STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 2002
v CHRISTOPHER DARYL NELSON, Defendant-Appellant.	No. 224901 Jackson Circuit Court LC No. 99-093357-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V CHRISTOPHER DARYL NELSON, Defendant-Appellant.	No. 224902 Jackson Circuit Court LC No. 99-094046-FH

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from jury convictions for armed robbery, MCL 750.529 (Docket No. 224901), and possession of a firearm during the commission of a felony, MCL 750.227b (Docket No. 224902), for which he was sentenced to consecutive prison terms of 51 to 120 months and two years, respectively. We affirm.

I

Defendant's convictions arise from the armed robbery of a clerk employed at an adult bookstore located in the city of Jackson. On appeal, defendant first argues that the trial court abused its discretion when it allowed a police detective to testify that he had seen defendant in possession of a handgun on an occasion approximately two months before the detective interviewed defendant in connection with the instant armed robbery. Because defendant initially objected to the evidence only on the ground that the bad act was "too remote," and his later objections were stated off the record during a bench conference, this issue is not preserved for our review. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore,

we review this claim for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court allowed the challenged testimony to rebut defendant's statement to the detective during an interview that he could not have committed the armed robbery because he did not have a gun and has never had a gun. Because the jury was able to corroborate the eyewitness identification of defendant as the robber by viewing the security videotape on which the events of the robbery and the images of the perpetrator were recorded, we are not persuaded that admission of the officer's testimony on this ground, even if error, was of such magnitude as to affect the outcome of the trial. See *id*. Accordingly, defendant is not entitled to a new trial on this basis.

II

Defendant next argues that he was deprived of his right to equal protection of the law as well as his right to an impartial jury drawn from a representative cross-section of the community because there were only two African-Americans in his forty-person jury venire.[1] Because defendant objected to the composition of the jury array only after the jury had been impaneled and sworn, the challenge was untimely advanced. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Unpreserved claims of constitutional error are reviewed under the plain error rule. *Carines*, *supra*.

Defendant seeks to establish a systematic exclusion of African-Americans from the jury selection process based solely on the fact that the number of African-Americans in his jury venire was disproportionate to the number of African-Americans in the general population of Jackson County. However, even if African-Americans were under-represented on defendant's venire, a systematic exclusion is not shown by one or two incidents of a venire being disproportionate. See *People v Hubbard (After Remand)*, 217 Mich App 459, 481; 552 NW2d 493 (1996). Accordingly, plain error has not been shown.

III

Defendant also argues that he was deprived of due process because counsel was not present at the four precustodial photographic showups conducted by law enforcement authorities, even though defendant had become the focus of the criminal investigation. Defendant again failed to preserve this issue for appellate review by failing to timely object or move the trial court to suppress the identifications. *People v Lyles*, 148 Mich App 583, 591; 385 NW2d 676 (1986). Indeed, defendant raised the issue for the first time in a motion for new trial filed in the trial court. Under these circumstances, we review defendant's claim subject to the plain error rule. *Carines*, *supra*. Again, we find no plain error.

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[1] Our review of the record reveals that both prospective African-American jurors were excused for cause by the trial court. One of the prospective jurors was excused after she indicated that her religion prohibited her from sitting in judgment of others. The other prospective juror was excused after he expressed animosity for and bias against certain Jackson County prosecutors and law enforcement officials.

Generally, the right to counsel does not attach to precustodial photographic identifications. See *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001). A defendant is, however, entitled to counsel at a precustodial photographic showup when the circumstances underlying the investigation are "unusual." *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000). Unusual circumstances exist where a "'witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant.'" *Id.*, quoting *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994).

In this case, there were no unusual circumstances surrounding the store clerk's identification of defendant at one of two photographic showups in which the clerk participated. A store security camera captured the events of the robbery, including images of the robber. The police seized the videotape as evidence. The detective assigned to investigate the robbery viewed the security video and recognized the individual shown committing the robbery, but was unable to "put a name to the face." He subsequently prepared two photographic lineups, one containing a photograph of a possible suspect identified by another police officer and one containing a photograph of defendant, which the detective discovered in the regular course of his duties. The clerk identified no one in the first set of photographs, but later identified defendant as the robber after viewing the second set. However, at the time of this identification, defendant was not in custody and had not been contacted or questioned. Moreover, the record evidence reveals that the purpose of the showup was to elicit a positive identification from the victim that defendant was the individual who committed the armed robbery. Accordingly, we find no error on this record with respect to the photographic showups involving the clerk.

Because the first photographic lineup was shown to the store manager before the store clerk identified defendant and before defendant was contacted, questioned and arrested, we similarly find no error in the absence of counsel during this showup. Moreover, because the second photographic showup with the manager (at which he identified defendant) occurred before defendant was arrested and was apparently conducted to confirm, in the face of defendant's repeated and steadfast denials that he committed the robbery, the identification of defendant as the person who committed the robbery, we find no error in the conduct of this second photographic showup despite the fact that the showup occurred eleven days after the store clerk positively identified defendant, and after defendant had been contacted by the detective and twice informally questioned at his residence.

IV

Defendant next argues that his convictions violate the prohibition against being twice placed in jeopardy for the same offense. Defendant is mistaken. It is well-settled that concurrent convictions for armed robbery and felony-firearm do not run afoul of the Double Jeopardy Clause. *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 388; 280 NW2d 793 (1979).

V

Defendant also argues that he was denied due process when the trial court failed to instruct the jury with regard to cross-racial identification, which occurs when an eyewitness is asked to identify a person of a different race. See, e.g., *State v Cromedy*, 158 NJ 112; 727 A2d 457 (1999). Not only did defendant fail to request such an instruction or to object when one was

not given, he affirmatively waived, and thereby extinguished, any errors when he specifically indicated to the trial court that he had no objections to the instructions "as . . . just read." *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

VI

Finally, defendant argues that he was deprived of his constitutional right to the effective assistance of counsel. Defendant identifies eight alleged instances of constitutionally deficient representation in support of his claim, only two of which he raised in the trial court in conjunction with a motion for new trial. However, because these two alleged instances raised below were not raised in conjunction with an evidentiary hearing, our review of all eight allegations of deficient representation is limited to the appellate record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To be successful on a claim of ineffective assistance of counsel, a defendant must establish that

> (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. [*Id*. at 659.]

Additionally, defendant must overcome a strong presumption that the conduct complained of reflects sound trial strategy. *Id*.

In challenging his counsel's performance at trial, defendant first argues that counsel was deficient in failing to request that a corporeal lineup be conducted and that the jury be read a cautionary instruction regarding the reliability of identification testimony. See CJI2d 7.8. We do not agree. There is nothing on this record to suggest that a corporeal lineup would have produced a result different from the photographic showups actually conducted. Indeed, the store clerk identified defendant at trial as the man who robbed him. Moreover, the jurors themselves viewed the surveillance tape of the robbery and could thus judge for themselves the reliability of the store clerk's identification without the need for additional instruction. Accordingly, we do not conclude that either of the deficiencies alleged by defendant affected the outcome of the trial.

We similarly reject defendant's claim that counsel was ineffective in failing to call two additional alibi witnesses. Several such witnesses, including defendant's mother, testified at trial in support of defendant's alibi defense. The jury obviously rejected that defense and there is nothing on this record to suggest that additional witnesses would have altered the jury's decision.

Defendant next argues that trial counsel provided deficient representation when he failed to move for a mistrial after the trial court elicited from a police witness the job duties of a community police officer. Again, we disagree. The officer testified that his duties included attempting to get community members "to be more positive about the community, and to assist us in ridding the crime, and increasing the quality of life for them." This testimony is not inherently prejudicial to defendant. Under such circumstances, a motion for mistrial would have

been futile. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Similarly, for the reasons set forth in our discussion of Issue I, a motion for mistrial made after the admission of the officer's testimony that he had seen defendant with a handgun several months prior to the charged armed robbery would have been an exercise in futility, which counsel was not required to undertake to be effective. *Id*.

Defendant next argues that trial counsel was ineffective when he made the following statement early in his closing argument:

> The first thing I want to address is the part about the crime. When you watch that videotape – and you can ask to see it again – you won't see any gun come out of *my client's* pocket . . . .

Counsel's isolated and innocuous slip-of-the-tongue neither rendered his representation deficient nor, given the evidence presented at trial, adversely affected the outcome of trial.

Defendant also argues that trial counsel rendered ineffective assistance when he elicited testimony from a police officer that defendant had a prior arrest for possession of a firearm after that same officer testified that he had seen defendant with a handgun several months before the instant robbery. However, the record indicates that defense counsel elicited the testimony as part of a strategy to defuse jury speculation that the only way the officer observed defendant with a handgun was through defendant's involvement in other criminal activity, the nature of which might be left to further jury speculation. By eliciting testimony that defendant had been arrested for possessing a firearm, counsel surmised that he could defuse any prejudice arising from the prior gun possession by further eliciting testimony that no conviction arose from the gun possession. This Court will not second-guess trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Lastly, defendant argues that trial counsel rendered ineffective assistance of counsel when he elicited testimony from a police officer suggesting that defendant dealt crack cocaine. We can neither ascertain nor posit a strategic reason for admitting such speculation. Nevertheless, we cannot say that absent the admission of this testimony "the outcome of the proceedings would have been different," where the jury viewed the actual robbery as it was recorded on a security video. *Sabin, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell