

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 5, 2009

No. 280428

Wayne Circuit Court

LC No. 07-007351-01

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and killing an animal, MCL 750.50b. He was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of ten to forty years for the home invasion conviction, five to ten years for the felon in possession conviction, four to eight years for the felonious assault conviction, and two to four years for the killing of an animal conviction, to be served consecutively to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

Defendant's convictions arise from an incident at a Detroit residence occupied by Ernestine Lynch, Antoine Porter, and Cynthia Porter. Testimony indicated that defendant entered the home armed with a gun and shot a dog. The police later arrested defendant at the home of his girlfriend, Rachel Haynes. A cell phone belonging to one of the victims and a gun were recovered during a warrantless search of Haynes's residence. The defense theory at trial was mistaken identity.

I. Effective Assistance of Counsel

Although defense counsel filed a motion to suppress the gun and cell phone that were seized during the warrantless search of Haynes's residence, defendant argues that counsel was ineffective because her investigation of the circumstances surrounding the search and her presentation of the motion to suppress were both deficient.

Because defendant did not raise this ineffective assistance of counsel claim in the trial court and no *Ginther*¹ hearing was held, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To justify reversal under either the federal or state constitution, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. "In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* Second, the defendant must show prejudice as a result of the deficient performance. *Id.* To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, supra* at 691. The right to the effective assistance of counsel includes having prepared counsel, i.e., an attorney who has investigated and is prepared to present all substantial defenses. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005); *People v Battles*, 109 Mich App 487, 490; 311 NW2d 779 (1981); *People v Lewis*, 64 Mich App 175, 183-184; 235 NW2d 100 (1975). To establish ineffective assistance of counsel based on defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990).

In this case, defense counsel moved to suppress the gun and cell phone on the ground that they were seized during a warrantless search without consent. After conducting an evidentiary hearing, the trial court determined that defendant did not reside at Haynes's home and, therefore, lacked standing to challenge the search of the home. The court further found, however, that the search was proper because it was conducted with Haynes's consent.

Although defendant now argues that counsel was ineffective because she failed to present documentary evidence to establish that he also resided at Haynes's house, the existing record does not support defendant's claim that documentary evidence of his residency existed. Even if such evidence existed, however, counsel's decision whether to present the evidence was a matter of trial strategy and defendant has not overcome the presumption of sound strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). It was not unreasonable for counsel to attempt to establish defendant's residency through Haynes's testimony and her cross-examination of Officer Owens, who acknowledged that he went to the home because he believed that defendant lived there. Furthermore, defendant's residency was relevant only to the issue of standing. The trial court additionally found that, apart from the issue of standing, the search was valid pursuant to the consent of another homeowner, Haynes. Thus, there is no reasonable

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

probability that the trial court would have granted the motion to suppress even if documentary evidence of defendant's residency had been presented.

Defendant also argues that defense counsel was ineffective for failing to argue a theory of coerced consent as "an alternative argument." At the hearing, however, Haynes testified that she never had any direct contact with a police officer and never consented to the search of her home. Defense counsel cannot be faulted for failing to pursue a theory that would have been in direct conflict with the testimony of her witness. For these reasons, defendant has not established a claim of ineffective assistance of counsel stemming from counsel's performance related to the motion to suppress.

II. Jury Instructions

Defendant next argues that the trial court's jury instructions on felonious assault and home invasion were deficient. At trial, however, defense counsel expressed satisfaction with the instructions given. Counsel's approval of the court's jury instructions constitutes an affirmative waiver of any instructional error, thereby precluding review.² *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

III. Habitual Offender Third Status

Defendant argues that a nonexistent 2005 felonious assault conviction was improperly used to establish his status as a third-felony habitual offender, MCL 769.11. Because defendant did not challenge his habitual offender status at sentencing, or in a post-sentencing motion, this issue is not preserved. MCL 769.34(10). But because defendant's habitual offender status affects the appropriate guidelines range, we may review this issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

As defendant correctly argues, a 2005 felonious assault conviction that was originally listed as a prior felony conviction for purposes of habitual offender enhancement was subsequently determined to belong to a different person with the same name. Thus, the felonious assault conviction was not available for enhancement. Defendant asserts that "[t]he PSIR reflects only one prior felony conviction." The PSIR does not support the argument raised by defendant. The prior record section indicates that defendant was convicted of two felonies, and the adult history section indicates that defendant was convicted of assault with intent to commit murder, MCL 750.83, and felony-firearm, MCL 750.227b. Although these convictions arise from the same criminal incident, our Supreme Court held that multiple convictions arising from the same incident are counted separately for purposes of determining the habitual offender status.

² Furthermore, even if we reviewed this issue under the plain error standard applicable to unpreserved issues, reversal would not be required. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Because defendant relied on a defense of mistaken identity, and the commission of a felonious assault and the larceny element of home invasion were not disputed issues at trial, any error in the court's jury instructions did not affect defendant's substantial rights. See *People v Petrosky*, 286 Mich 397, 401-402; 282 NW 191 (1938).

People v Gardner, 482 Mich 41, 44; 753 NW2d 78 (2008). Accordingly, in light of the two prior felony convictions, there was no plain error in sentencing him as a third-felony habitual offender.

