

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ARON,

Defendant-Appellant.

UNPUBLISHED

November 10, 2009

No. 286951

Wayne Circuit Court

LC No. 05-003732-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from bench trial convictions of felonious assault, MCL 750.82, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Scott Keway, a truck driver, testified that defendant assaulted him with a gun while Keway's truck was temporarily blocking a street. Ronald Gibson, an undercover police officer who just happened to be in the area, witnessed the event and confirmed that it occurred exactly as Keway had described. Gibson followed defendant from the scene, approached defendant's car when he parked in front of his house, and saw the gun on the floorboard when defendant got out of the car. Defendant and his witnesses offered an alibi defense. They testified that defendant was at home at the time in question and that "Rock," a neighborhood mechanic, had taken the car earlier and returned shortly before the police arrived. Defendant went out to get the beer Rock had brought with him, and no sooner did he enter the car than he was accosted by the police.

Defendant's sole claim on appeal is that trial counsel was ineffective for failing to move to suppress Keway's identification testimony. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial

strategy.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

Defendant contends that Keway’s identification testimony was tainted because Keway was talking to the prosecutor while Keway was waiting in the hallway for the trial to begin, and the prosecutor turned and pointed defendant out to Keway and identified him by name. There is nothing in the lower court record to suggest that the prosecutor was in any way involved, and the “offer of proof” submitted with defendant’s motion to remand, which is not part of the lower court record, cannot be considered on appeal. *People v Walter Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

“An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process.” *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Even an in-court identification procedure may be impermissibly suggestive where, for example, the victim first identifies the defendant in court, the confrontation occurs years after the offense, the victim has no independent recollection of the perpetrator, and the police say something to suggest that the defendant is the guilty party. See, e.g., *People v Solomon*, 47 Mich App 208, 217-219; 209 NW2d 257 (1973) (Lesinski, C.J., dissenting), adopted 391 Mich 767 (1974).

Assuming without deciding that there was some evidence that the hallway identification was impermissibly suggestive, that alone would not preclude admission of Keway’s identification testimony. His testimony would still be admissible if the court determined that an independent basis for in-court identification, which was untainted by the suggestive pretrial procedure, could be established. *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977); *Kevin Williams*, *supra* at 542-543. Defendant has not addressed this secondary issue and thus has not shown that a motion to suppress Keway’s identification testimony was likely to have succeeded.

In any event, defendant cannot show that, but for counsel’s alleged error, the outcome of the trial was likely to have been different. The record clearly indicates that the court had some concerns about Keway’s identification testimony and relied primarily on Gibson’s testimony in determining that defendant had in fact committed the offenses. Therefore, even if Keway’s identification testimony had been suppressed, the court would still have had the benefit of Gibson’s identification testimony and thus it is unlikely that the outcome would have been different.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens