

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN R. RUTLEDGE,

Defendant-Appellant.

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UNPUBLISHED

July 7, 1998

No. 198639

Recorder's Court

LC No. 96-003415 FY

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to three to seven years' imprisonment. We affirm.

Defendant's first issue is that he was denied a proper *Wade*<sup>1</sup> hearing because the trial court did not permit defendant to call witnesses to testify that the lineup was unduly suggestive. We disagree. Defense counsel agreed at the *Wade* hearing that the issue was strictly limited to the physical appearance of defendant as compared to the other participants in the lineup. The trial court reviewed the lineup sheet and photograph and found that the lineup was not unduly suggestive. The scope of the hearing was limited to how the participants in the lineup looked, and the trial court considered how the participants looked based on the lineup sheet and photograph. Defendant was not deprived of a *Wade* hearing.

Further, the trial court did not err in its determination that the lineup was not impermissibly suggestive. Physical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). The trial court found that four of the five participants in the lineup were within the range of height and weight that was reasonable. Considering the totality of the circumstances, defendant was not substantially distinguished from the other participants so as to make the differences significant.

Defendant also argues that the in-court identification of defendant was improper because the prosecution failed to establish that the complainant's in-court identification of defendant had an independent basis. We disagree. The need to establish an independent basis for an in-court

identification only arises where the pretrial identification is tainted by improper procedure or unduly suggestive comments. *People v Laidlaw*, 169 Mich App 84; 425 NW2d 738 (1988). As noted, the lineup identification of defendant was not tainted. Therefore, the prosecution did not need to establish an independent basis for the complainant's in-court identification of defendant.

Defendant argues that there was insufficient evidence to support his conviction. We again disagree. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Here, the prosecution presented evidence that defendant rushed over to the complainant, put a gun to her neck, took her purse and jewelry, then asked her, "do you have anything else." When she indicated that she did not, defendant ran away. The complainant later identified defendant in a store and had him detained until police arrived, and identified defendant in a lineup. Although the defense presented testimony that defendant was working at the time of the robbery, questions regarding the credibility of witnesses are left to the trier of fact. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant possessed the requisite intent and that all of the elements of the crime were proven beyond a reasonable doubt.

Finally, defendant contends that he was denied effective assistance of counsel. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that under an objective standard of reasonableness counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant and the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.*

Defendant argues that his trial counsel should have questioned the complainant about her criminal history because "she may have contrived the entire incident." Even assuming *arguendo* that complainant had a criminal history, counsel's decision in this regard was a matter of trial strategy that will not be second-guessed by this Court. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Affirmed.

/s/ Richard Allen Griffin  
/s/ Roman S. Gribbs  
/s/ Michael J. Talbot

<sup>1</sup> *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 1149 (1967).