

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICARDO LAMONT RICHARD,

Defendant-Appellant.

UNPUBLISHED

August 23, 2007

No. 269203

Wayne Circuit Court

LC No. 05-010263-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICARDO LAMONT RICHARD,

Defendant-Appellant.

No. 272072

Wayne Circuit Court

LC No. 05-010260-01

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In Docket No. 269203, defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 30 to 60 years' imprisonment for his armed robbery conviction, 40 to 60 months' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

In Docket No. 272072, defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 30 to 60 years' imprisonment for his armed robbery convictions, 40 to 60 months' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. For the reasons set forth in this opinion, we also affirm the convictions and sentences of defendant.

These cases arise out of defendant's involvement in a string of robberies. On September 28, 2005, around 2:00 a.m., Leunita Williams was sitting in a parked car at a Coney Island in Detroit near East Warren and Marlborough Streets, while her boyfriend, Porter Williams, Jr., was inside the restaurant ordering food. As Porter was returning to his car, a green or black Grand Prix with two occupants parked next to Porter. Porter identified defendant as the occupant in the passenger's seat and noted that defendant had an afro. Defendant asked Porter if he knew where he could get some marijuana. When Porter responded that he did not know, defendant got out of the Grand Prix, pressed a gun against Porter's chest, took Porter's cellular phone, and told Porter to "run [his] pocket." Porter gave defendant \$52 or \$53. Defendant then told Porter to go to the passenger side of Porter's car where Leunita was sitting. Leunita opened her door, and defendant demanded money. When Leunita told defendant she had no money, defendant told Leunita to "give up something." Leunita gave defendant her rings, bracelet and earrings. Leunita noted that defendant, who was standing about two or three feet from her, had hair "like a 'fro." Defendant then told Porter to turn his back and left the scene in the Grand Prix.

Around 2:14 a.m., Leunita reported the incident to police. Leunita told police that defendant was about 5'5" tall with a heavy build and an afro and was wearing a black coat. Leunita described the other perpetrator as wearing a black buttoned-down shirt with a white t-shirt underneath. Leunita also provided a partial description of defendant's license plate number.

Around 2:15 a.m. that same morning, defendant approached Alan Stampley at a Fast Track gas station in Detroit near 7 Mile and Goulburn Streets as Stampley was getting into his truck. Defendant was holding a gun and demanded Stampley's money and jewelry. Stampley gave defendant his watch, chain, and cash, and defendant took the keys to Stampley's truck. Stampley indicated that he was able to see defendant for three or four minutes during the robbery and described defendant as having an "afro" and a "longish beard." Stampley reported to police that two other individuals in addition to defendant were involved in this robbery. One individual was driving a car and the other approached Stampley's truck with defendant.

Around this time, Rosalee Hall reported to police that she had been robbed at a gas station at Lakepointe and Morang Streets, which, according to testimony presented at trial was near the sites of the previous robberies. Hall described the perpetrators' vehicle as a turquoise Grand Prix. Then, around 3:00 a.m. that same morning, Detroit Police Officers Brett Riccinto and Ernie Harris received a message indicating that two individuals in a green Pontiac Grand Prix had just been involved in an armed robbery that had taken place on Morang Street. One individual was described as a black male with a large afro, a goatee and mustache, approximately 5'11" tall, weighing around 160 pounds, and wearing a black puffy nylon coat, sweatpants, and dark shoes. The other was described as approximately 5'8" tall, weighing 135 pounds, with braids, wearing a baseball cap, jeans, and a long black shirt. The message also provided a partial license plate number for the Grand Prix. About seven to ten minutes after receiving the message, Riccinto and Harris found a vehicle matching this description parked near Houston Whittier and Celestine Streets. Five minutes later, Riccinto saw two individuals matching the description in the message approach the Grand Prix. The light inside the Grand Prix turned on and the doors of the Grand Prix were unlocked. A woman who was walking with the individuals then yelled, "The police are at the corner." The officers then arrested defendant and Jerry Hampton. An officer then brought Hall to the scene of the arrest where she identified defendant and Hampton as the individuals who had robbed her and the Grand Prix as their car.

Following these arrests, police found the keys to the Grand Prix lodged in the back seat of the squad car where defendant had been sitting. Police also found a watch on defendant's person and a necklace on Hampton's person. These items matched the descriptions of the watch and necklace stolen from Stampley. Later, Leunita, Porter, and Stampley each identified defendant in a lineup. Hall, however, was unable to identify defendant. The lineup slips indicated that defendant was six feet tall, weighed 160 pounds, and was 24 years old.

In contrast to the above version of events, defendant's girlfriend, Jenise Buck, testified that she sent defendant to a gas station for some Tylenol on September 28, 2005, around 2:00 a.m. Defendant claimed that he met a girl named Crystal (no last name was provided) at the gas station who lived near Buck's house. As he was walking Crystal home, defendant saw a man trying to sell CDs outside of an apartment building near Celestine and Houston Whittier Streets. After Crystal bought a CD, defendant saw a blue-green Pontiac parked on Celestine. Defendant heard a woman say that the police were there. Then, police officers ordered defendant, Crystal, and the man who had sold Crystal the CD to get on the ground.

Both cases were jointly tried below. This Court consolidated defendant's appeals from case numbers 05-010263-01 and 05-010260-01 on October 27, 2006. *People v Richard*, unpublished order of the Court of Appeals, entered October 27, 2006.

On appeal, defendant argues that he was denied the effective assistance of counsel because trial counsel approved of the prosecutor's motion for joinder. Claims of ineffective assistance of counsel involve a mixed question of law and fact, which this Court reviews de novo and for clear error, respectively. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "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 and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To the extent this issue involves the question of whether the charges against defendant were related under MCR 6.120(B), this issue is reviewed de novo. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005).

At the outset, we note that joinder was appropriate in this case. MCR 6.120(B)(1) provides that "[j]oinder is appropriate if the offenses are related," meaning they are based on "(a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan." Under this rule, joinder is not appropriate merely because the acts at issue are of the "same or similar character." *People v Tobey*, 401 Mich 141, 152; 257 NW2d 537 (1977); see also *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). However, joinder may be appropriate where a series of successive offenses occur "within a close time-space sequence." *Tobey*, *supra* at 152 n 15.

Defendant was convicted for his participation in two armed robberies. These robberies occurred on September 28, 2005, between 2:00 and 2:30 a.m., at public locations in the same area of Detroit. In both robberies, a perpetrator demanded money from the victims at gunpoint as the victims were approaching or already inside of their cars and stole both money and jewelry.

Given this, it appears the robberies were “a series of connected acts” or “a series of connected acts constituting parts of a single scheme or plan” aimed at robbing similarly situated victims of similar items “within a close time-space sequence.” MCR 6.120(B)(1)(b) and (c); *Tobey, supra* at 152 n 15. Moreover, each victim identified defendant as a perpetrator. Thus, joinder was appropriate in this case. In light of this, any objection by defense counsel to the motion for joinder would have been futile. “Defense counsel is not required to make a meritless motion or a futile objection.” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Notwithstanding the above, defense counsel’s approval of the prosecution’s motion for joinder did not constitute ineffective assistance of counsel. To succeed in his claim that he was denied the effective assistance of counsel, “defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant has failed to meet this burden.

At the *Ginther*¹ hearing, the court found that defendant’s trial counsel sought joinder of the cases in order to attack the victims’ identification of defendant. This finding was not clearly erroneous and was supported by the trial record. Indeed, during closing argument, defendant’s trial counsel argued that two of the victims who were involved in separate cases against defendant provided partially inaccurate descriptions of defendant with respect to defendant’s height and weight. Thus, by having the cases consolidated, defense counsel was able to argue inconsistencies to the jury that he would otherwise have been unable to raise. In light of this, defense counsel’s approval of the prosecution’s motion for joinder constituted sound trial strategy. Furthermore, nothing in the record suggests that counsel’s performance was outcome determinative. Accordingly, defendant was not deprived of effective assistance of counsel.

Defendant next argues that the trial court’s determination that the victims’ had sufficient independent basis for their identification of defendant was clearly erroneous. This Court reviews a trial court’s decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). “A trial court’s finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made.” *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). However, to the extent this issue involves issues of law, review is de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

An identification procedure violates a defendant’s right to due process when it is unduly suggestive. *Kurylczyk, supra* at 306, citing *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972). Where a witness was exposed to an unduly suggestive pretrial lineup, the prosecution must show that, in light of the totality of the circumstances, the witness had an independent basis to identify the defendant in court. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

Relevant factors in considering the totality of the circumstances regarding whether a witness had an independent basis to identify defendant include: (1) the witness’s prior

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

relationship with defendant; (2) the witness's opportunity to observe the offense; (3) the length of time elapsed between the offense and the identification; (4) discrepancies between the witness' pretrial identification of defendant and defendant's actual appearance; (5) the witness's previous prior identification or failure to identify defendant; (6) any identification of another person as the perpetrator; (7) the witness's mental state at the time of the offense; and (8) whether defendant had any idiosyncratic or special features. *Id.* at 116.

When considering the totality of the circumstances in this case, the court's ruling was not clearly erroneous. Despite the fact that the robberies occurred at night and the victims were nervous, each of the victims indicated that there was sufficient light to clearly see the defendant's face. Moreover, defendant was within a few feet of the victims during the robberies. Further, although the victims' descriptions of defendant's height and weight were inaccurate, these discrepancies were minimized during the pretrial identification given that the participants in defendant's lineup were sitting down when the victims viewed the lineup.

With respect to defendant's lineup, the victims neither failed to identify defendant nor identified any other individual as the perpetrator. Moreover, little time elapsed between the offense and the identification given that the lineup was conducted on the day of the robberies. Regarding defendant's features, Sergeant Julius Moses', who conducted the lineup of defendant, noted that defendant had a "real wild" afro. Two of the victims' description to police noted defendant's afro. In light of these circumstances, the trial court's finding fails to leave us "with a definite and firm conviction that a mistake has been made." *Williams, supra* at 537. Therefore, defendant's argument fails.²

Affirmed.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello

² Defendant also argues that the lineup was unduly suggestive because no other participant in the lineup resembled him with the exception of Gerry Hampton, the other perpetrator involved in the robberies. However, the trial court already ruled that the lineup was unduly suggestive, and this ruling is not at issue here.