

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACEY L. WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

May 21, 2009

No. 283375

Wayne Circuit Court

LC No. 07-009110-FC

Before: Servitto, P.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of 11 to 20 years for each robbery conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Because there was sufficient evidence to convict defendant, his sentences were constitutional, the photographic lineup was proper, and defendant was not denied the effective assistance of counsel, we affirm.

Defendant was convicted of robbing William Rice and Cheryl Sanford at an ATM. Rice and Sanford both testified that while seated in their vehicle at a drive-through ATM, two men approached them with guns, demanding their money and Ms. Sanford’s purse. After the victims handed over the items, the robbers jumped into a nearby red car. Mr. Rice shot several times at the red vehicle, but it was able to get away.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to identify him as one of the robbers. We disagree. In *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005), this Court explained:

We review claims of insufficient evidence de novo. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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. This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the

credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. All conflicts in the evidence must be resolved in favor of the prosecution. [Citations omitted.]

At trial, Sanford positively identified defendant as one of the robbers. Further, Rice and Sanford identified the robbers' vehicle as a red Beretta, and Rice stated that he saw a white baseball cap on the back window ledge. Rice also testified that he fired a gun at the vehicle as it was leaving. Defendant owned a red Beretta and when his car was discovered a few days after the robbery, it had a shattered windshield and apparent bullet damage to a rear-view mirror, and a white baseball cap was on the back window ledge. This evidence, viewed in a light most favorable to the prosecution, was sufficient to establish defendant's identity as one of the robbers beyond a reasonable doubt. The credibility of the identification testimony was for the trial court, as the trier of fact, to determine. *People v Crump*, 216 Mich App 210, 215; 549 NW2d 36 (1996).

## II. Defendant's Sentences

Defendant next argues that his sentences of 11 to 20 years each for the robbery convictions violate the constitutional prohibitions against cruel or unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. We find no merit to this argument.<sup>1</sup>

Defendant's sentences are within the appropriate guidelines range, which was determined to be 81 to 135 months. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008)(internal citation omitted). Defendant contends that his sentences are cruel and unusual considering the quality of the evidence against him, and because he had no prior criminal record and was employed at the time of the offense. As previously explained, however, the evidence was sufficient to establish defendant's involvement in the offense beyond a reasonable doubt. Further, defendant's lack of a prior criminal record was accounted for in the scoring of the sentencing guidelines, and the fact that defendant was employed does not render his sentences disproportionate. In sum, defendant has failed to overcome the presumptive proportionality of his sentences and, accordingly, there is no merit to his claim that his sentences are constitutionally cruel or unusual.

## III. Defendant's Standard 4 Brief

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which have merit.

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<sup>1</sup> Plaintiff asserts that this Court must affirm defendant's sentences because MCL 769.34(10) provides that a sentence within the sentencing guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, and defendant here does not allege a scoring error or reliance on inaccurate information. However, the limitation on review specified in MCL 769.34(10) is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant first argues that Sanford's in-court identification was tainted by an improper pretrial photographic showup, and that there was no independent basis for her in-court identification. Because defendant did not challenge Sanford's pretrial identification or object to her in-court identification at trial, this issue is not preserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Here, defendant does not argue that the pretrial photographic showup was unduly suggestive, but rather contends that it was improper to conduct a photographic showup because he was in custody at the time.<sup>2</sup>

When an accused is in custody or can be compelled to appear, identification by photographic showup should not be made unless a legitimate reason for doing so exists. *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993). Circumstances that might justify use of a photographic showup include: (1) it is not possible to arrange a proper lineup, (2) there is an insufficient number of persons available with the accused's physical characteristics, (3) the case requires immediate identification, (4) the witnesses are distant from the location of the accused, or (5) the accused refuses to participate in a lineup and by his actions seeks to destroy the value of the identification. *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

In this case, because defendant did not pursue this issue below, no record was developed concerning the circumstances surrounding the photographic identification, and there is no basis for concluding from the existing record that there was no legitimate reason for conducting a photographic showup. Therefore, defendant has not sustained his burden of establishing a plain error. *Carines*, *supra* at 763. Furthermore, our review of the trial testimony in light of the factors set forth in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), fails to establish that there was no independent basis for Sanford's in-court identification. For these reasons, appellate relief is not warranted with respect to this unpreserved issue.

Defendant lastly argues that trial counsel was ineffective for failing to challenge the pretrial identification procedure and for failing to obtain Canadian border records that allegedly would have supported his alibi defense. Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

To establish ineffective assistance of counsel, 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, defendant must show that counsel's performance was deficient, which requires a showing that counsel made an error

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<sup>2</sup> Contrary to what defendant asserts, the record indicates that a lawyer represented defendant at the photographic showup.

so serious that counsel was not performing as the “counsel” guaranteed by the Sixth Amendment. *Id.* at 600. Second, defendant must show that the deficient performance prejudiced the defense. *Id.* To demonstrate prejudice, defendant must show a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.*

First, in light of our conclusion that there is no basis in the record for finding that the photographic showup was improper, or that there was no independent basis for Sanford’s in-court identification, the record does not support defendant’s claim that counsel was ineffective for failing to pursue this issue below.

In support of his second argument, defendant relies on the affidavits of four individuals who each aver that trial counsel was asked to obtain Canadian border records that allegedly would have supported defendant’s claim that he was in Canada at the time of the robbery. However, the record discloses that counsel attempted to obtain the records, but that Canadian Customs does not allow United States citizens to subpoena its border records. Counsel also attempted to obtain the border records through a Canadian citizen, but the trial record does not disclose the results of that effort. On this record, there is no basis for concluding that counsel’s performance in relation to the border records was deficient.

Furthermore, defendant has never produced anything describing what the actual border records would reveal. Without something more, there is no basis for concluding that the evidence would have actually been favorable to defendant, or could have provided a substantial defense. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Thus, defendant has not established that he was prejudiced by counsel’s failure to obtain the records.

For these reasons, we reject defendant’s claim that he was deprived of the effective assistance of counsel.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Peter D. O’Connell  
/s/ Brian K. Zahra