

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS MAXWELL ROSS,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 266549

Wayne Circuit Court

LC No. 05-007023-01

Before: Meter, P.J., and O’Connell and Davis, JJ.

MEMORANDUM.

Defendant appeals as of right from his conviction following a jury trial of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve concurrent prison terms of 8 to 20 years for armed robbery and carjacking and a consecutive prison term of 2 years for felony-firearm. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant’s sole argument on appeal is the assertion that his counsel was ineffective for failing to request the appointment of an expert witness. We disagree. Defendant failed to preserve his claim of ineffective assistance by seeking a *Ginther*¹ hearing below. “When no *Ginther* hearing has been conducted, our review of the defendant’s claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that counsel’s deficient performance prejudiced the defense. In order to demonstrate that counsel’s performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel’s

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

performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

“Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). Defendant does not suggest that direct testimony from a missing witness would have exonerated him, but rather indicates that his trial counsel should have obtained expert testimony to elaborate on inconsistencies in the various descriptions of the culprit and defendant. Defendant’s trial theory was that he had been misidentified by the victim. Counsel vigorously pursued this defense by questioning the victim about his distance from the culprit during the crime and the length of time he had to look at his assailant. Counsel also inquired into the victim’s lack of reference to defendant’s substantial facial scarring and a prominent tattoo on his forearm. Counsel questioned the inconsistencies between the victim’s testimony and other descriptions of the perpetrator, including his clothing. Therefore, defendant was not denied a substantial defense by his counsel’s failure to pursue an expert on the topic of eyewitness identification. *Julian, supra*; see also *People v Hill*, 84 Mich App 90, 96-97; 269 NW2d 492 (1978).

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O’Connell
/s/ Alton T. Davis