

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS MASON FOSTER,

Defendant-Appellant.

UNPUBLISHED

April 25, 2000

No. 215043

Ingham Circuit Court

LC No. 98-073330-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of ten to twenty-five years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion by admitting evidence of defendant's extradition papers at trial because the prosecution failed to disclose the documents pursuant to defendant's discovery request under MCR 6.201. Defendant's argument is without merit. The record reveals that although defense counsel initially objected to the admission of defendant's extradition papers at trial on discovery violation grounds, defense counsel ultimately offered to stipulate that defendant was extradited from Texas to Michigan for trial. In view of the stipulation and defense counsel's undisputed knowledge that defendant was extradited prior to trial, defendant has failed to demonstrate how he was prejudiced by the prosecution's tardy disclosure of the extradition papers and the admission of the waiver of extradition form at trial. Accordingly, we find no abuse of discretion.

Defendant next argues that he received ineffective assistance of counsel at trial because counsel's decision to introduce the photographic lineup as evidence at trial was not sound trial strategy. We disagree.

Because defendant failed to move for a *Ginther*¹ hearing below, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; NW2d (1998); *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must overcome a strong presumption that counsel's decisions were a matter of sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1995).

Trial counsel's decisions regarding what evidence to present and whether to question certain witnesses are presumed to be matters of trial strategy that will not be second-guessed by this Court. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997); *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defense counsel made a strategic decision to introduce the photographic lineup in order to challenge the credibility of the witnesses who stated that they picked defendant out of the photographic lineup as the perpetrator of the robbery. The record shows that the witnesses initially informed the police that the assailant had a mustache and a goatee, but subsequently identified defendant in the photographic lineup as the assailant, although he did not have facial hair in the photograph. Defense counsel's tactical decision to discredit the witnesses, although unsuccessful, did not constitute ineffective assistance of counsel. Further, we are not convinced that had the photographic lineup not been admitted, there was a reasonable probability that the result of the trial would have been different. *Stanaway, supra* at 687-688. Even before defense counsel introduced the photographic lineup, several witnesses had already identified defendant as the perpetrator based on their familiarity with defendant's characteristics and voice from when defendant used to work at the grocery store. Defendant has failed to establish that he received ineffective assistance of counsel.

Defendant next argues that the cumulative effect of the alleged errors described above was prejudicial to defendant and denied him a fair trial. Because we have already determined that no actual error occurred at trial, there can be no improper cumulative effect denying defendant a fair trial. *People v Bahoda*, 448 Mich 261, 292-293, n 64; 531 NW2d 659 (1995); *People v Snider*, ___ Mich App ___, ___ NW2d ___ (Docket No. 203328, issued 1/14/00), slip op, p 17, n 6.

Lastly, defendant argues that the trial court abused its discretion by sentencing him to ten to twenty-five years' imprisonment because his sentence was based on defendant's continued denial that he was the assailant, and because his sentence was disproportionate. We disagree. We review sentencing matters for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990).

This Court has previously held that resentencing of a defendant is necessary if the trial court impermissibly based the sentence on the defendant's assertions of innocence. *People v Grable*, 57 Mich App 184, 188-189; 225 NW2d 724 (1974). However, after reviewing the trial court's statement in this case, we conclude that the trial court did not sentence defendant to a lengthy prison term because

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

he maintained his innocence. See *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999); *People v Stewart (On Remand)*, 219 Mich App 38, 44-45; 555 NW2d 715 (1996). The trial court simply referred to the existence of the overwhelming amount of evidence on which the jury relied to convict defendant. We find no abuse of discretion.

We also reject defendant's argument that his sentence was not proportionate to the seriousness of the offense and the offender. A trial court abuses its discretion in sentencing a defendant when the sentence violates the principle of proportionality, which considers the circumstances surrounding the crime and the offender. *Milbourn, supra* at 635-636. A sentence that is within the applicable guidelines' range is presumed to be valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). However, a sentence within the range of the guidelines may violate the principle of proportionality under unusual circumstances. *Milbourn, supra* at 661.

Defendant's minimum sentence of ten years' imprisonment was within the sentencing guidelines' recommended range of five to twenty years' imprisonment and is thus presumptively valid. *Broden, supra* at 354-355. Defendant has not stated any unusual circumstances to overcome the presumption that his sentence is valid. *Milbourn, supra* at 661. A defendant's lack of criminal history and minimum culpability are not unusual circumstances that would necessarily overcome the presumption that the sentence is valid. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Therefore, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff