

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WALKER,

Defendant-Appellant.

UNPUBLISHED

January 10, 2006

No. 255234

Wayne Circuit Court

LC No. 04-000371

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530, and was sentenced as a fourth habitual offender, MCL 769.12, to seven to thirty years’ imprisonment.¹ Defendant appeals as of right, asserting that he was denied the effective assistance of counsel. We affirm. This appeal is being decided without an oral argument pursuant to MCR 7.214 (E).

To obtain relief on a claim of ineffective assistance of counsel, the defendant must establish that the trial counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). The defendant must show that “counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland, supra* at 687.

Defendant claims he was denied the effective assistance of counsel because his trial counsel failed to challenge either the complainant’s identification of him at a photographic

¹ Although the sentencing transcript indicates that defendant was sentenced as a third habitual offender, the initial Judgment of Sentence did not cite any statute for the sentencing enhancement. The Department of Corrections subsequently brought this to the trial court’s attention, and the trial court amended the Judgment of Sentence on June 28, 2004, citing MCL 769.12, which sets forth the sentencing enhancements for defendants with three or more prior convictions. In any event, defendant does not raise any issue with regard to his sentence on appeal.

showup that was conducted while he was in custody or the complainant's subsequent in-court identification of him as the robber.

This Court will not reverse a trial court's decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). The prohibition against conducting a photographic showup when the defendant is in custody is not absolute; certain exceptions apply. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004). Defendant never objected to the photographic showup either before or at the trial, nor did he request an evidentiary hearing. Therefore, our review of this claim is confined to the existing record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant asserts that the photographic showup was prohibited because he was in custody at the time and available for a live lineup. There is in nothing the existing record, however, to suggest that a photographic showup was improper under the circumstances. Because defendant failed to make an adequate record in the trial court before raising this issue on appeal, this Court cannot determine that the police did not have a sufficient reason for conducting a photographic showup rather than a corporeal lineup, such as a lack of available participants with sufficiently similar characteristics to defendant. Therefore, we cannot say that the trial court's decision to admit the photographic show up was clearly erroneous and defendant has not shown that he was denied the effective assistance of counsel on this ground.

Defendant also asserts that the photographic showup was impermissibly suggestive because the other photographs showed individuals with different complexions than his, the showup was not conducted in a police station, and he was the only one wearing a coat. A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *Anderson, supra* at 169. The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczuk*, 443 Mich 289, 306, 311-312 (GRIFFIN, J.), 318 (BOYLE, J.); 505 NW2d 528 (1993). Physical differences among the showup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other showup participants. *Kurylczuk, supra* at 312 (GRIFFIN, J.), 318 (BOYLE, J.). Physical differences generally affect only the weight of an identification and not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). In the instant case, the record does not establish any significant discrepancies among the physical characteristics of the showup participants so as to require the exclusion of the showup identification. Although the showup participants did not exactly mirror each other in height, weight, or complexion, nothing significantly distinguishes defendant from the other participants when they are viewed as a group.

We finally note that counsel was appointed for the photographic showup and that counsel certified that the showup was properly conducted. Defendant has failed to demonstrate that the use of a photographic showup was error or that his counsel's failure to challenge the procedure so prejudiced him that he was denied a fair trial. In fact, the record shows that defendant was

clearly not prejudiced. The robbery was caught on a DVD by the store's surveillance camera and the DVD was shown to the jury. The jury had ample opportunity to observe defendant's face during the three-day trial to determine whether defendant was the robber whose image was caught on the DVD. Thus, defendant has not shown that there is a reasonable probability that, but for counsel's alleged errors, the result would have been different. *Strickland, supra* at 694.

Because the photographic showup identification was proper, we find no merit in defendant's contention that the complainant's in-court identification was tainted and erroneously admitted. In any event, the record clearly establishes that the complainant had an independent basis for her in-court identification of defendant as the robber. *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972); *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). The complainant had no prior knowledge of, or relationship with, defendant, but she had ample opportunity to observe him for a considerable length of time and in close proximity while he shopped in the well-lit store. Defendant's face was not covered or shielded from her view. And, although the complainant was crying after the incident, there is nothing in the record indicating that she was overly upset such that her ability to recall the robber was compromised. She gave a fairly detailed description of the robber, which generally matched the physical characteristics of defendant. Moreover, the complainant was positive in her identification of defendant during the trial based on her observations of him on the day of the robbery. She had not previously misidentified anyone else as the robber, and there was a relatively short period of time between the robbery and the in-court identification of defendant at trial.

We also find no merit in defendant's contention that his trial counsel erred in failing to investigate a refund receipt. This was a choice made by his trial counsel, which is entitled to highly deferential scrutiny by this Court. *Strickland, supra* at 681.

Defendant fails to make the required showing of either deficient performance or sufficient prejudice to sustain his ineffective assistance of counsel claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot