STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MILES, a/k/a KEVIN MILES,

Defendant-Appellant.

UNPUBLISHED
August 25, 2000

No. 211371
Wayne Circuit Court
Criminal Division
LC No. 97-006973

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony firearm conviction, to be served prior and consecutive to two concurrent terms of eight to twenty years for each of the armed robbery convictions. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support the armed robbery convictions. When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). We have reviewed the trial record and find no merit to defendant's claim. Defendant's sufficiency of the evidence argument is nothing more than an attack on the credibility of the evidence.

Defendant maintains this Court should view with suspicion identification evidence elicited from eyewitnesses on the ground that "[t]here is a general unreliability of observation of unexpected events." *People v Anderson*, 389 Mich 155, 211; 205 NW2d 461 (1973) (emphasis omitted). However, *Anderson* does not stand for the proposition that uncorroborated eyewitness identification testimony lacks credibility as a matter of law. The reliability of eyewitness testimony should be tested through cross examination. It is the sole province of the fact finder to weigh the credibility of witnesses and decide the facts. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998); *People v Terry*,

224 Mich App 447, 452; 569 NW2d 641 (1997). Factual finding will not be disturbed on appeal merely because the event about which a witness testifies occurred suddenly or unexpectedly.

Defendant similarly argues that the lineup from which the complaining witnesses identified defendant should be rejected as competent evidence because the other participants in the lineup did not closely resemble defendant. If a lineup is unduly suggestive, testimony as to the identification of a defendant is excluded in the absence of clear and convincing evidence that an in-court identification is premised on an independent basis. *United States v Wade*, 388 US 218, 240; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). An identification will be deemed improper, however, only in cases where it is established that the identification procedure was so impermissibly suggestive that there exists a very substantial likelihood of irreparable misidentification. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). Mere differences in height, weight, clothing or other aspects of appearance will not automatically render a lineup unduly suggestive. *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984); *People v Morton*, 77 Mich App 240, 244; 258 NW2d 193 (1977).[1] We conclude there exists no competent evidence on which to conclude that the lineup was unduly suggestive. As previously stated, any issues regarding the accuracy of the identification should have been presented to the factfinder through cross-examination.

Defendant, through counsel and *in propria persona*, also attacks the sufficiency of the evidence by suggesting that one of his brothers may have been involved in the crime instead of defendant. However, it is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce; it is not necessary for the prosecution to disprove every reasonable theory of innocence. *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984). The unambiguous identification, in and out of court, of defendant by both complaining witnesses provided a sufficient basis upon which the trial court could conclude that defendant was indeed the perpetrator of the crimes.

Defendant next argues that the trial judge applied the incorrect legal standard when weighing the evidence. We disagree. The seasoned and learned trial judge did indeed state that he was reviewing the evidence in the light most favorable to the prosecution. However, there was no objection to the court's statement and it is not clear from the record whether the court truly misapplied the law or merely misspoke. We therefore remanded this matter to the trial court for clarification of the record. The trial court conducted a hearing on March 24, 2000. After indicating that he had recalled the case independent of the trial transcript, the trial judge clarified the record as follows:

> I am certainly well aware of the fact that you must find somebody guilty beyond a reasonable doubt. I was well aware [of] that as I was trying the case and I think it took some time to try this case. If I did say: 'considering the testimony in this case based on the light most favorable to the prosecution,' I truly misspoke. It was certainly my intention and it is as of this day, because I still remember the case.

[1] Questions of suggestiveness are best addressed through pretrial evidentiary hearings. *Wade, supra*. In the present case, defendant did not seek to suppress the lineup identification via a pretrial motion. Thus, we have no specific record to review to determine whether the lineup was unduly suggestive.

> The proofs were overwhelming and beyond a reasonable doubt as to each of the defendants. I found them guilty based on the proofs beyond a reasonable doubt.

Based on the above, we conclude that the trial court applied the correct legal standard when weighing the evidence presented at trial.

Defendant, *in propria persona*, has supplemented his counsel's arguments on appeal. Defendant argues that he was denied due process because the purse he purportedly took from the victim was lost by the police. This issue was not preserved in the trial court. Thus, reversal is not warranted unless defendant shows plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In *Carines*, the Supreme Court, relying on *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), set forth a stringent standard for setting aside a conviction on a claim of unpreserved error:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' [*Carines, supra* at 763 (footnote and citations omitted).]

Considering this stringent standard, we conclude that defendant has failed to demonstrate that there is any substance to this unpreserved claim or that relief is necessary to protect the fairness, integrity or public reputation of judicial proceedings. Where a defendant seeks appellate relief on the ground that he was prejudiced by missing evidence, the "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). In the instant case, defendant has failed to show either. Defendant merely speculates that production of the physical evidence in question would have exonerated him. Defendant was free to place on the record some request for production of that evidence, to develop the argument that it was withheld or destroyed in bad faith, or to cross-examine those witnesses who described the stolen items and the items later found in defendant's possession. Because this issue is unpreserved, and because defendant offers only speculation concerning why the purse and its contents were not produced, or how he was prejudiced thereby, we conclude that defendant has not demonstrated plain error that affected his substantial rights. *Carines, supra* at 774.

Next, defendant argues that he was denied a fair trial because the trial court utilized inferences upon inferences to support its findings of fact. Defendant's argument is without merit. We review a trial court's findings of fact for clear error. MCR 2.613(C). Defendant correctly cites authority for the proposition that a trial court sitting as a trier of fact may not support findings of fact with inferences

made upon inferences. Significantly, however, defendant cites to no specific inference found by the trial court that is based only upon other inferences. Moreover, we have reviewed the record and find none.

Finally, defendant asserts that his trial counsel was ineffective for failing to conduct a pretrial investigation and by failing to call certain alibi witnesses. Defendant further argues that his appellate counsel was ineffective for failing to assert the ineffectiveness of trial counsel. Effective assistance of counsel is presumed, and a defendant bears a heavy burden in proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "To establish ineffective assistance of counsel, a defendant must show a very serious error, must overcome the presumption that the challenged action might be considered sound trial strategy, and must prove prejudice." *People v Jackson*, 203 Mich App 607, 613-614; 513 NW2d 206 (1994), citing *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). When claiming that counsel was unprepared for trial due to a failure to investigate, a defendant is required to show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

In this case, defendant speaks generally of "several witnesses available to testify who would place him at their home, drunk, at the time the alleged robbery occurred," then states more specifically that "hope [sic] McLeod dropped appellant off at home between 1:00-1:30 AM drunk," and that "prior to this, he was . . . home with her family at the time of the alleged robbery." However, defendant's trial counsel elicited from defendant's mother a differing alibi defense – that defendant had been home, drunk and asleep, at the time that the robbery took place. Assuming that counsel had the choice of witnesses, and of alibi theories, that defendant now argues was before him, counsel wisely chose not to present two conflicting accounts of defendant's whereabouts. Further, counsel may well have reasoned that defendant's mother, though having an obvious bias in defendant's favor, was nonetheless a more credible witness than those with whom, according to defendant's present posture, defendant got drunk on the night in question. The record simply does not support defendant's contention that counsel wholly failed to conduct a pre-trial investigation. Counsel recalled a police witness for the purpose of casting doubts on the reliability of the police lineup and called defendant's mother in an attempt to obtain her sympathetic testimony. Further, the record of the cross-examination of the prosecution's witnesses supports the conclusion that counsel was prepared for trial. Having concluded that

defendant's trial counsel was not ineffective, we find no merit in defendant's claim that his appellate counsel rendered ineffective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra