

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 17, 2016

v

DALVIN DEANTE HAPSON,
Defendant-Appellant.

No. 324818
Muskegon Circuit Court
LC No. 14-064710-FC

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

Defendant appeals his convictions for assault with intent to murder, MCL 750.83; armed robbery, MCL 750.529; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons provided below, we affirm.

I. IDENTIFICATION TESTIMONY

Defendant argues that his right to due process was violated when the victim identified defendant in court after an unnecessarily suggestive identification procedure at the preliminary examination. Questions of constitutional law, including a claim for denial of due process, are reviewed de novo. *People v Smith*, 498 Mich 466, 475; 870 NW2d 299 (2015).

It is well established law that “[a]n identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process.” *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To challenge an identification on due process grounds, a defendant must establish that the pretrial identification procedures were so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.* If the trial court finds that the identification procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis can be established for the in-court identification “that is untainted by the suggestive pretrial procedure.” *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Courts should consider the following factors when determining whether an independent basis exists for the admission of an in-court identification: (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 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. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Defendant is correct that the identification at the preliminary examination was suggestive. The fact that defendant, a young black man wearing jail clothing, was seated next to his attorney, a middle-aged white man, created the inference that defendant was the individual suspected of the crime. However, it does not necessarily follow that the victim's identification of defendant was constitutionally defective. Defendant must demonstrate that there was a substantial likelihood of misidentification. *Williams*, 244 Mich App at 542. Defendant has failed to make such a showing here. The victim was able to observe defendant at the time of the shooting and robbery. The victim testified that he saw defendant's face "in plain view" when he opened the hotel room door. The victim was able to describe defendant's clothing at trial. Moreover, the victim and defendant were also in close contact as they "wrestled" or "tussled," and the victim testified that they fought for "a good minute or two." After the victim was shot and after he ran down the hallway, he observed defendant once again as he exited the hotel. The victim testified that he saw defendant well enough to be able to identify him and that he would not forget defendant's face. Under the circumstances, defendant has not established that the victim's identification of defendant at the preliminary examination created a substantial likelihood of misidentification. Therefore, defendant has not shown that his identification was constitutionally defective.

Moreover, even where an identification procedure is impermissively suggestive, evidence concerning the identification may be admitted at trial where there is an independent basis for the in-court identification that is untainted by the pretrial procedure. *Kurylczyk*, 443 Mich at 303. To the extent that defendant's jail garb and his location at the defense table at the preliminary examination were unduly suggestive, the record establishes an independent basis for the victim's in-court identification of defendant at trial. When evaluating the factors outlined in *Gray*, some factors weigh against finding an independent basis for the identification, but overall, the factors weigh in favor of finding an independent basis. The victim testified that he had never seen defendant before the robbery, and the identification at the preliminary examination occurred around five months after the robbery at the Baymont Hotel. Also, the record indicates that defendant had facial hair and tattoos, but the victim testified at trial that he did not remember whether defendant had any facial hair or tattoos. However, the victim had a significant opportunity to view the perpetrator and he was very certain in his identification at the preliminary examination and at trial. Weighing the factors, the record establishes that there was an independent basis for the victim's in-court identification, and therefore the identification was admissible. Likewise, defendant's related claim that counsel was ineffective by failing to object to the identification fails because "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the introduction of MRE 404(b) evidence at trial. At trial, the

prosecution introduced testimony that defendant participated in a subsequent robbery. A witness at trial testified that defendant used a gun and an accomplice to rob him of his money and Pelle coat after shopping at a mall one day. The prosecution also introduced surveillance videos from the mall showing defendant and the witness shopping together at the mall, and defendant appeared to be wearing a Pelle coat that looked similar to the one stolen from the victim in the instant case. The record indicates that, before trial, the prosecution filed notice that it intended to introduce evidence of the subsequent robbery, and defense counsel filed a motion in limine to exclude this evidence. In his motion in limine, defense counsel argued that the facts of the two robberies were not similar enough to show a common plan or scheme, and that the subsequent robbery did not demonstrate the perpetrator's intent or purpose in the robbery in the instant case. According to defense counsel, evidence of the subsequent robbery was extremely prejudicial and had no probative value whatsoever. The trial court considered the issue and found that evidence of the subsequent robbery was admissible "to the extent that the People are able to demonstrate that the defendant wore this victim's jacket when he perpetrated the subsequent robbery."

On appeal, defendant argues that his trial counsel was ineffective for failing to object to the testimony at trial on the basis that the prosecution failed to demonstrate that defendant wore the victim's jacket when he perpetrated the subsequent robbery or on the basis that he should have agreed to the testimony regarding the jacket but not the testimony about the robbery.

To establish the ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668, 669, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is strongly presumed and the defendant bears the burden of proving otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). Mere speculation as to a different outcome is not sufficient to show prejudice. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant has failed to demonstrate that his trial counsel's performance was ineffective when he failed to object to the introduction of the MRE 404(b) evidence at trial. When evaluating whether counsel was effective,

"a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." [*People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995), quoting *Strickland*, 466 US at 697.]

Here, assuming arguendo that trial counsel's performance was deficient, defendant has failed to show that there is a reasonable probability that, but for defense counsel's failure to object to the victim's identification, the result of the proceeding would have been different. *Pickens*, 446 Mich at 309. The record contains overwhelming evidence that defendant shot and robbed the victim at the Baymont Hotel. Particularly, in addition to the victim's identification of

defendant as the perpetrator, defendant's girlfriend, Alecia Knapp, testified that defendant committed the instant crimes. Knapp testified that she went to the Baymont Hotel with defendant and that, when the victim opened the door to the hotel room, defendant had his gun pulled out and went inside the room. According to Knapp, she heard defendant say "give me this" and "where's it at" before gunshots were fired. Afterward, defendant left the room, and Knapp and defendant left the hotel together. Knapp testified that defendant had the victim's pants, wallet, and jacket in the car after they left the hotel. Further, defendant's statement to a jail inmate where he admitted that "he shot somebody . . . over a robbery" at the Baymont Hotel was admitted into evidence. And numerous witnesses testified that after the robbery, they observed defendant wearing the jacket that the victim identified as the one stolen from him. Thus, had trial counsel successfully objected to the admissibility of the subsequent robbery, there is no reasonable probability that the result of the proceeding would have been different.

Affirmed.¹

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey

¹ Defendant initially raised a sentencing issue in his brief on appeal as well, but he subsequently withdrew it, and we therefore will not address it.