STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2010
v	No. 291037 Wayne Circuit Court
DARRETT LAMAR KING, Defendant-Appellant.	LC No. 08-011331-FC

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right convictions following a jury trial of two counts of assault with intent to murder, MCL 750.83, and one count each of possession of a firearm during the commission of a felony (felony-firearm), second conviction, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to 171 to 300 months for each count of assault with intent to murder and two to five years for felon in possession, to run concurrently with each other and consecutive to a five-year sentence for felony-firearm. We affirm.

On December 24, 2004, Emmanuel El-Amin and Roy Washington were assaulted by two men while they were outside at a gas station on the southeast corner of 7 Mile and Patton Street in Detroit. As Washington tried to run away from the attackers, one of the assailants fired what appeared to be a semi-automatic firearm at him and the other assailant followed him on foot on 7 Mile. When El-Amin exited his car, the assailant who had followed Washington on foot down 7 Mile, turned and shot at El-Amin, hitting him. El-Amin testified that he then watched the shooter flee north across 7 Mile onto Patton, where he saw the shooter overtaken and arrested by police officers. He testified that he did not lose sight of the shooter during the incident. The man was brought to El-Amin shortly afterwards and El-Amin identified him as the person who had shot him. Some days later, El-Amin was asked to pick his assailant from a photo lineup, but he failed to identify defendant.

Detroit Police Officer Jason Neville testified that he was on duty on the night in question, driving his patrol car westbound on 7 Mile when he heard gunshots. He testified that he saw two people running toward his patrol car, with two other people running after them with handguns, firing shots. He stopped the car on 7 Mile and got out to chase the shooters. When Neville began to close the distance between himself and defendant, defendant gave up and was arrested. Defendant was released shortly thereafter.

In 2008, Detroit Police Officer Michael Carlisle was a investigating an unrelated unsolved case for which he considered defendant a suspect. Carlisle searched the Detroit Police Department computer base and discovered that defendant had been arrested for the assaults on El-Amin and Washington, but never charged. He contacted El-Amin and Washington and tracked down a report of a gunshot residue test performed at the time of the shooting. He discovered that the residue test had shown that defendant had fired a gun. An arrest warrant was issued, and Carlisle then went to serve defendant who was in prison on unrelated charges.

Defendant first argues that there was not sufficient evidence to support his assault with intent to murder conviction. We review questions of sufficiency of evidence de novo, taking all of the evidence presented at trial and resolving all questions of weight and credibility in favor of the prosecution, to "determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Defendant makes much of the fact that neither El-Amin nor Washington saw the face of either of the assailants. However, El-Amin testified that he watched the man who shot at him chased and apprehended by a police officer. Neville testified that the man he apprehended, defendant, was the one of the two people he saw running and firing shots as Neville was driving on 7 Mile. Moreover, there was expert testimony that defendant's left glove showed evidence that he had fired a gun. In addition, Washington identified defendant at trial as one of the assailants.[1] Based on this evidence, a rational trier of fact could find beyond a reasonable doubt that defendant was the shooter.

Citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), defendant next argues that his due process rights were violated when the trial court allowed testimony as to the results of the gunshot residue testing, even though the evidence itself had been destroyed.

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), citing *Brady*, 373 US at 87.]

Defendant cannot make the first or fourth required showings. There was no evidence showing that the gunshot residue kit would have been favorable to defendant. Expert testimony indicated that the test showed that defendant had fired a gun. Moreover, even if the evidence had been retested and given a negative result, the residue expert testified that a negative test result is

[1] Washington explained that defendant's mask did not fit properly and that he was able to identify defendant by his eyes and his coloring.

not evidence of not having fired a gun; it is simply absence of evidence. [2] Defendant therefore cannot show that this was exculpatory evidence that would raise a reasonable probability of a different trial result.

A different standard applies when a defendant argues a due process violation based on destruction of evidence that merely might have been exculpatory. *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In such a case, the defendant bears the burden of showing bad faith on the part of the police. *Id.* at 58. Defendant points to no evidence supporting a finding that the Detroit Police Department destroyed this evidence in a bad faith effort to keep it from being retested, or to keep it from defendant.

Because defendant cannot show either that the evidence would have been exculpatory, or that it was destroyed in bad faith, he cannot show a due process violation based on its destruction.

Related to this argument is defendant's assertion that the trial court abused its discretion in denying his proposed jury instruction that an adverse inference may be drawn from the destruction of the gunshot residue evidence. See *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, a defendant is only entitled to an adverse inference instruction regarding the loss or destruction of potentially exculpatory evidence on a showing of bad faith. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). As discussed, no evidence was presented that indicated bad faith in the destruction of the gunshot residue evidence.

Defendant also argues that the trial court erred in allowing testimony regarding El-Amin's in-court identification of defendant. However, at the pre-trial suppression hearing, defendant's counsel acknowledged that defendant had not shown that either the police or the prosecutor had done anything improper either prior to or during the initial photographic showup, expressed his agreement with the argument that the testimony would be admissible, and stated that the issue was one of weight and credibility. Thus, we find that the issue has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Moreover, even were we to find otherwise, we would find that the trial court did not err when it allowed El-Amin's in-court identification. 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).

"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."

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[2] Defendant's counsel alluded to a ten percent error rate at the lab that did the testing, but at no time was any evidence presented that would indicate the gunshot residue testing would have a ten percent error rate. There was some testimony regarding errors in ballistics testing. Ballistics is "[t]he science of the motion of projectiles, such as bullets," and involves "[t]he study of a weapon's firing characteristics." Black's Law Dictionary (9th ed).

Harris, 261 Mich App at 51. The danger of 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. *People v Gray*, 457 Mich 107, 112; 577 NW2d 92 (1998). "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*.

Here, in support of his claim of error, defendant cites only to the fact that an unduly suggestive photographic array can violate defendant's right to due process. However, defendant does not maintain that the photographic showup was in any way unduly suggestive. Defendant notes that, shortly after El-Amin failed to identify the defendant in the photographic showup, the prosecutor told El-Amin that he had chosen the wrong person. However, defendant does not provide case law in support for a claim that this was in itself unduly suggestive; nor would we so find here where the prosecutor did not provide El-Amin this information at the time of the showup and ask him to try again. See *United States v Moskowitz*, 581 F2d 14, 19-20 (CA 2, 1978) (disapproving of the practice of informing a witness that his choice was incorrect but finding this is far less likely to produce an "irreparable misidentification" because it merely narrows the field from which the witness will make a second selection, and it does not involve any improper reinforcement or confirmation of the second selection itself.) Moreover, while evidence was presented at the motion hearing that defendant and Washington later spoke concerning defendant's choice, the fact that Washington chose defendant, and that Washington was pretty sure that his choice was correct, this is akin to a happenstance occurrence that does not bring into play the protections afforded to defendants in police-induced, arranged confrontations. 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). *People v Yacks*, 49 Mich App 444, 447-449; 212 NW2d 249 (1973).

This Court has held that the fact that a witness is unable to identify the defendant at a pretrial identification proceeding does not render a subsequent in-court identification impermissible. Instead, the previous failure to identify goes to weight, not admissibility. *People v Davis*, 106 Mich App 351, 352; 308 NW2d 206 (1981); *People v Jordan*, 34 Mich App 360, 365-366; 191 NW2d 58 (1971). Here, where defense counsel thoroughly explored the discrepancies in the previous identifications and misidentifications and the circumstances surrounding El-Amin's opportunity to view his assailant, we find no error in the trial court's decision to allow El-Amin's in-court identification of defendant.[3]

[3] El-Amin's identification of two innocent individuals during the initial photographic lineup underscores, however, the importance of the rule that corporeal lineups, rather than photographic
(continued…)

Defendant additionally challenges the trial court's intent instruction on the charge of assault with intent to murder. The instruction complained of read in relevant part, "Likewise, you may infer that the defendant intended the usual result that follows from the use of a dangerous weapon." Citing *People v Richardson*, 409 Mich 126; 293 NW2d 332 (1980), defendant argues that the jury instruction related to this element violated his due process by impermissibly shifting the burden of proof. See *People v Brown*, 267 Mich App 141, 148-149; 703 NW2d 230 (2005). The instruction in issue in *Richardson* read in relevant part as follows:

> "If a man kills another suddenly and without provocation, the law implies malice and the crime is murder. If the provocation is sufficient . . . , the killing would be manslaughter.
>
> "The instrument with which the killing was done will be taken into consideration by you because the intention to kill in the absence of evidence showing a contrary intent may be inferred by *[sic]* the use of a deadly weapon in such a manner that the death of the person assaulted would be an inevitable consequence." [*Id.* at 142 (emphasis omitted; mistakes noted by *Richardson*).]

Richardson clearly indicates that the improper language was not the portion instructing that "the intention to kill . . . may be inferred by the use of a deadly weapon," but rather the qualification, "in the absence of evidence showing a contrary intent." *Id.* at 44. See also *People v Wright*, 408 Mich 1, 25; 289 NW2d 1 (1980).

The error in *Richardson*, then, was not that the jury was instructed that it may infer intent to kill from the use of a deadly weapon, but that that inference was to be made "in the absence of evidence showing a contrary intent," implying a burden on defendant to produce evidence to avoid such an inference. See *Wright*, 408 Mich at 24. Thus, the error was not that the jury was instructed that it may infer intent from the use of a deadly weapon, but that that inference was to be made in the absence of contrary evidence. In the case at hand, the portion of the instruction challenged does not make a similar error. The instruction indicated that intent may be inferred from defendant's use of a dangerous weapon, but it did not transform the permitted inference into a presumption by indicating that it can be reached in the absence of opposing evidence.

Finally, defendant identifies several areas in which he argues his trial counsel was constitutionally deficient. Because defendant failed to preserve his claim by moving for a new trial or requesting a *Ginther*[4] hearing below, we limit our review of his claim to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Overriding our analysis is the presumption that counsel's conduct was "sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

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ones, be conducted absent special circumstances. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In order to show ineffective assistance of counsel, a defendant must show three things: "that counsel's performance was below an objective standard of reasonableness under prevailing norms," *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different," *id.*, and "that the resultant proceedings were fundamentally unfair or unreliable," *People v Odom*, 482 Mich 41, 69; 753 NW2d 78 (2008).

Most of defendant's examples of ineffective assistance of counsel are based on trial strategy. Counsel could have reasonably believed that by spotlighting the unrelated, unsolved case, the jury might come to believe that Carlisle was driven by his desire to solve the unsolved case, not by a desire to bring the true assailants of El-Amin and Washington to justice. Defendant also portrayed himself as a successful drug dealer. Out of context this might not seem like sound trial strategy. However in the context of the charges brought, it would be reasonable to try to show that defendant would have no financial motive to commit the crimes. We will not presume to substitute a different judgment for defense counsel in matters of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also claims trial counsel was ineffective for failing to move for a retesting of the gunshot residue evidence and suppression of the ballistics evidence. The gunshot residue evidence was destroyed, so any attempt to retest it would have been futile, *id.*, as would any attempt to challenge the ballistics evidence based on a problem in the chain of custody. Testimony as to the chain of custody of the ballistic evidence revealed no problem with the chain of custody of the ballistic evidence. It would also have been futile to object to the intent instruction on the assault charge because, as already discussed, there was no error in that instruction.

Defendant claims counsel was ineffective for failing to move to suppress evidence of defendant's prior felony convictions. While none of the details of defendant's prior convictions came out at trial, the following exchange occurred on cross-examination:

> *Prosecutor*: All right. Of course, you were the one in prison you said for gun and drug charges and you said felony firearm, right?
>
> *Defendant*: Yes.
>
> *Prosecutor*: What's that mean? What's felony firearm?
>
> *Defendant*: A felon in possession of a gun.
>
> *Prosecutor*: Of a gun?
>
> *Defendant*: Yes.
>
> *Prosecutor*: Of course, this was done by people with—this event here was done by people with guns, right?
>
> *Defendant*: Yes.
>
> * * *
>
> *Prosecutor*: So guns are something that, you're not a stranger to guns, are you?

In context, the prosecutor's line of inquiry does not appear intended to attack defendant's credibility as a witness. MRE 609(a). Rather it appears that the prosecutor was attempting to make an improper propensity inference. MRE 404(b)(1). However, although the question was objectionable, defendant cannot show that it is reasonably likely that the outcome of the trial would have been different had counsel objected.[5]

Finally, defendant claims counsel was ineffective for failing to object to the line of questioning, on cross-examination, relating to defendant's involvement in the unrelated, unsolved case. We disagree. The questioning about defendant's arguments with the victim in that other case went directly to defendant's credibility and was admissible impeachment evidence. Defendant had previously testified that, as a successful drug dealer, he would have had no motive to rob El-Amin and Washington. The prosecutor elicited testimony from defendant that his argument (and pushing match) with the victim in the other case concerned only $50. In any event, given the other evidence against defendant, he cannot show that this had a reasonable probability of determining the outcome of the trial.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

[5] For the same reason we reject defendant's assertion that his counsel's failure to object to the prosecutor's further questioning regarding the kind of weapon involved rises to the level of reversible error.