STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2008
v	No. 277796 Kent Circuit Court
MATTHEW LEE ROBINSON, Defendant-Appellant.	LC No. 05-012604-FC

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 33 to 50 years in prison. Defendant appeals as of right. We affirm.

Defendant first argues that the in-court identifications of defendant by two witnesses should not have been allowed because they were based on an impermissibly suggestive pre-trial lineup. Specifically, he claims that his unique features--reddish hair and eyebrows coupled with a light complexion--substantially distinguished him from the other people in the lineup. Defendant did not object or move to suppress the evidence; therefore, review is precluded absent manifest injustice. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Defendant further asserts that counsel provided ineffective assistance in failing to object to or move for suppression of this evidence. Review of this issue must be based on the existing record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If there is insufficient detail in the record to support an ineffective assistance claim, the issue is effectively waived. *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). If a witness is exposed to an impermissibly suggestive pretrial lineup, an in-court identification of the defendant should be disallowed unless there is clear and convincing evidence of a sufficiently independent basis to purge the taint of the improper identification.

People v Gray, 457 Mich 107, 115; 577 NW2d 92 (1998). "Differences among participants in a lineup

> are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up . . . . It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness' identification. (*People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988; 469 NW2d 294 (1991). [*Kurylczyk, supra* at 312].

"Physical differences generally relate only to the weight of an identification and not to its admissibility." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Although defendant was the only lineup participant with reddish hair and eyebrows, one witness testified that she recognized defendant, who was stationed at position number 2 in the lineup of five men, before the other participants even entered the room. The other witness recognized him "immediately." Moreover, both recognized his voice, which was distinctive. Further, one of the witnesses was a licensed instructor for personal protection, who taught people to be extremely observant of approaching people, and who was practicing this instruction at the time of the robbery so that he would be able to subsequently identify the robber. He testified that he watched the robber's eyes very closely "because a lot of times you can tell what a person's going to do by watching their eyes, and I wanted to know what he was going to do with that gun." Under the totality of these circumstances, there was no substantial likelihood that the differences among line-up participants, rather than recognition of defendant, were the basis of the witnesses' identification. Accordingly, there was no manifest injustice. *Whitfield*, *supra* at 351. Moreover, since an objection or motion to suppress would likely have been futile, there was no ineffective assistance of counsel based on the failure to take these actions. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). The result of the proceedings would not have been different. *People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996). Finally, the alternative approach of focusing on the dissimilarities of those in the lineup appears to have been a sound tactical decision. *People v LaVearn*, 448 Mich 207, 213-214; 528 NW2d 721 (1995).

Defendant next argues that his motion for mistrial should have been granted after a detective referred to a report during trial that had never been provided to the prosecution or the defense. However, the evidence garnered from this report would not have been favorable to defendant and accordingly, it would not have led a jury to entertain a reasonable doubt about defendant's guilt. See *People v Lester*, 232 Mich App 262, 281-283; 591 NW2d 267 (1998). Thus, the failure to provide the report did not justify a mistrial.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto