

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK MAURICE JONES,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 227624
Oakland Circuit Court
LC No. 99-167298-FH

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree home invasion, MCL 750.110a(2), larceny of a firearm, MCL 750.357b, felon in possession of a firearm, MCL 750.224f, and habitual offender, third offense, MCL 769.11, entered pursuant to a plea and after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Vincent and Tammy Turner testified that between 5:30 a.m. and 9:30 a.m. on March 24, 1999, someone broke into their home and took money, jewelry, and firearms. Lottie Gualdoni testified that between 7:10 a.m. and 7:20 a.m. on March 24, 1999, she saw a man standing on the porch of the Turner residence. Gualdoni identified defendant as the person she saw at the Turner residence. Margaret Miela testified that on the morning of March 24, 1999, she saw a man leave her neighbor's backyard. She acknowledged that she had been unable to identify anyone when she viewed a photo show-up. Over defense objections, she was allowed to state that defendant looked similar to the person she saw in the yard. A search of defendant's residence revealed a revolver that belonged to the Turners. Defendant pleaded guilty to the charge of felon in possession of a firearm and the habitual offender charge. The jury found defendant guilty of first-degree home invasion and larceny of a firearm.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process of law. To establish that an identification procedure resulted in the denial of due process, a defendant must show that the procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, his in-court identification of the defendant will not be allowed unless the prosecutor establishes by clear and convincing evidence that the in-court identification has an untainted, independent basis. *People*

v Gray, 457 Mich 107, 115; 577 NW2d 92 (1998). We review the trial court’s findings of fact for clear error. *Id.*

Defendant argues that the trial court clearly erred in admitting Miela’s in-court identification of him as the person she saw in her neighbor’s backyard because the trial setting was unduly suggestive. We disagree. Defendant does not assert that the pretrial photo show-up, at which Miela could not identify him, was unduly suggestive. The establishment of an independent basis for an in-court identification is necessary when a pretrial identification procedure was tainted or was unduly suggestive. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995). No authority supports defendant’s argument that a trial setting itself can be so suggestive that any in-court identification made by a witness must have an independent basis. Even assuming that Miela’s statement that defendant looked “similar” to the person she saw in her neighbor’s backyard constituted an identification of defendant, the trial court did not clearly err in admitting the testimony. Miela’s credibility was for the jury to determine. *Id.*, 676.

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel’s performance resulted in prejudice. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that trial counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of receiving or concealing stolen property, MCL 750.535, which is a cognate lesser included offense of first-degree home invasion. See *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993). We disagree. Defense counsel conceded that a firearm taken from the Turner residence was found in defendant’s home, but contended that defendant could have come into possession of the firearm in a number of legitimate ways. The decision to request an instruction on a lesser included offense is a matter of trial strategy, and a defendant who claims that counsel’s failure to request such an instruction constituted ineffective assistance must overcome the presumption that counsel’s decision did not constitute sound trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). Defendant has not overcome this presumption. The decision to forego an instruction on a lesser included offense was consistent with defendant’s theory of innocence. Defendant has not established that but for counsel’s alleged error, the result of the proceedings would have been different. No prejudice occurred. *Toma, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Donald S. Owens