

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY SIMPSON,

Defendant-Appellant.

UNPUBLISHED

December 20, 2002

No. 228117

Genesee Circuit Court

LC No. 99-004884-FC

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment for the armed robbery conviction. Defendant also received consecutive sentences of twenty to forty years' imprisonment for the home invasion conviction and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from his alleged participation in a scheme whereby he and an accomplice, while pretending to be police officers, broke into a home and robbed the occupants at gunpoint.

I. Identification Procedure

Defendant initially argues that his in-court identification by the complainant was tainted by a suggestive pretrial identification procedure and should have been suppressed. We disagree. Because defendant failed to preserve this issue, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

If the pretrial identification is tainted by improper procedure or is unduly suggestive, an independent basis must be established for an in-court identification. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Shortly after the charged offense was committed in this case, defendant sought treatment at a hospital for a gunshot wound. The police brought the complainant to the hospital to determine whether defendant was one of the perpetrators. See *People v Libbett*, 251 Mich App 353, 360-361; 650 NW2d 407 (2002). However, the complainant was unable to make an identification at that time and defendant was not taken into

custody. There is no indication that the hospital viewing procedure was suggestive, as shown by the complainant's inability to identify defendant at that time. The fact that complainant was unable to identify defendant at the hospital created a credibility issue for the jury but did not render his subsequent in-court identification inadmissible. *Barclay, supra* at 676. Defendant has further failed to show that the complainant's subsequent chance encounter with defendant on the street was suggestive or improper because it was not arranged by the police. See *People v Metcalf*, 65 Mich App 37, 50; 236 NW2d 573 (1975). Accordingly, we find no plain error.¹

II. Sufficiency of the Evidence

Defendant next asserts that there was insufficient evidence to identify him as a perpetrator of the charged crimes because the two complaining witnesses differed on such matters as the police department's response time. We find no merit to this claim. An argument that the witnesses were not credible affects the weight of the evidence rather than its sufficiency. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Credibility is an issue for the trier of fact that will not be resolved anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Viewing the witnesses' identification testimony and the DNA evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have concluded beyond a reasonable doubt that defendant perpetrated these crimes. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

III. Ineffective Assistance of Counsel

Defendant further argues that defense counsel was ineffective because he made several serious mistakes that denied him a fair trial. We disagree. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights. *Carines, supra* at 763-764.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel, and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). After reviewing defendant's list of alleged mistakes in the instant case, we find defendant has failed to establish that his trial counsel's performance was so deficient that it denied him the effective assistance of counsel. *Id.*

¹ Because we find that the identification procedures were proper, defense counsel did not err by failing to challenge the procedures. See *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998).

IV. Admission of Evidence

Defendant also contends that the trial court erroneously permitted a witness to read into evidence notes that she wrote summarizing the contents of a letter. The witness alleged that defendant sent her a letter, via his cousin, with instructions that she could read the letter but not keep it. The notes indicated that defendant's letter was threatening and asked the witness to lie about a car she rented for his use.

A trial court's decision to admit evidence is reviewed on appeal for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). "However, where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo." *Id.* To the extent that defendant failed to object, our review is limited to a plain error analysis under *Carines, supra*.

While defendant opines that the foundational requirements were not met for admitting testimony concerning the letter, we note that the witness testified that she grew up with defendant and recognized his handwriting. The witness also testified that she expected defendant to send the letter as a result of their previous telephone conversation. See MRE 901(b)(2). The contents of the letter were admissible as a party admission under MRE 801(d)(2). Further, the letter was relevant because a defendant's attempt to get a witness to lie is evidence of a consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). The record also demonstrates that the witness had an insufficient recollection to enable her to testify fully and accurately, rendering her recorded recollection admissible under MRE 803(5). Thus, the trial court did not abuse its discretion in admitting this evidence. *Layher, supra* at 761.

V. Prosecutorial Misconduct

Defendant also claims that the prosecutor's conduct denied him a fair trial. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved constitutional error only warrants reversal if it is plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

After carefully reviewing each of defendant's alleged prosecutorial errors, we find that defendant has failed to establish that any error prejudiced his substantial rights. The prosecutor's reference during closing argument that defendant was the "only" person who appeared at any local hospitals with a gunshot wound was inappropriate but did not prejudice defendant. While the record was silent concerning whether other gunshot victims appeared at area hospitals on the night in question, defendant's wound was still strong circumstantial evidence of his involvement in the charged crimes. Indeed, this was confirmed by the DNA evidence linking blood splatters at the crime scene with defendant's blood sample. Additionally, the prosecutor's misstatement in closing argument that a nurse testified that defendant gave a false birthdate and address was

not prejudicial in light of other evidence that defendant gave a false name and encouraged a witness to lie. With regard to defendant's remaining claims, plain error has not been shown.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

/s/ Jessica R. Cooper