STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 242924 Wayne Circuit Court
JUWAUN LONG, Defendant-Appellant.	LC No. 01-5450-01

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 27 to 40 years' imprisonment for the armed robbery convictions, to run consecutively to 2 years' imprisonment for the felony-firearm conviction. Defendant moved for a new trial on the basis of ineffective assistance of counsel. Following a *Ginther*[1] hearing, the trial court ruled that defendant had not demonstrated that he was denied effective assistance of counsel, and denied his motion for a new trial. We affirm.

The instant case arises out of the armed robberies of Dennis Whitehead, Randy Whitehead, and Demirlo Brown. Dennis Whitehead testified that on April 16, 2001, between 9:00 p.m. and 10:00 p.m., he was walking with his brother, Randy Whitehead, and his cousin, Demirlo Brown, on Seven Mile Road in Detroit, heading to his grandmother's house. As Whitehead turned the corner onto his grandmother's street, he saw that his brother and cousin had their hands up, and felt a gun, which he later saw to be a black pistol, in his back. He was pushed toward the side of a building, where the perpetrator searched his pockets. Whitehead identified defendant as the perpetrator, and explained that he saw defendant's face when they initially passed each other at the corner; defendant then circled around and placed the gun in his back. Defendant was wearing a black hooded sweatshirt, black pants, and dark shoes; he kept the hood up during the robbery. Whitehead identified the other two perpetrators as a "little kind of chubby guy" and Terry Douglas. The "chubby" guy had a shotgun and Douglas had a black

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

pistol. Whitehead, his brother, and his cousin were forced into an alley; Whitehead testified that a "big blue light" hanging from a building adjacent to the alley allowed him to "really see[]" defendant's face. Douglas ordered Whitehead to take off his shoes, and the "chubby" man picked them up and placed them in a bag. The three men also took four dollars, his bus card, and his wallet.

Whitehead testified that on April 27, 2001, he picked defendant out of a live lineup within "a couple of seconds." Whitehead testified that it was easy to identify defendant at the lineup because he had seen defendant's face during the robbery, none of the other men in the lineup looked similar to defendant, and he had no doubt that defendant was the person who robbed him.

Randy Whitehead testified to essentially the same account of events as his brother. He testified that as they were turning the corner onto his grandmother's street, someone yelled "[y]a'll niggers about to get robbed." Randy Whitehead testified that a "husky fellow" that was approximately 6'1" or 6'2" had a shotgun, frisked him, and took five dollars from him. The other two men were frisking Randy Whitehead's brother and cousin. Randy Whitehead identified defendant as one of the men who was frisking his brother, and testified that defendant had a handgun. Whitehead stated that he observed defendant "for a good minute" and that there was a "very bright light" in the alley which enabled him to see defendant's face.

Randy Whitehead testified that he attended a photographic lineup a few days after the robbery; however, he did not recall seeing defendant's picture. Randy Whitehead testified that he did not identify defendant at the live lineup; he told the police officer that defendant looked very familiar, but did not identify defendant because the police said he had to be 100 percent sure, and he was only 90 percent sure of defendant's identity. Randy Whitehead's statement described two of the robbers as slim, dark complected, with "nappy afros"; the other robber was a heavy set, dark complected male that was 6'2" or 6'3." Defendant was wearing dark clothing, including a dark hooded sweatshirt.

Brown testified to essentially the same account of events as Dennis and Randy Whitehead. Brown identified defendant as one of the robbers, and testified that defendant pointed a gun at Dennis Whitehead's back. Brown testified that the robbery lasted for approximately 15 minutes or 20 minutes, and that he got to look at defendant for 15 minutes. Brown identified defendant at the live lineup. Brown testified that he attended a photographic lineup, but was unable to identify any of the robbers.

William Jackson, the investigating police officer on the case, testified that he was aware that defendant had a twin brother, and that the twin brother was not in the live lineup. Jackson had never seen defendant's brother, and did not know if he was an identical twin.

At the March 21, 2003 *Ginther* hearing, Wright Blake, trial defense counsel, testified that he represented defendant in a homicide trial that concluded six weeks before the instant trial began, as well as a separate armed robbery case. Blake testified that he discussed a potential alibi defense with defendant and defendant's mother. "[Defendant's mother] claimed that [defendant] was not responsible but there weren't any particulars or specifics such as she recalled on that particular date he was such and such a place." Blake discussed the possibility of an alibi defense with defendant, but defendant could not recall where he was at the time of the incident;

he simply maintained his innocence. Blake did not recall receiving names of alibi witnesses from defendant or defendant's mother; therefore, no notice of alibi was filed. During trial, the prosecutor moved to amend the witness list to include a deputy who heard defendant say "you broke ass niggers, you didn't [have] any money anyway" to the three complainants. The trial court would not allow the deputy to testify, but indicated that if defendant testified, the prosecutor could inquire about the statement on cross-examination, and that the deputy could become a rebuttal witness. Blake intended to have defendant testify to explain his whereabouts on the night of the incident, but decided against it in order to avoid the comment being brought out on cross-examination.

Blake testified that there was also a discussion regarding having co-defendant Terry Douglas testify, but that he "was a horrible witness," and "didn't want to risk putting him on the stand." Blake did not recall ever being given the names of Christopher Peave, Antonio Gravely, or Eugene Wyatt for use as alibi witnesses.

Defendant's mother, Wanda Long, testified that while Blake was representing defendant in the instant case as well as the murder case and another armed robbery case, she called him "all the time." According to Long, she told Blake about three alibi witnesses for the instant case, however Blake indicated that he "did not want to get into that until the murder case was over." Long testified that defendant told her the nicknames of the alibi witnesses, and that she knew their legal names, but never communicated them to Blake because he did not return her phone calls. According to Long, she attempted to contact Blake more than 10 times between the end of the murder trial in January 2002 and the trial in the instant case in June 2002. Long testified that after the defense rested in the instant case, she asked Blake "what about the witnesses for my son"?. According to Long, Blake told her that defendant did not remember where he was at the time of the incident; Long believed this to be a lie because defendant "had been bugging [her] all the time about get those friends of his and give [Blake] the names."

Defendant testified that the same day he was found not guilty in the murder trial, Blake asked him "who [he] had for witnesses" for the instant case. Defendant testified that Blake wrote down the names of the three alibi witnesses (Antonio Bradley, Eugene Wyatt, and Christopher Peave), and that he told Blake that he could get the phone numbers and addresses of the witnesses from his mother. Defendant testified that during trial, he began to think that things were not "straight" because Blake did not subpoena any of the alibi witnesses. According to defendant, Blake told him that "it was straight," that "everything was cool," and not to "worry about it." Defendant testified that he was "not really" upset that Blake did not present the alibi witnesses and that he does not hold grudges. Defendant admitted that he did not mention Blake's failure to present the alibi witnesses at sentencing, and stated that he told the trial court that he "had nothing to do with it at all" at sentencing.

Blake testified that he was aware that defendant had a twin brother, and recalled asking Officer Jackson whether he was aware that defendant had a twin. Blake asked Jackson about defendant's twin in an attempt to rebut the complainants' identification of defendant. Blake did not attempt to introduce the twin brother at trial, because he did not believe they looked sufficiently similar for the jury to conclude that the complainants mistakenly identified defendant: defendant had longer "nappy" hair worn in a "large afro," whereas his brother had a shorter hairstyle. Additionally, defendant's brother is larger and heavier than defendant. Blake believed it was more advantageous to not introduce defendant's twin brother, and to let the jury

draw their own conclusions. Defendant's mother confirmed that defendant and his brother were fraternal twins.

Blake testified concerning his representation of defendant in the Won Young Park armed robbery case. Park identified defendant as one of the men who robbed him; however, it was later determined that defendant was incarcerated at the time of the Park robbery, and therefore could not have been the perpetrator. The Park robbery case was dismissed after defendant was found guilty in the instant case. Blake did not attempt to introduce evidence that defendant had been improperly identified in the Park robbery, because the Park robbery charges were still pending at the time of the instant trial, and he "didn't feel comfortable with trying to get into that realm during the trial." Blake did not think it would be beneficial to defendant's case to inform the jury that he had been identified as a suspect in a different armed robbery.

At trial, Blake questioned Randy Whitehead and Demirlo Brown about whether they attended a photographic lineup; the witnesses testified that they attended a photographic lineup, but were unable to identify any of the robbers. At the *Ginther* hearing, Blake admitted that when he asked the complainants about the photographic lineup, he was unaware of whether such a lineup took place. Blake did not know, and never attempted to find out, whether the complainants had been shown a picture of defendant during the photographic lineup. Blake agreed that evidence that the complainants were unable to identify defendant at a photographic lineup would have been helpful to the defense.

Blake testified that he did not move for a *Wade*[2] hearing to determine the fairness of the live lineup because he did not feel it was appropriate. The trial court commented that all six of the men were of the same stature and height, and that the skin tone of the men varied from medium brown to dark brown. Blake testified that two of the six men were dark complected, one of which was defendant. Blake could not tell from the picture of the lineup whether two of the six men had their hair in braids. Blake used the photograph of the live lineup during cross-examination of the complainants to demonstrate the weight that should be given to their identification of defendant.

Defendant argues that he was denied the effective assistance of counsel. The right to counsel guaranteed by the United States and Michigan Constitutions is the right to effective assistance of counsel. US Const, Am VI and Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). "To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.*

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

Defendant first argues that his trial counsel was ineffective because he failed to properly prepare an alibi defense. This Court has held that "a defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "At a post-trial evidentiary hearing, however, a defendant must show that he made a good-faith effort to avail himself of this right and that the defense of which he was deprived was substantial." *Id*. "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. In the instant case, "a substantial alibi defense would be one in which defendant's proposed alibi witnesses verified his version." *Id*. at 526-527.

At the *Ginther* hearing, defendant claimed that he gave defense counsel the names of three alibi witnesses following his acquittal in the murder trial, and that defense counsel wrote down the names. However, defendant's mother testified that defendant gave her the names of the alibi witnesses and told *her* to give the names to defense counsel. According to defendant's mother, she was never able to give defense counsel the names of the witnesses because he was first occupied with the murder trial, and thereafter failed to return her calls. Defense counsel testified that neither defendant nor his mother ever provided him with a list of alibi witnesses, and that defendant could not recall his whereabouts on the night of the incident. The trial court determined:

> With respect to the alibi witnesses, during the evidentiary hearing conducted by this Court, the defendant's mother testified that she attempted at least twice to give counsel the names of three alibi witnesses and the counsel was either always unavailable, too busy or did not want to be distracted from defendant's murder trial. Counsel testified that he did not pursue alibi evidence because defendant had not given him any and defendant [] himself could not recall his whereabouts on the night in question. In light of the totality of evidence, this Court is not convinced of the veracity of testimony given by defendant's mother.

The trial court's ruling is supported by defense counsel's testimony that neither defendant nor his mother provided him with the names of alibi witnesses. Based upon the testimony from the *Ginther* hearing, we are not persuaded that defendant made a good-faith effort to avail himself of an alibi defense or that the defense was in fact substantial. *People v Hubbard*, 156 Mich App 712, 715; 402 NW2d 79 (1986).

Defendant next argues that his trial counsel was ineffective because he failed to conduct a *Wade* hearing to determine whether the live lineup was fair. However, defense counsel testified that he did not feel a *Wade* hearing was appropriate in the instant case, and wanted the photographs of the live lineup to be admitted as evidence so that the jury could assess the weight to give the complainants' identification of defendant. The trial court determined:

> Counsel indicated he did not consider a *Wade* hearing to have the line up pictures ruled inadmissible because he wanted the pictures to be seen by the jury. It was his intent and strategy to point out that the other people in the line up bore hardly any resemblance at all to defendant. That including the age, height and skin color, this was a dissimilar line up. Trial strategy is without the boundary of this Court's review. Hence, defendant has failed to meet his burden for an ineffective assistance claim on this basis.

Here, the record does not reflect reasons for finding the live lineup improper, which would be the only basis for requesting a *Wade* hearing. *People v Laidlaw*, 169 Mich App 84, 96; 425 NW2d 738 (1988). We are not persuaded that defendant met his burden of showing that defense counsel failed to perform an essential duty, or that the failure prejudiced defendant. *Id*. Further, defense counsel closely questioned the three complainants on cross-examination concerning their identification of defendant at the live lineup. We find no ineffective assistance of counsel in defense counsel's failure to move for a *Wade* hearing.

Defendant next argues that his trial counsel was ineffective because he failed to introduce sufficient evidence that defendant had a twin brother. However, defense counsel testified that he had seen defendant's fraternal twin before trial, and felt that they were too dissimilar to present defendant's twin to support the argument that the complainants were mistaken as to the robbers' identity. The trial court determined:

> Counsel further testified that with regard to the defendant's twin brother, he made a strategic decision not to present further witnesses. He testified that he believed the two were significantly different in appearance. The mother confirmed that they are fraternal. On cross-examination, counsel testified that he thought it was better to let the jury reach their own conclusion as to whether defendant could have been mistaken for the twin, rather than to show them the twin for comparison. This Court finds that sound trial strategy, its success or failure being irrelevant, will not be second-guessed.

Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The record does not demonstrate that defense counsel's performance was unreasonable, and his judgment in not calling defendant's twin to testify will not be substituted with the judgment of this Court. *Id*. at 77.

Defendant next argues that his trial counsel was ineffective because he failed to introduce evidence that defendant was mistakenly identified in the Park robbery. However, defense counsel testified that the armed robbery charges in the Park case were still pending against defendant during the instant case, and that in any event he did not want to introduce evidence that defendant was a suspect in a different armed robbery case. The trial court determined:

> Counsel addressed the issue of defendant having been misidentified in another armed robbery in the same area. That case was not dismissed until after the instant case returned the guilty verdict. Prior to that, it was not confirmed that defendant's case would be dismissed as counsel was still negotiating with the prosecutor and there may have been some inaccuracies in the documentation he had received on the matter. Counsel did not want to present to the jury another armed robbery where defendant was the suspect. Once again, counsel acted within the wide range of constitutionally competent representation.

Decisions regarding what evidence to present is presumed to be a matter of trial strategy, and we will not substitute our judgment for that of defense counsel regarding such matters. *Rockey, supra* at 76. The record does not demonstrate that defense counsel's performance was

unreasonable, and his judgment in not presenting evidence that defendant was misidentified in a different armed robbery case will not be substituted with the judgment of this Court. *Id*. at 77.

Defendant next argues that trial counsel was ineffective for failing to properly investigate whether two of the complainants were shown a picture of defendant in a photographic lineup and failed to identify defendant. Defense counsel admitted that he was unaware that a photographic lineup had been conducted, and that when he questioned the complainants about a photographic lineup, he was merely "fishing" for answers to discredit their in-court identification of defendant. Officer Jackson testified that after searching the photograph database, the only photograph of defendant he discovered was taken on April 27, 2001 for the investigation in the instant case. Jackson's testimony indicates that defendant's picture was not in the photographic lineup shown to the complainants, and thus explains their inability to identify defendant as one of the robbers. The trial court determined:

> Counsel was not aware of mugshots having been used until he asked the question in open court without knowing what the answer would be. Further, he testified that nothing in the discovery materials notified him that the complainants had viewed mugshots prior to the line up. The officer in charge testified that the only mugshot of defendant that he was able to obtain after investigating the same is the one that was taken April 25, 2002, after defendant was arraigned on the instant case. Therefore, this Court finds that had counsel investigated mugshots, he would [not] have found one taken subsequent to the time when the complainants were alleged to have viewed them. In light of the positive live line up and courtroom identifications by all three complainants, this line of defense would have had marginal impact at best. Hence, defendant has not demonstrated that counsel's failure to investigate was such that it significantly prejudiced defendant's position.

"When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant failed to present evidence that an investigation would have revealed any information to benefit defendant, and Officer Jackson's efforts revealed that a picture of defendant was not likely shown to the complainants during the photographic lineup. After reviewing the trial transcript and the record from the *Ginther* hearing, we conclude that defendant has not met his burden of overcoming the presumption that his trial counsel provided effective assistance. *Id.* at 642.

Finally, defendant contends that OV 13, concerning continuing pattern of criminal behavior, was incorrectly scored at twenty-five points. MCL 777.43. A score of twenty-five points requires a determination that "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). MCL 777.43(2)(a) provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

Contrary to defendant's assertion that a continuing pattern of criminal behavior is not established by concurrently robbing three people, this Court has held that OV 13 was appropriately scored at twenty-five points where the defendant was convicted of four concurrent

felonies. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Further, defendant's criminal history indicates that he had been charged with three additional armed robberies, as well as assault and homicide within a five year period. While defendant argues that he had not been convicted of a number of those offenses, MCL 777.43(2)(a) clearly indicates that such offenses may be scored "regardless of whether the offense resulted in a conviction." We conclude that the trial court did not abuse its discretion in scoring twenty-five points for OV 13.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage