

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALONZO QUINTANILLA,

Defendant-Appellant.

UNPUBLISHED

September 14, 2010

No. 291752

Ottawa Circuit Court

LC No. 08-033069-FC

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for unarmed robbery, MCL 750.530. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 105 to 360 months' imprisonment with credit for 140 days. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his due process rights were violated because there was insufficient evidence to establish that the taking of the money was accomplished by putting the employee at the Family Fare Quik Stop, in fear, which is one of the essential elements of the crime. The United States and Michigan Constitutions provide that due process requires that a prosecutor must prove beyond a reasonable doubt all elements of a charged offense. US Const, Am V; Const 1963, art 1, § 17; *People v Mette*, 243 Mich App 318, 326-327; 621 NW2d 713 (2000). We review de novo the question whether there was sufficient evidence to support the verdict by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

In this case, the record clearly established that the employee was put in fear because she testified that she was terrified, afraid, very scared, and felt threatened. The employee also testified that after the robber reached toward his waistband, she felt that he had a weapon. Also, after the robber left the store, she hyperventilated and started crying hysterically. Based on the foregoing, and viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the element of fear necessary to support conviction of the crime were proved beyond a reasonable doubt. *Herndon*, 246 Mich App at 415.

II. IDENTIFICATION AND INEFFECTIVE ASSISTANCE

Defendant also argues that the employee's identification of him at the preliminary examination was impermissibly suggestive because he was brought into the courtroom wearing orange jail clothes and he was the only person in the courtroom who was a jail prisoner. Thus, the identification of him at trial was tainted by the employee's earlier viewing of him at the preliminary examination. In addition, defendant argues that his trial counsel was ineffective because he never requested a *Wade*¹ hearing so that the trial court had an opportunity to determine whether an independent basis for the in-court identification existed. Moreover, he was prejudiced by defense counsel's failure because the tainted identification of him at trial led to his conviction.

Absent manifest injustice, a claim of an unduly suggestive pretrial identification procedure will not be reviewed on appeal unless the defendant objected or moved the trial court to suppress the identification so that an evidentiary hearing could be conducted. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974); *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). In this case, defense counsel did not object in the trial court or move to suppress the in-court identification based on an alleged suggestive pretrial identification, specifically the employee's seeing defendant at the preliminary examination. Hence, no evidentiary hearing was held. Thus, this issue is unpreserved and review is limited to the existing record. *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007). Accordingly, we will review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Whether defense counsel rendered ineffective assistance of counsel is also not preserved for this Court's review, *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), so this claim will also be considered based only on the existing record. *Id.* To establish ineffective assistance of counsel during trial, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, 462 Mich at 302. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Further, counsel is not ineffective for failing to make motions or objections that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To establish that an identification procedure denied him due

¹ *United States v Wade*, 388 US 218, 229; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

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.” *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). Generally, if a witness is exposed to an impermissibly suggestive pretrial lineup or showup, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be sufficiently independent to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 96-97; 252 NW2d 807 (1977). Appropriate factors to consider in determining whether the in-court identification would be sufficiently independently based include: (1) the witness’s prior knowledge of the defendant, (2) the witness’s opportunity to observe the criminal during the crime, (3) the length of time between the crime and the disputed identification, (4) the witness’s level of certainty at the prior identification, (5) discrepancies between the pretrial identification description and the defendant’s actual appearance, (6) any prior proper identification of the defendant or failure to identify the defendant, (7) any prior identification of another as the culprit, (8) the mental state of the witness at the time of the crime, and (9) any special features of the defendant. *Gray*, 457 Mich at 115-116; *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

After considering the pertinent factors, we conclude that defendant was not denied due process because defendant has not shown, based on the totality of the circumstances, that the pretrial identification procedure was so suggestive that it led to a substantial likelihood of misidentification at trial. *Kurylczuk*, 443 Mich at 302. Moreover, the in-court identification was sufficiently independent to purge any taint caused by the employee seeing defendant in jail clothes at the preliminary examination. *Gray*, 457 Mich at 115; *Kachar*, 400 Mich at 96-97. We recognize that, during the preliminary examination, defendant was brought into the courtroom wearing his jail clothes and that he was the only person wearing orange jail clothes in the courtroom. We further recognize that the employee indicated at trial that she could specifically recall the robber’s face because she remembered defendant from the preliminary examination. However, importantly, the employee also immediately indicated that she instantly recognized defendant as the robber at the preliminary examination the moment that he was brought into the courtroom. In addition, the record reflects that she felt certain, both at the preliminary examination and subsequently at trial, that defendant was the robber. Her identification of defendant was based on independent knowledge apart from the preliminary examination. Indeed, the circumstances of the crime itself were conducive to an accurate identification on the part of the complainant because the employee was only four feet from the robber during the robbery, there appeared to be adequate lighting in the store, and nothing obstructing the employee’s view of the robber. The robber did not wear a mask or anything to obstruct the employee’s view of his face other than sunglasses. Also, the robber made four statements and the employee asked three questions during the robbery, which demonstrates that there was a sufficient amount of time for the employee to study the robber. Moreover, the employee demonstrated an independent basis for her identification of defendant as the robber at trial when she indicated that defendant was more clean-shaven at trial than he was during the robbery.

Although defendant denied committing the robbery, thus making the identity of defendant as the robber an issue at trial, it was not only the employee’s testimony that identified defendant as the robber, and Deputy James Douglas testified that clothes similar to the ones worn

by the robber as seen on the surveillance video were recovered from defendant's residence along with a large amount of cash.

Based on the foregoing, we conclude that defendant was not denied his due process rights because he has not shown, based on the totality of the circumstances, that the pretrial identification procedure was so suggestive that it led to a substantial likelihood of misidentification at trial. *Kurylczuk*, 443 Mich at 302. In addition, the in-court identification was sufficiently independent to purge any taint caused by Rios viewing defendant at the preliminary examination. *Gray*, 457 Mich at 115; *Kachar*, 400 Mich at 96-97. There was no plain error. *Carines*, 460 Mich at 763.

Accordingly, we also conclude that defense counsel was not ineffective for failing to make a motion or objection that would be futile. *Milstead*, 250 Mich App at 401; *Fike*, 228 Mich App at 182. In addition, defense counsel simply bringing the suggestive pretrial identification procedure to the attention of jurors and arguing that the identification was based on an assumption appears to have been sound trial strategy, and this Court does not second-guess trial strategy. See *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defense counsel's performance did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302; *Rodgers*, 248 Mich App at 714. Moreover, there is not a reasonable probability of the results of the trial being different without the employee's in-court identification based on the testimony of the bystander and Deputy Douglas along with the employee's testimony of the events of the robbery itself. *Id.* Therefore, defendant has failed to carry his burden of demonstrating ineffective assistance of counsel on this issue. *Solmonson*, 261 Mich App at 663.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray