

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON A. WESTBROOK,

Defendant-Appellant.

UNPUBLISHED
February 17, 2009

No. 282397
Wayne Circuit Court
LC No. 07-005517-FC

Before: Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 7 to 15 years' imprisonment for the armed robbery conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

First, defendant argues that there was insufficient evidence to support his convictions of felon in possession of a firearm and felony-firearm. He contends that the prosecution did not establish beyond a reasonable doubt that the object used to rob the victim was a firearm within the definition of MCL 8.3t. He asserts that the prosecutor failed to establish the caliber of the weapon, the means of propulsion, or the specific characteristics of the barrel.

A challenge to the sufficiency of the evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must "view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felony firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). The felon in possession statute prohibits a person convicted of a felony from possessing a firearm if fewer than three years have passed since the person paid all fines,

served all terms of imprisonment, and successfully completed all terms of probation or parole imposed for the violation. *People v Perkins*, 262 Mich App 267, 269; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005); MCL 750.224f(1).¹ MCL 8.3t provides:

The word “firearm,” except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air.

Defendant is only disputing whether there was sufficient evidence to establish that he was in possession of a firearm. An item is a firearm for the purposes of felony-firearm and felon in possession of a firearm if it is designed and manufactured to propel a dangerous projectile, other than BBs, regardless of whether it is currently operable. *People v Peals*, 476 Mich 636, 655-656; 720 NW2d 196 (2006). Moreover, “[w]here conviction of an offense requires proof beyond a reasonable doubt that a defendant possessed a firearm, this element may be proven without the actual admission into evidence of the weapon.” *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

When reviewing a sufficiency of the evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses. *Wolfe, supra* at 514. Therefore, “[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The victim testified that defendant pointed a gun at her stomach when he demanded her purse. She testified that it was daylight and described the gun as a silver handgun with “one of the revolving bullets.” The prosecution is not required to show that the gun was operable or to produce the gun as evidence. Therefore, the victim's testimony about the presence of a handgun, which she had the opportunity to view in broad daylight, along with her description of the gun, constituted sufficient evidence for a reasonable jury to infer that defendant was in possession of a weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion, i.e., a firearm. Nothing in the victim's testimony suggested that a toy gun was being used to commit the robbery.

Next, defendant argues that defense counsel's failure to move to suppress the pretrial identification based on an unduly suggestive pretrial identification procedure constituted the ineffective assistance of counsel. Defendant contends that the victim's identification of defendant in a photographic lineup was done using an unduly suggestive procedure because singling out one person or one photograph in some way makes the lineup unduly suggestive. He

¹ The parties stipulated that on the date of the incident, defendant was not eligible to possess a firearm.

argues that this was the case here because the victim was shown six photographs, but only two actually matched the general description of the perpetrator. Defendant also contends that this improper procedure tainted the victim's in-court identification of defendant, and there was not an independent basis for the in-court identification. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because this Court denied defendant’s motion to remand, there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to effective assistance of counsel. *Cline, supra* at 637. “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). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). “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), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “Defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.” *Dixon, supra* at 396.

A photographic identification procedure can be so suggestive that it deprives the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *Id.*; *People v Kurylczyk*, 443 Mich 289, 306, 311-312; 505 NW2d 528 (1993) (Griffin, J.). Generally, a photographic lineup is not suggestive if it contains some photographs that are fairly representative of the defendant’s physical features and thus are sufficient to reasonably test the identification. *Id.* at 304. Differences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others do not render a lineup impermissibly suggestive. *Id.* at 304-305. Physical differences generally affect only the weight of an identification and not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

The photographic lineup was not impermissibly suggestive. Unlike in *Gray, supra* at 111, the victim was shown six photographs, not one. Defendant suggests that, based on the victim's testimony, only two actually fit the description she gave police. However, physical differences in the photographs do not render a lineup impermissible as long as the lineup contains some photographs that are fairly representative of defendant’s features. *Kurylczyk, supra* at 304. This is the case here because all of the individuals in the six photographs were of young looking African-Americans males, all of the photographs were the same size, and they all were only headshots. Additionally, police told the victim that the perpetrator might not be in one

of the photographs. The victim testified that she looked at each photograph carefully, but her eyes were drawn to defendant's photograph. There is no evidence that the police did anything to make defendant's photograph stand out.

Because the identification procedure was not suggestive there is no basis for concluding that defense counsel was ineffective for failing to challenge the identification evidence. Counsel is not required to make a frivolous or meritless motion. *Riley, supra* at 142.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Stephen L. Borrello