

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYATTA LAJUAN DANIELS,

Defendant-Appellant.

UNPUBLISHED

June 4, 2009

No. 283451

Wayne Circuit Court

LC No. 07-013935-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and of one count each of being a felon in possession of a firearm, MCL 750.224f, and of possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for the armed robbery convictions, one to five years' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

At approximately 9:40 p.m. on August 2, 2007, Byron Newkirt and Verlynn Pitts were standing in front of a building at the corner of Kentucky and Margarett streets in Detroit. Defendant approached them as he loaded a clip into an automatic weapon and demanded their jewelry. He warned that he had enough bullets to kill everyone standing in front of the building. After Newkirt and Pitts gave defendant their jewelry and some money, defendant walked around the corner and entered the passenger side of a turquoise car, which then left the scene. The same car returned shortly thereafter, without defendant. Police officers recovered a Wayne County Jail identification bracelet with defendant's picture on it inside the car. Newkirt and Pitts each separately identified the man pictured on the bracelet as the robber and then subsequently identified defendant in photographic lineup. Defendant's theory of defense during trial was misidentification, and he denied committing the robberies or carrying a firearm.

Defendant first argues that he was denied his rights to due process and a fair trial when the trial court denied his motion to suppress evidence stemming from his photographic identifications, which defendant argues were unduly suggestive. We disagree. Absent clear error, this Court will not reverse a trial court's decision admitting identification evidence. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists if we are left

with a definite and firm conviction that a mistake was made. *Id.* Further, we review constitutional issues de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

Defendant argues that the police officers' display of the identification bracelet to Newkirt and Pitts tainted their subsequent photographic lineup identifications as well as their in-court identifications of defendant. "An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Harris, supra* at 51. An impermissible suggestion may arise when a witness is shown only one person's photograph because, in such a situation, the witness may be tempted to assume that the person pictured is the perpetrator. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The danger of such a suggestive photographic identification procedure is that, once the witness identifies the person photographed as the perpetrator, the witness will base later identifications of the suspect on the photograph rather than on an independent recollection of the crime. *Id.* at 112. "It is the likelihood of misidentification which violates a defendant's right to due process[.]" *Neil v Biggers*, 409 US 188, 198; 93 S Ct 375; 34 L Ed 2d 401 (1972).

"[T]o determine whether the admission of testimony regarding an out of court identification offends [a] defendant's due process rights, we conduct a two-step analysis." *United States v Hawkins*, 499 F3d 703, 707 (CA 7, 2007). "First, the defendant must establish that the identification procedure was unduly suggestive." *Id.* This involves showing that the procedure was both suggestive and that the suggestiveness was unnecessary. *Id.* If the defendant establishes the first step, we must then determine whether the identification was nevertheless reliable under the totality of the circumstances. *Id.*

For purposes of this appeal, we will assume without deciding that, in accordance with Newkirt's testimony, the police officers showed him the identification bracelet and inquired whether the person pictured on the bracelet was the perpetrator. If, as the police officers maintained, Newkirt merely happened to see the photograph on the bracelet and spontaneously remarked that the person pictured was the robber, such would not constitute a police-induced identification procedure entitling defendant to constitutional protections. See *People v Metcalf*, 65 Mich App 37, 41, 50; 236 NW2d 573 (1975); *People v Hampton*, 52 Mich App 71, 76-77; 216 NW2d 441 (1974), rev'd on other grounds 394 Mich 437 (1975).

We hold that the display of the bracelet to Newkirt was not unnecessarily suggestive. The procedure employed was, in essence, a "showup," or "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup[.]" *Stovall v Denno*, 388 US 293, 302, 87 S Ct 1967; 18 L Ed 2d 1199 (1967), overruled in part on other grounds *Griffith v Kentucky*, 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987). Although the use of showups has been widely condemned as inherently suggestive, they have been held constitutionally permissible where necessary to quickly confirm a suspect's identity. *Id.*; *Brisco v Phillips*, 376 F Supp 2d 306, 313 (ED NY, 2005). As stated in *Brisco*, "[q]uick identification permits the release of a wrongly detained suspect and allows the police to continue the search for the suspect who may still be at large." *Id.* "For this reason, courts have consistently admitted showups that are held in close temporal and geographic proximity to the crime." *Id.*; see also, *United States v Butler*, 970 F2d 1017, 1021 (CA 2, 1992). In *Simmons v United States*, 390 US 377, 382-386; 88 S Ct 967; 19 L Ed 2d 1247 (1968), the United States Supreme Court held that the defendant's due process protections were not violated when FBI agents showed photographs

of the suspected bank robbers, including the defendant, to bank employees the day following the bank robbery. Considering the totality of the circumstances, the Court opined that the identification procedure was not unnecessary and there was little chance that the procedure utilized led to misidentification. *Id.* at 384-386.

Here, police officers showed Newkirt the bracelet within a very short time after, and at the same location where, the robbery was committed, while Newkirt's memory was still fresh. Police officers retrieved the bracelet from the same vehicle in which the perpetrator left the scene following the robbery. Newkirt took the bracelet inside a nearby building to view it in better lighting and determined that the person pictured was the same person who committed the robbery. In addition to the fact that the identification occurred shortly after the robbery and at the same location, it was necessary to the officers' investigation because the perpetrator did not return to the scene with the vehicle, and was still at large.

Further, although Newkirt was shown only one photograph, the procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. *Simmons, supra* at 384. No evidence indicates that the police officers suggested to Newkirt that the person pictured on the bracelet committed the robbery. In addition, Newkirt testified that the robber looked familiar to him, he was focused on the perpetrator's face during the robbery, and the robbery occurred under a street light. Accordingly, considering the totality of the circumstances, we cannot conclude that Newkirt's identification of defendant resulted from an unduly suggestive identification procedure. Therefore, the trial court properly denied defendant's motion to suppress Newkirt's testimony regarding the identification bracelet. *Hawkins, supra* at 707-708.

Unlike the identification procedure involving Newkirt, however, the procedure involving Pitts was unnecessarily suggestive. *Id.* at 707. When Pitts arrived at the police station on the night of the robbery, officers informed her that they had arrested the perpetrator and showed her the identification bracelet with defendant's picture on it. She was aware that the person pictured on the bracelet was the person that the officers had in custody. Pitts first identified defendant as the robber from his picture on the bracelet and then identified him in a photographic lineup conducted that same night. The totality of the circumstances show that the identification procedure was suggestive and unnecessarily so considering that there was no need to show Pitts the bracelet.

Because the identification procedure was unduly suggestive, we must next determine whether Pitts's identification was nonetheless reliable, under the totality of the circumstances. *Hawkins, supra* at 707, 710, citing *Neil, supra* at 199. In making this determination, we consider Pitts's opportunity to see the perpetrator during the offenses, her degree of attention, the accuracy of her prior description, her level of certainty demonstrated at the confrontation, and the length of time between the crime and the confrontation. *Id.* at 710, citing *Neil, supra* at 199-200.

We conclude that Pitts's identification was reliable despite the suggestiveness of the procedure. Pitts identified defendant as the perpetrator on the same night that the robbery occurred and expressed no hesitation in doing so. She testified that it was still light outside during the robbery and she was able to get a good look at the perpetrator's face. She described the robber as having a goatee, wearing light-colored clothing, and having a medium build. She also described him as bald because he had a low, fade haircut. When police officers showed

Pitts the bracelet, she was certain that the person pictured on the bracelet was the person who robbed her, and the event was fresh in her mind. Therefore, notwithstanding the unduly suggestive identification procedure, the record shows that Pitts's identification was reliable. *Hawkins, supra* at 707, 710. Thus, the admission of Pitts's testimony did not violate defendant's due process protections. *Id.* at 707.

Defendant next argues that the prosecutor's comments and failure to produce evidence during discovery denied him his rights to due process and a fair trial. We disagree. We review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). We also review constitutional issues de novo. *Geno, supra* at 627.

A criminal defendant has a due process right to access evidence that the prosecutor possesses if that evidence "might lead a jury to entertain a reasonable doubt about [the] defendant's guilt." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). In order to warrant reversal because of a prosecutor's failure to disclose such evidence, "a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). The failure to preserve evidence that might have exonerated a defendant will not constitute a due process violation unless the defendant demonstrates bad faith on behalf of the police. *Id.*

Defendant contends that the prosecutor committed misconduct by failing to produce the DVD recording of the police officers' stop of the turquoise car. The record demonstrates, however, that no such recording exists. Sergeant Jason Marzette informed defendant and the trial court that the recording equipment in the police vehicle at issue was used to record video at 7:43 a.m. on August 2, 2007, and next recorded video at 5:30 a.m. on August 3, 2007. Therefore, no recording of the stop of the turquoise car that occurred on the night of August 2, 2007, existed. Although defendant characterizes the missing video as destroyed evidence, the record shows that the purported evidence simply never existed. Accordingly, no due process violation occurred.

In any event, the trial court instructed the jury that the missing evidence would have been unfavorable to the prosecution. The court instructed the jury as follows:

Film from an onboard video camera with sound is a missing piece of evidence which was the Prosecution's responsibility to produce for this trial. You may infer that the film/DVD disk that is missing would contain evidence unfavorable to the Prosecution's case.

Thus, although the record shows that the purported evidence never existed, the trial court instructed the jury as if it had existed and as if the prosecutor failed to produce the video for trial. Thus, defendant is entitled to no further relief.

Defendant also challenges the prosecutor's failure to turn over police logs, notes, and reports. Defendant fails to show, however, that any of the requested materials were exculpatory or were destroyed in bad faith as required to constitute a due process violation. *Hanks, supra* at 95. Moreover, the record shows that defendant was provided with two police reports during trial. After receiving the second of the two reports, the trial court stated that it was willing to grant a

continuance to provide defense counsel more time to review the report. Defense counsel declined the offer of a continuance, indicating that he had already discussed the report with defendant and was ready to proceed. Thus, the record does not show that defendant was denied a fair and impartial trial. *Cox, supra* at 450-451.

Defendant next argues that the prosecutor committed misconduct by posing numerous objections that suggested that defense counsel was doing something wrong. Defendant challenges three objections in particular, all of which the trial court overruled. The record shows that both defense counsel and the prosecutor posed numerous objections during trial and that the proceeding was somewhat contentious. In light of that and having reviewed the challenged objections in context, we find that defendant has not shown that the prosecutor's objections denied him a fair and impartial trial. *Id.*

Defendant further argues that the officer in charge of the case improperly exposed a "Wanted" poster displaying two pictures of defendant to the jury. When the trial court asked the jurors whether they had seen the poster, one juror indicated that he had seen defendant's photograph but was unable to read the writing on the poster. Defense counsel did not request that the juror be excused, and in fact stated that he did not have a basis to ask the court to excuse any of the jurors. Counsel further indicated that a jury instruction emphasizing that the jurors should consider only the evidence that was admitted during trial was sufficient to remedy the situation, and the trial court so instructed the jury. Thus, defendant was not denied a fair and impartial trial. *Id.*

Finally, defendant contends that the cumulative effect of the prosecutor's conduct and the exposure of the "Wanted" poster to the jury denied him a fair trial. "[O]nly actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002), citing *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because defendant has not established any actual errors, there is no improper cumulative effect of such errors that denied him a fair trial. Thus, reversal is not warranted.

Defendant next argues that defense counsel's failure to present witnesses and compel the production of crucial evidence denied him the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, and this Court denied his motion to remand for an evidentiary hearing, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id.*, quoting *LeBlanc, supra* at 579.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner, supra* at 75-76. As for deficient performance, a defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant argues that defense counsel presented only a “bare-bones” defense and made no effort to explain defendant’s whereabouts on the night of the robbery, how Johnnie Vernon Jones, the driver of the turquoise car, came to possess defendant’s car, why defendant’s jail bracelet was found in the car, and what defendant was wearing on the day of the robbery. Generally, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are [] matters of trial strategy,” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), which we will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses constitutes ineffective assistance of counsel only if it deprives a defendant of a substantial defense. *Id.*

Defendant was not deprived of a substantial defense, and defense counsel effectively presented his defense of misidentification. Counsel thoroughly questioned Newkirt and Pitts regarding their identifications of defendant and whether they identified defendant merely because his picture was on the bracelet recovered from the turquoise car. Although defendant relies on Jones’s affidavit attached to his brief on appeal, the affidavit does not establish that counsel was ineffective for failing to call Jones as a witness. In the affidavit, Jones maintains that the car belongs to defendant and defendant testified as such during trial. When the police stopped the car on the night of the robbery, however, Jones claimed that he, rather than defendant, owned the car. As a result, Jones may well have been perceived to be an incredible witness, and defendant has not overcome the presumption that counsel’s decision not to call him constituted sound trial strategy. In any event, defense counsel effectively presented defendant’s misidentification defense, and defendant was not denied the effective assistance of counsel.

We affirm.

/s/ Richard A. Bandstra

/s/ Donald S. Owens

/s/ Pat M. Donofrio