Defendant also argues that defense counsel was ineffective for failing to object to his habitual offender status at sentencing. At the commencement of the proceedings against defendant, trial counsel questioned the reliance upon a felonious assault conviction to serve as the foundation for the habitual offense. The issue was investigated, and the PSIR acknowledged the error regarding felonious assault, but clarified that defendant nonetheless had two prior felony convictions. Where the record establishes that defendant properly was sentenced as a third-felony habitual offender, defense counsel was not ineffective for failing to object. Counsel was not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

IV. Scoring of OV 13

Plaintiff concedes that the record does not support the trial court's 25-point score for OV 13 (three or more crimes against a person within a period of five years), MCL 777.43(1)(b), and that the scoring error affects the appropriate guidelines range, thereby requiring resentencing. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). Accordingly, we vacate defendant's sentences and remand for resentencing.

V. Defendant's Standard 4 Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

A. Motions to Suppression

Defendant argues that the trial court erred in denying his pretrial motions to suppress (1) the cell phone and gun evidence, and (2) the victims' pretrial identifications. This Court reviews for clear error a trial court's findings of fact regarding a motion to suppress. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). However, the trial court's ultimate decision is reviewed de novo. *Id.*

1. Victims' Identifications

Ernestine Lynch and Antoine Porter both identified defendant at a pretrial lineup. Defendant argues that the trial court erred in denying his motion to suppress those identifications on the ground that the identification procedure was unduly suggestive.

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "In order to challenge an identification on the basis of lack of due process, 'a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.'" *Id.* When the trial court concludes that the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for the in-court identification can be established that is untainted by the suggestive pretrial

procedure. *Id.* at 542-543. The fairness or suggestiveness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

In this case, testimony indicated that efforts were made to ensure that the lineup was fair and comprised of individuals with similar characteristics. An attorney appointed to evaluate the fairness of the lineup indicated on the lineup form that the lineup was fair. Although defendant asserted that he saw Antoine Porter coming down the hall before the lineup was conducted, Officer Hansberry testified that neither Porter nor Lynch had an opportunity to see defendant in police custody before the lineup was conducted. Further, despite defendant's claim that he saw Porter in the hallway, there was no evidence that Porter saw defendant. On this record, the trial court did not clearly err in rejecting defendant's claim that the pretrial identifications by Antoine Porter and Lynch were tainted by an unduly suggestive procedure.

We also find no support for defendant's argument that defense counsel was ineffective in presenting and arguing the suppression motion. Counsel's decisions regarding whether to call or question witnesses were matters of trial strategy and defendant has not overcome the presumption of sound strategy. *Carbin, supra*. Further, defendant has not demonstrated that he was prejudiced by counsel's decision not to call the lineup attorney as a witness, given her representation that the lineup was fair. In addition, counsel was not ineffective for failing to pursue an interlocutory appeal of the trial court's decision. Any appeal would have been futile. *Torres, supra*.

2. Consent to Search

Relying on Haynes's testimony that she did not consent to a search of her residence, defendant argues that the trial court clearly erred in finding that there was consent for the search. In contrast to Haynes's testimony, however, Officer Owens testified that Haynes gave him permission to search the residence. The conflicting testimony presented a classic credibility dispute, which the trial court resolved by finding that Officer Owens's testimony was credible, whereas Haynes's testimony was not. This Court defers to the trial court's determination of credibility. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). Thus, the trial court did not clearly err in finding that consent to search was given.

Defendant also argues for the first time on appeal that any consent given was not voluntary. Because defendant did not challenge the validity of the search on this basis in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The record provides no support for defendant's claim that consent was not voluntarily given. Thus, we find no plain error. Further, a finding of probable cause was not necessary because consent is an established exception to the general warrant and probable cause requirements. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

Lastly, defendant has not demonstrated that counsel's performance at the suppression hearing was deficient or prejudicial. Accordingly, we reject defendant's related ineffective assistance of counsel claim with respect to this issue.

B. Bindover

Defendant raises two issues related to his bindover after the preliminary examination. Because defendant failed to raise these issues in an appropriate motion in the trial court, they are not preserved. Accordingly, we review the issues for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

We reject defendant's argument that there was insufficient evidence to identify him as the perpetrator of the charged offenses to bind him over for trial. The district court must bind a defendant over for trial if the evidence presented at the preliminary examination establishes that a felony has been committed and there is probable cause to believe that the defendant committed the crime. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support a bindover. *Id.* "The prosecution is not required to prove each element of the crime beyond a reasonable doubt. Where there is credible evidence both to support and to negate the existence of an element of the crime, a factual question exists that should be left to the jury." *Id.*

Both Ernestine Lynch and Antoine Porter identified defendant at the preliminary examination as the person who committed the charged offenses. Moreover, Officer Owens testified that he spoke to "Wayne," the person the perpetrator had been looking for, and was directed to the Wisconsin Street residence where defendant was located. The police also found a cell phone belonging to one of the victims and a gun matching the description of that used by the perpetrator. This evidence was sufficient to establish probable cause that defendant committed the charged offenses. Questions relating to the credibility or reliability of the identification testimony were for the jury to resolve at trial. Thus, defendant was properly bound over for trial on the charged offenses, and defense counsel was not ineffective for failing to challenge the bindover decision. Moreover, the record does not support defendant's claim that counsel's performance at the preliminary examination was deficient.

We also reject defendant's argument that he was never bound over on the charge of killing an animal and that the circuit court therefore lacked jurisdiction over that charge. The circuit court's jurisdiction is limited to the offenses specified in the return made by the examining magistrate. *People v Curtis*, 389 Mich 698, 707; 209 NW2d 243 (1973); *People v Evans*, 72 Mich 367, 387-388; 40 NW 473 (1888). Although the magistrate failed to mention count VI, killing an animal, on the record at the preliminary examination, the return indicates that the magistrate found probable cause to bind defendant over on that charge. Accordingly, the circuit court had jurisdiction over that charge and defense counsel was not ineffective for failing to seek dismissal of the charge.

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood