

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONTAE JAREE GORDON,

Defendant-Appellant.

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UNPUBLISHED

March 12, 2002

No. 227620

Kent Circuit Court

LC No. 99-008958-FC

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of the lesser-included offense of second-degree murder, MCL 750.317, and possession of firearm during the commission of a felony, MCL 750.227b(1).<sup>1</sup> Defendant was sentenced, as an habitual offender, second offense, MCL 769.10, to 33 to 100 years' imprisonment for the conviction of second-degree murder, consecutive to the mandatory two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant initially asserts that the pretrial identification procedures violated his right to due process because the photographic lineup was "unduly suggestive." We disagree.

We begin by pointing out that, although defendant objected to the admission of a photograph of defendant, he did so by contesting the foundation for that evidence. Defendant never contested the admission of either the photograph or any evidence relating to the photographic identification based on the grounds of the photographic identification procedure being "unduly suggestive." "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Therefore, defendant failed to preserve this issue. Nevertheless, defendant may avoid forfeiture of this issue, under the "plain error" rule, by showing that: (1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, the

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<sup>1</sup> The jury found defendant not guilty of first-degree murder, MCL 750.316, and armed robbery, 750.529.

third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.*

Defendant correctly notes that the admission of evidence resulting from an “unduly suggestive” pretrial identification procedure constitutes a denial of due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). In order to challenge an identification procedure, however, “a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Here, defendant fails to specify how the photographic lineup was “unduly suggestive.” In the absence of any indication that the photographic lineup was “unduly suggestive,” we have no basis to conclude that defendant was deprived of due process, much less that plain error occurred.

Defendant next asserts that defendant was denied his right to counsel at the photographic lineup. Again, we disagree. Our Supreme Court has ruled that, in matters of photographic identification, the right to counsel attaches with custody. *Kurylczyk, supra* at 302. Defendant concedes that he was not in custody, but contends that there were “unusual circumstances” regarding the instant photographic identification that required having defendant’s attorney present. Indeed, we have suggested two instances where “unusual circumstances” would require the presence of counsel during a photographic identification procedure: (i) when a suspect, who had been in custody and subject to two corporeal lineups with counsel present, was released and a photographic lineup was later conducted without counsel, *People v Cotton*, 38 Mich App 763, 770-771; 197 NW2d 90 (1972); and (ii) “where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant,” *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). Here, neither of these unusual circumstances was present.

Moreover, we decline to regard defendant’s circumstances as “unusual” in any other way that would require his counsel’s presence. We regard the identification technique employed by the police to be very common. After the crime was discovered, the police identified defendant as someone in the neighborhood who fit the description of the perpetrator. After talking to defendant, and conducting a consensual search of his home, the police showed an eyewitness defendant’s photograph. As the *Kurylczyk* Court stated:

Under these circumstances, the appointment of counsel is neither necessary nor feasible. At the early stage of an investigation of an unsolved crime, investigators cannot predict whether a witness will recognize a particular suspect as the perpetrator of that crime. Thus, it is impossible to know whether a photographic array will help to “build a case against the defendant” or will “extinguish a case against an innocent bystander.” Often, the distinction between those two courses of action is apparent only after an eyewitness has made, or failed to make, an identification. [*Kurylczyk, supra* at 301-302, quoting *Cotton, supra* at 769-770.]

There is nothing unusual about this procedure. Therefore, defendant’s assertion that he was denied his right to counsel is without merit.

Defendant next asserts that he was denied his right to effective assistance of counsel because his trial counsel failed to request an evidentiary hearing in order to suppress the identification of the defendant. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Generally, a successful claim of ineffective assistance of counsel requires a defendant to show that his or her attorney's representation deviated from an objective standard of reasonableness, resulting in the denial of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. A defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). However, as shown above, the witness' trial testimony was properly admitted, and a suppression hearing, in all likelihood, would not have been successful. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, defendant's ineffective assistance of counsel claim must also fail.

Defendant next challenges the sufficiency of the evidence supporting his convictions. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In the instant matter, there was eyewitness testimony placing defendant outside the victim's car minutes before he was shot. This witness observed defendant walk away from the victim's car, and then walk back towards the car. At the same time, a second witness saw "a person" also walk towards the car and get inside. Shortly thereafter, a third witness heard what she thought were firecrackers, and observed a person getting out of the victim's car. Although these last two witnesses did not get a sufficient look at the "person" to specifically identify him as defendant, read together, the jury could have reasonably concluded that these witnesses also observed defendant. In addition, defendant's palm print was found on the victim's car. A bullet of the same type used to kill the victim was found in defendant's bedroom, as were clothes consistent with those the witnesses observed on defendant or the "person," respectively. Finally, the victim's ring was found in defendant's bedroom. We believe that this evidence, while circumstantial, was sufficient for a reasonable jury to conclude that defendant shot and killed the victim with a firearm. Consequently, we reject defendant's challenge to the sufficiency of the evidence supporting his convictions.

Finally, defendant takes issue with the trial court's denial of his motion for resentencing. Defendant asserts that numerous errors occurred in scoring different variables in order to arrive at his sentencing guidelines.<sup>2</sup> The trial court correctly acknowledged that at least one error occurred during defendant's sentencing. However, the trial court opined that, even if all

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<sup>2</sup> Defendant does not assert that the trial court erred by enhancing his sentence to account for his earlier felony conviction.

variables were scored as defendant argues, defendant's minimum sentence would still fall within the corrected guidelines range.<sup>3</sup> More importantly, the trial court noted that it would not change defendant's sentence, notwithstanding the change in the appropriate guidelines range. Specifically, the trial court opined: "Without doubt, this Court would have imposed the same sentence had it been working with Guidelines of 225-468 months. That being the case, this Court need not resentence defendant."

Generally, when it is this Court that finds a scoring error, we remand to the trial court to determine whether it would resentence the defendant to the same sentence under the correct scoring of the variables or to a different sentence. See *People v Polus*, 197 Mich App 197, 199; 495 NW2d 402 (1992). However, where, as here, defendant properly requests review of the scoring below, the trial court is afforded an opportunity to make this determination before our review. In other words, our need to remand is obviated by the trial court's prompt attention to the matter. Moreover, defendant's contention that he is entitled to either re-sentencing or a re-sentencing hearing based on the trial court's correction of the appropriate guidelines range is not supported by statute. Simply put, upon correction of the guidelines scoring, defendant was ultimately sentenced under the appropriate sentencing guidelines range, as required by MCL 769.34(10). In addition, because defendant's sentence remains within the appropriate guidelines range, we are required to affirm defendant's sentence. MCL 769.34(10).

Affirmed.

/s/ Patrick M. Meter  
/s/ Jane E. Markey  
/s/ Donald S. Owens

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<sup>3</sup> The record indicates that the trial court requested defendant's sentencing information report to be corrected to reflect the changes sought by defendant.