STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2003
v	No. 241766 Calhoun Circuit Court
EDWIN LEROY SHEPPARD, Defendant-Appellant.	LC No. 01-004225-FH

Before: O'Connell, P.J. and Jansen and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of unarmed robbery, MCL 750.530, and the trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 114 to 240 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant was convicted for knocking down a senior citizen as she was walking into a grocery store and then running away with her purse. Before being knocked down, the victim saw a man, whom she identified as defendant, standing near the door of the store. While the victim never saw the person who snatched her purse, defendant was the closest person to her.

Unlike the victim, three other people actually saw the robber take the purse from the victim. Immediately, one began chasing after the robber on foot. Two other people, who had just been parking their vehicle, drove around to block off the robber's escape route as he ran around the store. The man who was driving the vehicle jumped out and joined the chase, while the woman in the vehicle got into the driver's seat. The two pursuers chased the robber to a wire mesh fence. Although the robber escaped by making it over the fence, he left the purse behind.

After the robber leaped over the fence, the woman in the vehicle that had cut off the robber's original escape route drove next to the robber for a few seconds, berating him for what he had just done. The robber ran off into a residential neighborhood. Police checked the neighborhood, but were not immediately able to locate the robber. Approximately two hours after the robbery, police responded to a 911 call indicating that there was a man knocking on doors in the neighborhood and found defendant. Defendant matched the various descriptions of the robber, and was promptly arrested.

I.

Defendant first argues on appeal that he is entitled to a new trial because the trial court did not strictly adhere to MCR 2.511(F) during the jury selection process, and that this failure violated his due process rights. We disagree. The parties entered more than one peremptory challenge to jurors at a time, and did not allow for voir dire of each juror to take place before a new juror was seated. While the trial court should not have used the particular jury selection method used during this trial, for the reasons set forth below we cannot say that the method constitutes error requiring reversal of defendant's conviction.

Defendant failed to object to the method of jury selection at trial and affirmatively expressed his satisfaction with the jury selected ("Defense is satisfied with jury") and, thus, has waived this issue for purposes of appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990) (*Russell II*), reviewing 182 Mich App 314 (1990) (*Russell I*) (for the reasons stated in Judge Sawyer's dissenting opinion); *People v Lawless*, 136 Mich App 628, 635-636; 357 NW2d 724 (1984); see also *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998). Use of the "struck jury" method is impermissible in Michigan, and no finding of prejudice is necessary to establish that a violation of the court rule is an error requiring reversal. See *People v Miller*, 411 Mich 321, 326; 307 NW2d 355 (1981) (holding that the struck juror method was impermissible under GCR 1963, 511.6, the predecessor of MCR 2.511(F)); *People v Colon*, 233 Mich App 295, 298-303; 592 NW2d 692 (1998). However, when no objection to the method of jury selection is made at any point during the trial proceedings, reversal is not required. *Lawless, supra* at 636; see also *Russell I, supra* at 316-317. In addition, defendant shows no reason why this method of jury selection, although irregular, rose to the level of a due process violation requiring reversal. See, generally, *People v Green*, 241 Mich App 40, 43-46; 613 NW2d 744 (2000) (holding that changes to court rules allow for any methods of jury selection that are not intrinsically unfair). Defendant failed to object to the method of jury selection and affirmatively expressed satisfaction with the jury that was selected, thus, extinguishing any error. *Carter, supra* at 214-216; *Russell II, supra*; *Russell I, supra* at 316-317.

II.

Defendant next argues that the prosecution committed prosecutorial misconduct, depriving him of his due process rights, by impermissibly vouching for two of its witnesses. We disagree.

Defendant failed to object to the prosecutor's alleged misconduct at trial and, thus, has failed to preserve this issue for appeal. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Id*. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Schutte, supra* at 720. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id*. at 721.

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276;

531 NW2d 659 (1995); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecution asked many of the witnesses if they were certain in their identifications of defendant as the robber, and introduced testimony regarding many of the witnesses', earlier, out-of-court identifications of defendant. The certainty of two of the witnesses in their identification of defendant was noted during the prosecution's closing argument.

Defendant contends on appeal that the introduction of the prior identifications, and references to the identifications during closing arguments, constituted improper vouching because MRE 403 precluded introduction of the identifications. Defendant fails to cite any cases supporting this interpretation of the rule. The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *People v Leonard*, 224 Mich App 569, 558; 569 NW2d 663 (1997), nor may he give issues cursory treatment with little or no citation of supporting authority, *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). In any event, it was not improper vouching for the prosecution to argue the credibility of witnesses based on facts in the record. *Schutte, supra* at 721; *Howard, supra* at 548. Moreover, any prejudice resulting from the prosecution's questions and statements could have been cured by a timely instruction had one been requested by defendant. *Schutte, supra* at 721. Therefore, the alleged instances of prosecutorial misconduct do not amount to plain error requiring reversal.

III.

Defendant also argues that he was subjected to unduly suggestive lineups, and that this deprived him of his due process rights. We disagree. "In order to sustain a due process challenge [based on an identification procedure], 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." *People v Kurylczyk*, 443 Mich 289, 300-301; 505 NW2d 528 (1993).

At one of the lineups, a witness was told in passing that police had caught the robber. Defendant bears the burden of proving that the lineup was impermissibly suggestive, and the fact that a witness is told that the perpetrator is in the lineup does not, by itself, render the lineup unduly suggestive. *People v McElhaney*, 215 Mich App 269, 286-288; 545 NW2d 18 (1996). In any event, the procedure was not so suggestive that it led to a substantial likelihood of misidentification. See *Kurylczcyk, supra* at 300-301. Thus, as defendant's claim relates to this witness, his claim must fail.

Although another witness saw defendant in the courtroom shortly before attending a lineup, his identification testimony was admissible because there was an independent basis for it. "The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002), citing *Kurylczyk, supra* at 306, 311-312. If the pretrial identification was tainted by creating a substantial likelihood of misidentification, there must be an independent basis for the identification before identification testimony of the witness is admitted at trial. *People v Gray*,

457 Mich 107, 114-115; 577 NW2d 92 (1998).[1] Appropriate factors for determining whether there was an independent basis for identification include: (1) the witness's prior knowledge of the defendant; (2) the witness's opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness's level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Gray, supra* at 116.

Whether there was an independent basis for the identification is a factual inquiry, using a number of factors to assess the totality of the circumstances with regard to the validity of the identification.[2] *Id.* at 115. The witness saw defendant's face as the witness was coming out of the store, watched defendant grab complainant's purse, and also got a good look at defendant's face after defendant stopped to rest on the other side of the fence he jumped. The witness' description of defendant right after the robbery matched defendant's description when he was arrested a couple of hours after the robbery. The witness was certain that defendant was the robber. Based on the above factors, there was an independent basis for the witness' identification of defendant as the robber, and the trial court committed no error in admitting this evidence.

IV.

Finally, defendant argues that he was denied effective assistance of counsel when his trial counsel failed to object to the testimony about the out-of-court identifications and to the method of jury selection, and failed to move for a *Wade*[3] hearing on the issue of the unduly suggestive lineups. We disagree.

Because there has been no evidentiary hearing regarding ineffective assistance of counsel, our review is limited to what is apparent on the record. *People v Rodrigues*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

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[1] Arguments were held outside the presence of the jury, and the trial was not satisfied that there were grounds to suppress the witness's testimony.

[2] The determination whether an identification has an independent basis is factual, and the trial court findings are reviewed for clear error. *Gray, supra* at 115. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Hornsby, supra* at 466.

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

As has already been discussed, the lineups to which defendant was subjected were not unduly suggestive, and failing to object to admissible evidence is not ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). Also, it appears, based on the record, that defense counsel as a matter of trial strategy chose not to request an evidentiary hearing regarding the police lineups, but instead chose to question plaintiff's witnesses about their earlier identifications in an attempt to show that defendant was misidentified as the robber. See *Rodriguez, supra* at 38. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Further, it would have been futile for defendant's trial counsel to have requested a *Wade*[4] hearing. Defense counsel brought a pretrial motion to have a witness' testimony excluded after the parties found out that the witness unwittingly wandered into the courtroom. The trial court was well aware of the evidentiary issues concerned, and still denied the motion. Therefore, trial counsel's failure to request a separate evidentiary hearing did not rise to the level of ineffective assistance of counsel because the result of the proceedings would have been the same. See *Bell, supra* at 695.

Additionally, defendant has failed to present us with facts on the record supporting the contention that trial counsel's acquiescence to the method of jury selection used at trial was anything other than trial strategy. See *Rockey, supra* at 76-77. For the above reasons, defendant has not demonstrated that his trial counsel's performance fell below an objective standard of conduct indicative of ineffective assistance of counsel. Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. *LeBlanc, supra* at 579.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[4] *Wade, supra*.