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IN THE COURT OF APPEALS OF INDIANA

MICHAEL CLAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1002-CR-56
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0808-FA-41

October 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Michael Clay was convicted of robbery resulting in serious bodily injury[1] and illegal consumption of alcohol by a minor.[2] He argues his counsel was ineffective because he did not move to suppress some photo arrays, did not object to in-court identification of Clay, and admitted Clay committed theft.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 20, 2008, at about 3:00 a.m., James Davis was walking to work in Elkhart. Eight or ten people, including Clay, were across the street. Clay and another man approached Davis, and one of them asked him for a cigarette. One of the men then punched Davis in the face and the other hit him on the base of his skull. Davis fell to the ground, and the rest of the group crossed the street and hit and kicked him until a car approached. Clay took Davis' wallet.

Davis described the two initial attackers to police. Police found Clay, who was intoxicated, on a nearby porch. Clay told police the house belonged to his aunt, but the woman who lived at the house did not know Clay. At the hospital, an officer showed Davis four photo arrays and asked him to "circle the one that he knew that he was a hundred per cent sure that that was the suspect," (Tr. at 154), and "if he was not a hundred per cent sure not to circle because we only want the victim to circle the suspect as long as they [sic] are a

[1] Ind. Code § 35-42-5-1.
[2] Ind. Code § 7.1-5-7-7.

hundred per cent sure that's the person." (*Id*. at 155.) Davis circled Clay. When police further questioned Clay, he admitted he was one of the two men who initially approached Davis, he took Davis's wallet, and he might have "accidentally" kicked him. (App. at 51.)

At trial, Davis again identified Clay as the person who attacked him, and Clay's counsel did not object to the admission of the photo arrays. The court instructed the jurors that if the State did not prove Clay was guilty of Class A felony robbery,[3] they could consider whether Clay committed Class B felony robbery,[4] and if the State did not prove either Class A or Class B felony robbery, they could consider whether he committed Class C felony robbery.[5] The jury found him guilty of Class A felony robbery.

DISCUSSION AND DECISION

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). Failure to satisfy either prong will cause the claim to fail. *Id*. Therefore, if we can reject an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. *Id*. Counsel is presumed competent, and performance is reviewed "with deference and without the distortions of hindsight." *Pemberton v. State*, 560 N.E.2d 524, 526 (Ind. 1990). Isolated poor strategy,

[3] Robbery is a Class A felony if it results in serious bodily injury to any person other than a defendant. Ind. Code § 35-42-5-1.
[4] Robbery is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant. Ind. Code § 35-42-5-1.
[5] Robbery is a Class C felony if it is accomplished by using or threatening the use of force on any person or by putting any person in fear. Ind. Code § 35-42-5-1.

inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel. *Id*.

1. The Photo Arrays

The admission of evidence is within the sound discretion of the trial court. *Lewis v. State*, 898 N.E.2d 429, 432 (Ind. Ct. App. 2008), *trans. denied*. We will not reverse a decision to admit evidence absent an abuse of discretion. *Id*. There is an abuse of discretion if the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id*.

The identification of a defendant must comport with standards of due process. *Id*. If an out-of-court identification is unduly suggestive, the testimony relating to it is inadmissible. *Id*. A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. *Id*. A photo array is impermissibly suggestive only where it is accompanied by verbal communications or the photographs in the display include graphic characteristics that distinguish and emphasize the defendant's photograph in an unusually suggestive manner.[6] *Id*.

Clay asserts, without citation to authority, that the photo array identification was "tainted," (Br. of Appellant at 12), because the officer asked Davis to "circle the one that he knew that he was a hundred per cent sure that that was the suspect," (Tr. at 154), and "if he was not a hundred per cent sure not to circle because we only want the victim to circle the

[6] Clay does not argue the display included "graphic characteristics that distinguish and emphasize [his] photograph in an unusually suggestive manner."

suspect as long as they [sic] are a hundred per cent sure that's the person." (*Id*. at 155.) Clay claims that "[i]mplicit in this statement is that one of the people in the photo lineups is a suspect."[7] (Br. of Appellant at 12.)

Although we are concerned the officer used language indicating someone in the photo array was "the suspect," we cannot find Clay's photo arrays impermissibly suggestive. Factors to be considered in evaluating the likelihood of a misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; and (4) the level of certainty demonstrated by the witness. *J.Y. v. State*, 816 N.E.2d 909, 913 (Ind. Ct. App. 2004), *trans. denied*. Other factors the court may consider are the manner and form in which the police asked the witness to identify the suspect and the witness' interpretation of their directives and whether the police focused on the defendant as the prime suspect, either by their attitude or the makeup of the photo array. *Id.*

As Clay was close enough to hit Davis, Davis viewed Clay from very close range at the time of the crime. The two attackers approached Davis from across the street and asked him for cigarettes, which suggests Davis was paying attention to the men before he was attacked. While viewing the photo arrays, Davis expressed certainty Clay was one of the

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[7] The State, without explanation or citation to the record, describes the officer's statement as an indication Davis' "attacker may not have been in the photo array" because Davis was not to circle a photo if he did not recognize "anyone" to one hundred percent certainty. (Br. of Appellee at 8.) That is a mischaracterization of the officer's instruction, which explicitly and consistently referred to "the suspect."

people involved. The officer's words suggested the photo arrays included the suspect, but nothing he said suggested Clay's photograph depicted "the suspect." Based on these facts, we do not believe the court would have sustained an objection to the arrays if one had been made. To prevail on a claim of ineffective assistance due to the failure to object, a defendant must show an objection would have been sustained if made. *Pruitt v. State*, 903 N.E.2d 899, 928 (Ind. 2009), *reh'g denied*. Thus, Clay's counsel was not ineffective for declining to move to suppress the photo array identification.

2. The In-Court Identification

Regardless of error in pretrial identification procedures, if there is sufficient basis for identification independent of the pretrial procedure, there is no error in permitting in-court identification. *Terry v. State*, 857 N.E.2d 396, 410 (Ind. Ct. App. 2006), *trans. denied*. Seven factors are relevant to determining whether a witness has a sufficient independent basis:

> [1] the amount of time the witness was in the presence of the perpetrator and the amount of attention the witness had focused on him, [2] the distance between the two and the lighting conditions at the time, [3] the witness's capacity for observation and opportunity to perceive particular characteristics of the perpetrator, [4] the lapse of time between the crime and the subsequent identification, [5] the accuracy of any prior descriptions, [6] the witness's level of certainty at the pre-trial identification and [7] the length of time between the crime and the identification.

Id. Where a witness had an opportunity to observe the perpetrator during the crime, a basis for in-court identification exists, independent of the propriety of pre-trial identification. *Id*.

The victim testified he saw Clay approach him from across the street. There was a

street light fifteen to twenty feet from where the robbery occurred and the incident lasted for about five minutes.[8] Davis had ample "opportunity to observe the perpetrator during the crime," *id*., so there was a basis for the in-court identification. As Clay cannot show an objection to the in-court identification would have been sustained if made, *see Pruitt*, 903 N.E.2d at 928, counsel was not ineffective for declining to challenge the in-court identification.

3. The Admission of Theft

Clay's counsel conceded at trial that Clay was present during the robbery and took Davis's wallet, but argued Clay did not cause serious bodily injury and therefore could not be convicted of a Class A felony. Trial strategy is not subject to attack through an ineffective assistance of counsel claim unless the strategy is so deficient or unreasonable as to fall outside the objective standard of reasonableness. *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). This is so even when such strategic choices ultimately prove detrimental to the defendant. *Id*.

In *Autrey*, our Supreme Court addressed a tactical decision not to tender a lesser included offense. It noted it is not sound policy to second-guess an attorney through the distortions of hindsight, and found the "all or nothing strategy employed by counsel was

[8] The State notes the victim identified Clay in the photo array shortly after the attack, then asserts he "remained 'positive' of his identification at trial." (Br. of Appellee at 9.) No such testimony can be found at the page of the transcript to which the State directs us. We admonish the State to refrain from so mischaracterizing the record.

appropriate and reasonable based on the facts in this case." *Id*.

The same is true of Clay's counsel's strategic decision to argue for a lesser included offense. The State asserted in closing argument "[w]hat this comes down to . . . is whether or not this constitutes serious bodily injury," (Tr. at 225), and told the jury "[w]e don't want you to come back on the lesser included offenses." (*Id*. at 228.) We decline to second-guess counsel's strategy to argue Clay could be convicted only of a lesser-included offense. *See Banks v. State*, 884 N.E.2d 362, 367-68 (Ind. Ct. App. 2008) ("conceding guilt to one count of a multi-count indictment to bolster the case for innocence on the remaining counts is a valid trial strategy, which does not rise to the level of deficient performance" and "concession to a particular fact or charge that is supported by overwhelming evidence may help enhance a defendant's credibility on the remaining issues at trial") (citations and quotation omitted), *trans. denied.*

Clay has not demonstrated his counsel was ineffective. Therefore we affirm Clay's convictions.

Affirmed.

ROBB, J., and VAIDIK, J., concur.