STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
v	No. 261603 Wayne Circuit Court
JESSE ALEXANDER JOHNSON, Defendant-Appellant.	LC No. 04-010282-01

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529; assault with intent to rob while armed, MCL 750.89; felon in possession of a firearm ("felon-in-possession"), MCL 750.224f; and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. The court imposed prison sentences of 9 to 15 years for the armed robbery and assault with intent to rob while armed convictions; three to five years for the felon-in-possession conviction;[1] and two years' imprisonment[2] for the felony-firearm conviction. We affirm.

I. Basic Facts and Procedure

Charles and Laura Gardner (the Gardners) were robbed by two men in the garage of their Detroit home on September 18, 2004. That evening, between 9:30 p.m. and 9:45 p.m., the Gardners returned home from a party. Charles Gardner wanted to get cigarettes and papers from his car, so the two walked into their garage. As the couple stood between the two cars in the garage, two men walked in through the service door and said, "this is a stickup." One of the men, whom Charles Gardner identified at trial as defendant, had a handgun. At trial, the Gardners testified that the men demanded money, warned them not to look at their faces, and restrained the couple while searching them, eventually taking $85 in cash from one of Charles Gardner's pockets. Both robbers then escaped on foot. Charles Gardner thought that the men were in the garage for 30 to 35 seconds. Laura Gardner thought the incident spanned "[m]aybe

[1] All to be served concurrently.

[2] A sentence which must be served consecutively. See MCL 750.227(b)(2).

three minutes," adding: "It felt like forever." The Gardners called police to report the robbery and gave descriptions that evening.

On September 23, 2004, police separately showed Charles Gardner and Laura Gardner an array of 45 mugshots, which were pulled from a database and located by using a computer program.[3] Each independently identified the same photograph of defendant. On September 28, 2004, police conducted a lineup of five men, including defendant. Charles Gardner and Laura Gardner each independently saw the same lineup. Charles Gardner identified defendant and testified that he had no doubt that defendant was the gunman at the time of the lineup. Laura Gardner could not identify defendant. Charles Gardner also identified defendant at the preliminary examination on October 11, 2004; Laura Gardner did not testify. At trial, the Gardners identified defendant as the gunman. Further testimony established that Charles Gardner turned on an overhead light when the Gardners entered the garage and that both could see clearly; that windows in the garage allowed in public lighting from the alley; and that Charles Gardner at one point stood within two to three feet of defendant.

Defendant presented three alibi witnesses–all friends or acquaintances–who testified that defendant attended a birthday party for his girlfriend, Rachel Jackson, at her home on the night of the robbery. All witnesses concurred that defendant left the party at some point and returned later. Testimony varied, though, regarding whether defendant was at the party during the time the robbery occurred.

II. Analysis

On appeal, defendant claims he was denied effective assistance of counsel because: his attorney failed to procure the testimony of an expert witness to contest the reliability of the Gardners' identifications; his attorney failed to move for a separate trial on the felon-in-possession charge; and his attorney failed to timely object to certain questions at trial.[4] Defendant also claims the jury was wrongly empanelled by use of the "struck jury" method. We disagree.

A. Standard of Review

The determination whether a defendant was given effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich

[3] The program works by entering into the computer an offender's general physical traits, e.g., height, weight, age, race, and gender. The program then generates on a computer screen those mugshots that fit the description.

[4] We decline to address this third claim. Defendant provides little explanation for how counsel erred and no explanation for how the purported errors affected the outcome of the proceedings. He cites *People v Loyer*, 169 Mich App 105; 425 NW2d 714 (1988), without further explanation. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

575, 579; 640 NW2d 246 (2002). We address de novo the constitutional question whether defendant's right to effective assistance was violated. *Id*. Our review is limited to facts apparent in the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise. *LeBlanc*, *supra* at 578. To support a claim of ineffective assistance, defendant must show: (1) the representation fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for the attorney's error, the result of the proceedings would have been different; and (3) the resulting proceedings were therefore fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In evaluating a claim of ineffective assistance, this Court "will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers*, *supra* at 715. Decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). However, a defendant is entitled to have his counsel "prepare, investigate, and present all substantial defenses"; a substantial defense is "one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

B. Defendant Was Not Entitled To An Expert Identification Witness

Defense counsel exhaustively questioned the Gardners regarding their abilities to remember and identify the gunman, as well as the criteria they used when they selected defendant from the array of photographs. The Gardners' testimony, particularly during their cross-examinations, revealed various discrepancies in their descriptions of the gunman and their respective descriptions of the events that took place during the evening of the robbery. Subsequently, defense counsel in his closing argument made many of the arguments that defendant now makes on appeal. He stressed the circumstances of the crime and the discrepancies among the Gardners' descriptions of the gunman. He also stressed Laura Gardner's inability to identify defendant in a live lineup, regardless that she chose his picture at the photo array, and suggested that it made little sense she had "no uncertainty" when she later identified defendant at trial. Counsel theorized that the Gardners had been inadvertently "taught" to identify defendant as the gunman by virtue of the original photograph they chose from the array. He suggested that defendant was merely a "convenient" suspect who had been "sucked" into the case by virtue of the fact that the police had his picture.

Nonetheless, defendant argues on appeal that counsel was ineffective because he failed to call an expert to attest to many of the same issues. Defendant refers to various studies and calls attention to the fact that our Supreme Court has acknowledged some psychological studies create concern regarding the reliability of eyewitness identifications, citing *People v Anderson*, 389 Mich 155, 172-180, 186-187; 205 NW2d 461 (1973), overruled by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). We find it noteworthy that the cases cited by defendant primarily address the effects to witnesses' memories that may result from suggestive pretrial identification procedures. See, e.g., *People v Kurylczyk*, 443 Mich 289, 303-304; 505 NW2d 528 (1993); *Anderson*, *supra* at 188-189. Here, defendant does not argue that the initial photo array was suggestive. There is no indication that defendant stood out from the other men in the photograph array nor any other suggestion of police influence. Although there was some evidence that the pictures in the photograph array varied in form based on whether they were added to the program

before or after 1999, there was little evidence that defendant's picture stood out in a meaningful way from the other 44 pictures shown to the Gardners. Accordingly, defendant fails to persuade us that an expert witness would have meaningfully countered the fact that both of the Gardners selected defendant's picture from the array.

C. Defense Counsel Did Not Err By Stipulating To Previous Felony Conviction

Defendant next claims that defense counsel erred by stipulating to his previous felony conviction for purposes of the felon-in-possession charge. This Court has established that a defendant suffers no prejudice when a single trial is conducted for multiple charges, including felon-in-possession, if the following safeguards are erected:

> (1) the introduction by stipulation of the fact of the defendant's prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and (3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge. [*People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998).]

Here, the court specifically instructed the jury to consider the prior conviction solely for the purposes of the felon-in-possession charge. The court does not appear to have given the more general limiting instruction. However, first, in *Green*, this Court ruled that the safeguards were sufficient even when the court omitted the specific instruction, i.e., to use evidence of the conviction only for purposes of the felon-in-possession charge. *Id.* at 692. Second, and more significantly, defendant does not argue that the safeguards used in his trial were insufficient under *Green*. Rather, he claims that the safeguards approved of in *Green* are generally insufficient.

While evidence of a conviction may create prejudice in a case in which identification of the assailant is the only issue, defense counsel's failure to move for severance was not objectively unreasonable and, regardless, would not have likely affected the outcome. Both conclusions are based largely on the fact that, for the trial to proceed at all, the jury had to be aware that the police had a picture of defendant. Accordingly, there was no way for defendant to create a semblance of an entirely innocent past. Therefore, first, defense counsel not only proceeded as most attorneys would under the *Mayfield* and *Green* Courts' pronouncements, but he also had little reason to believe that the absence of evidence of the prior conviction would cast defendant in a significantly different light. Second, even if defense counsel should have anticipated the heightened effect of a prior conviction in a case that hinges on identification, the existence of the picture, combined with the Gardners' repeated identification of defendant as the gunman, prevented this error from having a likely effect on the overall proceedings.[5] Thus, this basis for defendant's ineffective assistance argument must also fail.

[5] Moreover, even defendant's alibi did not weigh strongly against conviction. The alibi testimony differed, but arguably established that he left the party he allegedly attended around the same time that the robbery occurred. Albeit, two witnesses claimed to have been with him and attested that none of them participated in a robbery.

D. The Trial Court's Jury Selection Process Did Not Deny Defendant An Impartial Jury

Finally, defendant claims that his constitutional rights were violated when the court permitted jurors to be selected using a "struck jury" method, which is prohibited by the rule then in place, MCR 2.511(F).[6] He argues that this alleged error requires automatic reversal even if the evidence shows he was not prejudiced by the selection process. Defendant did not object to the method of jury selection at trial. Accordingly, he forfeited this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). However, defense counsel also appears not to have explicitly expressed satisfaction with the panel at the completion of the selection process. Accordingly, review has not been entirely precluded through waiver of the issue. *Id*. We review alleged violations of the jury selection process and the interpretation of court rules de novo. *People v Fletcher*, 260 Mich App 531, 554; 679 NW2d 127 (2004).

A so-called "struck jury" method necessarily involves exhaustion of all peremptory challenges before the court selects additional jurors. *People v Miller*, 411 Mich 321, 323-324; 307 NW2d 335 (1981).

Both defendant and the prosecution made several peremptory challenges during the course of voir dire. The court called additional jurors to replace those excused and then subjected them to the same voir dire as prior potential jurors. After the court called the last two jurors who would eventually be impaneled, and subjected them to voir dire, this exchange took place:

The Court: On behalf of the Defense, preemptories (sic)?

(Defense counsel): Not at this time, your honor.

The Court: On behalf of the Prosecution, preemptories (sic)?

(The Prosecution): We have a panel.

The Court: We have a panel.

[6] Before January 1, 2006, MCR 2.511(F) read: "After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors." Defendant was tried in February 2005.

At that point, the court instructed the remaining members of the pool not impaneled to return to the pool room for possible service in another case. All in all, the record reflects the jury in this case was selected in a typical manner that fits the rule in place at the time. Moreover, defendant clearly did not exhaust his peremptory challenges. Therefore, defendant's final argument fails.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio