchini testified that he identified defendant at the park from his memory of the person he saw running. Moreover, although all broadcasts were not introduced, an audiotape presented by defendant indicated that Cicchini's description of defendant was not included in the portions played. "Under the totality of the circumstances, defendant has failed to show that there was a substantial likelihood of misidentification." *Colon, supra* at 305. We conclude that there was clear and convincing evidence that Cicchini's identification was not based on any suggestiveness surrounding the on-scene identification, but had a sufficiently independent basis. *Id.* Further, we find that the lineup identification was not tainted as defendant suggests. Cicchini testified that he made the identification based not only on seeing defendant at the park, which had a sufficiently independent basis, but also on his memory of the person he saw running. Accordingly, we find the trial court's denial of defendant's motion to suppress the identification evidence was not clear error.

Defendant next argues that several instances of prosecutorial misconduct require a new trial. We disagree. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved and reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Contrary to defendant's assertion, the prosecutor did not elicit expert testimony from Officer Spens without qualifying him as an expert. The prosecutor only asked Officer Spens to testify about what he observed, and Officer Spens merely testified about his observations at the scene. "[A]ny witness is qualified to testify as to his or her physical observations and opinions formed as a result of these observations." *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983), citing MRE 701. Because the testimony was not improper, there was no plain error. *Carines, supra*.

Defendant also argues that statements by the prosecutor during rebuttal closing argument were improper. A prosecutor may argue the evidence and all reasonable inferences that arise from it. *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007). In responding to defendant's argument that there was reasonable doubt whether defendant or a curly, dark-haired man was the offender, the prosecutor stated:

> The identification was not tainted. Nothing about this case was tainted. The police did exactly what they were supposed to do, when they were supposed to, and they did an excellent job of it. *The perimeter was secured and no random*

black, curly haired man got away that committed this crime. That didn't happen. They found the person who committed the crime.

The prosecutor was arguing that because a perimeter was secured, any other suspect would have been discovered, and because no other suspect was discovered, there was no other black curly-haired man who got away. Consequently, the prosecutor's argument was properly based on the evidence and the reasonable inferences that arose therefrom. *Id.* There was no plain error. *Carines, supra*.

Defendant next claims that there was insufficient evidence to sustain his conviction for first-degree home invasion. Specifically, he argues there was insufficient evidence of his intent to commit larceny.[1] We disagree. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

"Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). A defendant's breaking and entering cannot be the sole basis on which to presume intent to commit larceny, but a reasonable inference of intent may be based on the nature, time, and place of defendant's actions before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988).

The evidence in this case was not limited to proof of a breaking and entering. Defendant knocked several times on the victim's door. Receiving no response, he rang the doorbell a few times. When there was still no response, he went around to the kitchen window and broke the screen to gain access inside. After partially entering the house, he fled when he realized that someone was inside the house. The evidence clearly indicated that defendant took steps to ascertain that no one was inside the house before breaking the kitchen screen to gain access to the house. Under the circumstances, the evidence allowed the jury to infer that defendant had a larcenous intent when breaking into the house. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Accordingly, we conclude that the evidence was sufficient to support defendant's home invasion conviction. *Tombs*, *supra*.

Defendant claims that he is entitled to a new trial because defense counsel was ineffective. We disagree. "When no *Ginther*[2] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Effective

[1] Because defendant only challenges the evidence of intent to commit larceny, we do not consider the other elements.

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

assistance of counsel is presumed, and it is defendant's heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffective assistance of counsel, a defendant must show that but for counsel's errors, the result of the proceedings would have been different. *Mack*, *supra* at 129.

Defendant first argues that defense counsel was ineffective for failing to object to the prosecutor's conduct of eliciting expert testimony from Officer Spens. As previously discussed, Officer Spens did not provide expert testimony, and the prosecutor's questioning was not improper. Counsel is not required to advocate a meritless position. *Id.* at 130. Therefore, defense counsel was not ineffective for failing to object.

Defendant next argues that defense counsel was ineffective when he chose to introduce an audiotape of police radio transmissions, which also included references to defendant's prior criminal history. However, the record indicates that defendant and defense counsel discussed whether the tape should be introduced, and that defendant wanted it admitted into evidence. Before the tape was admitted, the following discussion occurred on the record:

> *The Prosecutor:* Judge, I would like to make a brief record. Regarding admission of the tape we have obviously covered this at length, including other acts that are on that tape. I just want the record to be clear that Counsel discussed that with his client, and his client wishes that tape admitted into evidence.
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> * * *
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> *The Court:* Okay. You have discussed what is on that tape with your client?
>
> *Defense counsel:* Yes, I have.
>
> *The Court:* And you're still satisfied that you want that admitted?
>
> *Defense counsel:* That's correct, Your Honor.

Although the trial court did not elicit a response directly from defendant, defense counsel's comments clearly indicated that defendant wanted the tape admitted, and defendant, who was present during this exchange, did not dispute counsel's statements. Thus, defendant waived any claim concerning the decision whether to introduce the audiotape. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

In any event, the record discloses that the audiotape was introduced for the purpose of attempting to discredit the identification testimony. Although the tape contained references to defendant's criminal history, identification was the principal issue at trial. The decision to introduce the tape, knowing that it contained both potentially valuable as well as potentially prejudicial information, was a matter of trial strategy, which this Court will not second-guess. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Lastly, defendant argues that trial counsel was ineffective for failing to present an identification expert. 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). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Matuszak*, *supra*. The failure to call a witness constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *Dixon*, *supra*. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Defendant's identification as the perpetrator was the principal issue at trial. The record discloses that defense counsel challenged each witness's identification testimony and the accuracy of the canine tracking. Further, the jury was fully instructed on witness credibility, including factors for evaluating witness testimony. The failure to call an expert witness to provide testimony regarding the reliability of eyewitness identifications did not deprive defendant of a substantial defense, *Dixon*, *supra*, and counsel's decision to attack the identification evidence through cross-examination was a matter of trial strategy that we will not second-guess with the benefit of hindsight, *Matuszak*, *supra*. Defendant was not denied the effective assistance of counsel.

Finally, defendant argues that the cumulative effect of the several errors in this case denied him a fair trial. Because we have found no errors, there can be no cumulative effect. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly