

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DWAYNE DAVENPORT,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 263437

Wayne Circuit Court

LC No. 04-012503-01

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of armed robbery, MCL 750.529, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The complainants testified that in separate instances in the early morning hours of April 22, 2004, they were robbed at gunpoint as they prepared to enter their vehicles. The complainants reported the incidents to the police, and in both instances viewed a photo array and identified defendant as the perpetrator. Defense counsel challenged the credibility of the witnesses' identifications, and defendant denied committing the offenses. Nevertheless, the trial court accepted the witnesses' identification testimony, and found defendant guilty as charged.

Defendant asserts that trial counsel was ineffective in failing to call an expert witness to testify regarding the uncertainty of eyewitness identifications, and in failing to seek the suppression of the witnesses' in-court identifications or obtain a live line-up. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must show that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Counsel's failure to call an expert witness constitutes ineffective assistance only if it deprived the defendant of a substantial defense. A defense is substantial when it may have affected the outcome of the trial. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Here, defense counsel cross-examined the complainants regarding their identifications of defendant as the perpetrator, and emphasized to the trial court that those descriptions were inconsistent in some respects with defendant's actual appearance. Expert testimony regarding the general unreliability of eyewitness testimony would not have added to the material evidence presented in the case. The court was aware from the testimony that one of the complainants was only fifty percent certain of his photo identification, and that his in-court certainty was based on his seeing defendant at court proceedings. Counsel's failure to call an expert witness did not deprive defendant of a substantial defense, *Daniel, supra*, and did not result in prejudice. *Carbin, supra*.

Defendant did not contend at trial that the complainants' pretrial identifications of him were tainted; therefore, the trial court was not required to determine whether an independent basis existed for the witnesses' in-court identifications. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988). Nor do we see a basis for counsel to have made such a claim. There is no suggestion that the initial photo array was suggestive or otherwise deficient. It is likely that counsel's decision to challenge the credibility of the witnesses by cross-examining them regarding their identifications of defendant, rather than by moving to suppress the identifications, was one of trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a particular strategy was not successful does not render its use ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not overcome the presumption that counsel rendered effective assistance by challenging the witnesses' identifications via cross-examination and argument. *Rockey, supra*.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly