STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2009
v	No. 280646 Oakland Circuit Court
JAMES WALKER POTLOW, JR., Defendant-Appellant.	LC No. 2007-212952-FC

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his judgment of sentence and his jury trial convictions of assault with intent to rob while armed, MCL 750.89, and attempted armed robbery, MCL 750.92; MCL 750.529. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 18 to 40 years' imprisonment. We affirm.

I. Basic Facts

On the evening of December 9, 2006, Samantha Berney was working as a cashier at a Family Dollar store in Ponitac, Michigan. Defendant approached Berney's register and as Berney was placing defendant's items in a bag, defendant grabbed her arm, opened his coat showing Berney a knife, and asked Berney to open the register. Scared, Berney pulled away, hit the panic button and ran to the store's back room while continuing to look back at defendant. Defendant hit the register, but was not able to get any money and he fled. Berney then paced around the store, crying.

When police arrived at the scene, Berney indicated that she "really didn't get a look at the guy's face," but described defendant as a tall African-American man with a moustache, wearing a blue jacket and red hat. Twenty to thirty minutes later, police officers apprehended defendant and summoned Berney to their location. Defendant was wearing a gray sweatshirt-type jacket, burgundy hooded sweatshirt, and a red baseball skullcap.[1] The officers told Berney that they had

[1] At trial, Berney indicated that defendant had been wearing a maroon hoody, khaki jacket, black pants, and a baseball hat.

"found a guy that might be the guy" or "we think we got the guy." Berney then identified the police suspect as defendant. Since this incident, Berney has suffered from nightmares.

II. Ineffective Assistance of Counsel

Defendant first argues that he was denied effective assistance of counsel because counsel failed to object to the on-scene identification as impermissibly suggestive. Specifically, defendant contends that it was improper for the police to engage the victim in an on-scene identification because she told them she "really didn't get a look at the guy's face" and too much time had lapsed between the crime and the identification. We disagree. Because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court reviews for mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. This Court reviews the factual findings for clear error and the constitutional question de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007) (quotation marks and citation omitted).

"[P]rompt, on-the-scene identifications are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime, and subject to arrest, or merely an unfortunate victim of circumstance." *People v Libbett*, 251 Mich App 353, 359; 650 NW2d 407 (2002) (internal quotation marks and citation omitted). Such "confrontations promote fairness by assuring greater reliability." *Id.* at 361. However, an on-scene identification procedure can violate a defendant's right to due process, in light of the total circumstances, if it is "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The factors to consider to determine the likelihood of misidentification include: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of a prior description from the victim, (4) the witness's level of certainty at the time of the pretrial identification, and (5) the amount of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). If a procedure is found to be impermissibly suggestive, an in-court identification by the witness is inadmissible unless the prosecution can demonstrate, by clear and convincing evidence, that the witness had an independent basis for the identification. *Gray*, *supra* at 114-115.

Based upon the totality of circumstances, there was not a substantial likelihood of misidentification and the on-scene identification was not unduly suggestive. Berney had an opportunity to view defendant when he approached her cash register and again while she was fleeing from defendant to the store's back room. Although Berney's initial description of defendant contained some discrepancies between defendant's actual appearance and her description, Berney nonetheless consistently depicted defendant as a tall African-American male wearing a red hat and never wavered in her identification of defendant, either on the scene or at

trial. While defendant was the only suspect presented to Berney and the officers indicated that they that they had "found a guy that might be the guy" or "we think we got the guy," the amount of time between the crime and the on-scene identification was minimal and the identification was made at a time where the perpetrator's appearance was still fresh in Berney's mind. There is no merit to defendant's challenge of the on-scene identification of defendant. Because trial counsel cannot be ineffective for failing to advocate a meritless position, defendant has not shown that counsel acted below an objective standard of reasonableness. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Further, even if we were to assume that defense counsel was unreasonable in not challenging the on-scene identification as impermissibly suggestive, defendant cannot establish that counsel's error was outcome determinative. The description of the perpetrator described him as an African-American male in his forties wearing a gray sweatshirt, red hat, and a burgundy hooded sweatshirt. Defendant was stopped wearing all of these items. There was also video surveillance shown to the jury in which the perpetrator could be seen wearing a burgundy hooded-sweatshirt and a gray sweatshirt. Moreover, defendant's shoes were wet, his clothing was covered with burrs and pickers from bushes, and he was spotted only five or six blocks from the store. Finally, defendant made unsolicited incriminating statements to police, when he asked, "was it a crime to ask someone for money and "how are they going to have my face on video and my picture when I had my hood covering?" Defendant was not denied the effective assistance of counsel.

III. Sentencing

Defendant argues that the record fails to support a scoring of ten points for offense variable (OV) 4; psychological injury to the victim. Ten points are to be scored "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34. Under this variable, there is no requirement that the victim actually receive psychological treatment. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). We review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Here, Berney testified that she was scared because she feared defendant would harm her with his knife, and, further, that she was crying and pacing around the store after the incident. She also testified that she suffered from nightmares due to the incident and that she "didn't want to go outside for a while." This evidence is sufficient to support the trial court's scoring decision, *Endres*, *supra* at 417. The trial court did not err by scoring OV 4 at 10 points.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio