STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2009
v	No. 285887 Genesee Circuit Court
TOMMY DORSEY FLOWERS, Defendant-Appellant.	LC No. 08-022381-FC

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 47 months to 15 years for the assault conviction, 28 months to 7-1/2 years each for the felon in possession and CCW convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

In the early morning of November 24, 2007, the victim was badly beaten outside a social club and eatery in Flint. The victim testified that he parked his vehicle in the parking lot behind a gray Dodge Stratus with a personalized license plate. As the victim walked toward the club, a passenger in the Stratus asked the victim if he left enough room for the Stratus to pull out. The victim responded affirmatively. The passenger in the Stratus, identified as defendant, answered with an obscenity, and the victim responded in a similar manner and continued walking. Defendant exited the passenger side of the Stratus and called to someone across the street in a burgundy "Eddie Bauer" Expedition to join him. Defendant approached the victim with a handgun, put the gun to the victim's chest, and questioned him about his comments. Meanwhile, defendant's brother, codefendant Gordon Flowers, had run across the street from the Expedition, stood next to the victim, and joined defendant in menacing the victim. The victim did not

[1] Defendant was acquitted of an additional count of armed robbery, MCL 750.529.

respond. Defendant then repeatedly hit the victim with the gun, while the codefendant repeatedly hit the victim with his fists. The victim testified that after the five-minute thrashing, codefendant Gordon snatched his diamond neck chain and the two defendants fled in the Expedition.

The victim went inside the club, called 911, and was eventually taken to the hospital. The victim testified that he gave the police a description of the two vehicles at the scene. Approximately a week after the incident, the victim told an associate about the Expedition and the associate gave him the street name and address of the person who drove the Expedition. In turn, the victim gave the information to the police. The police subsequently observed the vehicle at the residence and later saw the codefendant in the vehicle. An officer testified that the victim identified each defendant in their respective photographic arrays in a "split second." The victim also identified each defendant at a corporeal lineup. The police discovered that defendant's girlfriend owned a 2002 Dodge Stratus with a personalized license plate, and that the defendants' mother owned a 1997 burgundy Expedition. The Ford Expedition was seized from the codefendant's residence.

The defense theory was that the victim had misidentified his assailants, and in furtherance of that theory defendant presented alibi witnesses who testified that he was with them at a birthday party on the night of the incident. Defendant's witnesses also stated that defendant was driving his own Suburban truck that evening.

II. Motion to Suppress Identification

Defendant argues that the trial court erred in denying his motion to suppress the victim's in-court identification because the identification procedure for the corporeal lineup was unduly suggestive. We disagree. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

A. Pretrial Identification Procedure

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). The fairness or suggestiveness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Defendant argues that the pretrial lineup procedure was unduly suggestive because the police used the same individuals in the lineup for codefendant Gordon Flowers on January 28, 2008, that were used in his lineup on January 31, 2008. However, the record supports the trial court's finding that no impermissible or unduly suggestive identification procedure occurred

here.[2] The officer in charge testified at the evidentiary hearing that he resorted to using the same individuals for defendant's lineup in order to have individuals with the same approximate height and body build as defendant. This procedure was not calculated to cause the victim to falsely identify defendant. The officer explained that because of defendant's taller height and physique, it was difficult to locate different individuals with similar characteristics to participate in the lineup. Although the police are not required to make endless efforts to attempt to arrange a lineup, *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985), the officer here testified that he went through "each and every floor of the [Genesee County] jail" in order to find different people with similar features because he was concerned that defendant would be obvious otherwise.

An attorney who attended defendant's lineup testified that all five participants were similar to defendant in height, body build and appearance, and that one "really did look a lot like [defendant]." In addition, the victim, the officer, and the lineup attorney all testified that the victim identified defendant instantly, without delay, and was certain about his identification. The victim explained that there was no need for him to go through the entire lineup because he knew defendant's face immediately based on how long he saw his face on the night of the incident. In sum, the evidence indicates that efforts were made to ensure that the lineup was fair and comprised of individuals with similar characteristics. Under the circumstances, the trial court did not clearly err in rejecting defendant's claim that the pretrial identification procedure was unduly suggestive.

B. In-Court Identification

Defendant also challenges the trial court's ruling that there was an independent basis for the victim's in-court identification. "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995), lv den 449 Mich 900 (1995) (citations omitted). Because the lineup procedure here was not unduly suggestive, it was not necessary to determine if an independent basis for the victim's identification existed. Nonetheless, the record supports the trial court's finding that there was an independent basis for the victim's in-court identification. The following factors are considered in determining whether an independent basis exists for the admission of an in-court identification:

> (1) [P]rior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and

[2] The trial court had an opportunity to view the photographs of both defendants' corporal lineups.

psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Thomas Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

Here, the victim did not have a prior relationship with defendant. But the victim testified that he had a good opportunity to observe defendant and saw his face during the entire offense. The area was amply lit, and the victim had an opportunity to observe defendant while he was in the car about five yards away, as defendant approached him on the sidewalk, and as defendant stood right next to him. The victim explained that as defendant pointed the gun at his chest, defendant's face was almost level with the barrel and defendant was only a foot away. The victim "saw his face a good 30 or 45 seconds" before he was struck. Although defendant was wearing a hood, there was nothing covering his face. Thus, the victim had a substantial opportunity to view defendant. Moreover, the victim testified that "he'll never forget" defendant's face, which he "vivid[ly]" remembers "as clear as day." In addition, the victim identified defendant in the corporeal lineup two months after the offense, and had previously identified defendant in a photographic array. The victim made no incorrect identifications, and never identified anyone other than defendant as the gunman. Although the victim did not provide any special identifying characteristics of defendant, there was no evidence that defendant had any unusual characteristics about his appearance that the victim should have noticed, such as visible birthmarks, scars, or tattoos. It is not necessary that all factors to be given equal weight, *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977), and, considering the victim's substantial opportunity to observe defendant and the totality of the circumstances, the trial court did not clearly err in finding that there was an independent basis for the victim's identification.

C. Trial Court Conduct

Defendant also argues that the victim's in-court identification was inadmissible because "the Judge helped [the victim]" and influenced his identification at the evidentiary hearing. Because defendant did not challenge the trial court's conduct below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999); *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006), lv den 477 Mich 931 (2006).

During the prosecutor's examination of the victim at the evidentiary hearing, the following exchange occurred:

> *Q*. With relation to - - the person that had the gun to you, do you see him here in Court here today?
>
> *A*. Yes, I do.
>
> *Q*. Point him out for - - for the record?
>
> *A*. The gun [sic] in the orange shirt right there (pointing).
>
> *Q*. Okay.
>
> *The prosecutor*: Your Honor, for purposes of this hearing, I'd request identification by our victim of the Defendant, Tommy Flowers.

The court: Yes. I want him now to tell me which one was Tommy Flowers though, which of the two?

A. Tommy Flowers is the guy with the gun.

The court: And he's the one sitting here in the - -

A. Sitting right here at the - - at the - - with the orange - -

The court: - - orange shirt?

A. Yes, ma'am, with the orange shirt there.

No plain error is evident from the record. The trial court's remarks were not calculated to influence the victim, but to merely acknowledge and clarify the identification that the victim had already made. Further, the victim's identification of defendant at the evidentiary hearing was not evidence admitted at trial, so it could not have affected defendant's substantial rights. This claim is without merit.

III. Other Acts Evidence

Defendant argues that his convictions must be reversed because evidence of other acts was improperly admitted under MRE 404(b), and because the prosecution failed to file a notice of intent to introduce the other acts in accordance with MRE 404(b)(2). We disagree. Because defendant did not object to the evidence below, we review this claim for plain error affecting defendant's substantial rights. *Carines*, *supra*.

MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998), reh den 459 Mich 1203 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Additionally, the prosecution is required to provide notice before trial when it intends to introduce other acts evidence. MRE 404(b)(2).

A. Narcotics References

Defendant argues that the testimony of two officers that he was engaged in narcotics distribution was inadmissible under MRE 404(b). During Sergeant Laurence Muddy's testimony, he stated:

> The information I received was that there were two suspects and possibly related, possibly brothers. One had just recently gotten out of prison, was informed that there *may be narcotics being sold out of his residence*. (Emphasis added).

To the extent that MRE 404(b) is applicable to this testimony, defendant cannot demonstrate prejudice. The officer did not identify who was possibly selling narcotics, nor was there clarification of the owner of the residence. In short, there was no evidence that defendant was actually involved in another crime or wrong, i.e., selling illegal narcotics. Moreover, given the compelling evidence in this case it is highly improbable that the brief and vague reference to narcotics affected the outcome of the proceedings. *Carines, supra*.

During defense counsel's cross-examination of Lieutenant Terence Green, the following exchange occurred:

> *Q*. Lieutenant, you stated previously that you are in the narcotics department, correct?
>
> *A*. That's correct.
>
> *Q*. And, why did you take on this case, if it's not a narcotics case?
>
> *A*. Well, previously to this incident, I received - - the name T-Flow *came across my desk in a narcotic investigation*. (Emphasis added).

Here, again, the emphasized testimony did not indicate that defendant was actually involved in drug trafficking. Moreover, the testimony cannot be characterized as other acts evidence presented by the prosecution. The emphasized testimony was elicited by defense counsel. A defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. In other words, defendant "opened the door" to the challenged evidence. See, generally, *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988), and *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), lv den 453 Mich 977 (1996).

B. Criminal History and Gun References

Defendant also argues that Sergeant Muddy's testimony that he had a criminal history and was facing federal gun charges was an impermissible character reference under MRE 404(b). The challenged testimony occurred during the prosecutor's direct examination of Sergeant Muddy, who is employed in the Genesee County Sheriff's Department as a sergeant assigned to the FBI and violent crimes task force:

> *Q*. And does [this case] fall within the purview of - - of your task force?
>
> *A*. Yes. It does.
>
> *Q*. Okay. And, with relation to this case . . . what does an Officer in Charge of a case do?
>
> *A*. You pretty much delegate what happens on the case. After Lieutenant Green did the majority of the leg work [sic] - - meaning, description of the suspects, possible place of residence . . . the vehicles they are driving; I did a *workup on - - a criminal - - a previous criminal history workup on the suspects*. They - - they *fit the criteria to be charged federally being that a gun was involved*. And *the gun* was alleged - - *that was used in the crime*. (Emphasis added).

Defendant's MRE 404(b) argument is misplaced. Here, the testimony concerned the course of the police investigation. It was not introduced for the purpose of proving defendant's character. Moreover, evidence that the police conducted a prior criminal history check did not constitute other acts evidence because there was no evidence concerning the results. Further, defendant stipulated that he had been convicted of a prior felony in relation to the felon in possession charge, so the reference to a prior criminal history did not affect defendant's substantial rights. In addition, the gun reference concerned the gun used in *this* case. The brief mention of federal charges related to the gun explained why an officer assigned to the FBI task force was involved in the investigation. In sum, this unpreserved claim does not warrant reversal.

C. Effective Assistance of Counsel

We reject defendant's alternative argument that defense counsel was ineffective for failing to object to the other acts evidence, or to the prosecutor's failure to file the required notice. In light of our conclusion that any error was not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), cert den ___ US ___; 128 S Ct 712; 169 L Ed 2d 571 (2007); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

IV. Identification Expert

Defendant also argues that defense counsel was ineffective for failing to request the appointment of an expert on eyewitness identification. We again disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), lv den 463 Mich 1010 (2001).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Effinger*, *supra*. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *Frazier*, *supra*. Defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant has failed to demonstrate that, had defense counsel requested an expert witness, there is a reasonable probability that the outcome would have been different. MCL 775.15 provides a trial court with discretion to appoint an expert witness for an indigent defendant upon request. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006), lv den 478 Mich 853 (2007). The statute requires a defendant to show that an expert's testimony is required to enable the defendant to "safely proceed to a trial." To be entitled to the appointment of an expert witness,

> an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838

> (1995). It is not enough for the defendant to show a mere possibility of assistance from the requested expert. [*People v*] *Tanner*, [469 Mich 437, 443; 671 NW2d 728 (2003)]. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Jacobsen, supra* at 641. [*Carnicom, supra* at 617.]

Here, defendant has failed to make the necessary showing that an expert was necessary for him to safely proceed to trial. Through cross-examination and other evidence, the defense attorneys were able to challenge the strength and reliability of the victim's identification testimony, and elicit apparent discrepancies and arguable bases for questioning the accuracy of the victim's identification.

Counsel elicited that the victim had three servings of vodka that evening, with his last drink being only 30 minutes before the incident. The victim acknowledged that after the beating, he was disoriented and woozy because of the impact of the blows to his head. Counsel noted the 911 call made immediately after the incident, elicited that the victim gave the operator a false name and stated that he could not describe the perpetrators, and questioned the victim's ability to later be able to provide an identification. Counsel also elicited that the victim told the Flint police, who first responded to the scene, that defendant was wearing a white T-shirt, but then subsequently claimed that defendant wore a black hooded jacket. Defense counsel elicited that the victim's testimony contradicted the initial police report in several other respects, including the number of times he was struck, the time of the incident, where he parked, and the year of the Expedition. Counsel also questioned an officer about the number of Ford Expeditions "out there." Given defendant's apparel as described by the victim, counsel cross-examined the victim about his ability to actually see defendant's face since he was wearing a hood. Defense counsel also cross-examined the victim and an officer about the lighting conditions outside at 1:30 a.m. In addition, defense counsel cross-examined the officer who conducted the photographic array, eliciting that all of the men in the photographs did not match defendant's complexion.

Because counsel was able to challenge the reliability and accuracy of the identification evidence through means of cross-examination and other evidence, defendant has failed to show that defense counsel was ineffective for failing to request the appointment of an identification expert, or that he was prejudiced by the absence of such an expert at trial. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

V. Inadmissible Hearsay

Next, defendant argues that he is entitled to a new trial because the trial allowed inadmissible hearsay statements of identification. We disagree. Because defendant failed to object to this evidence below, we review this claim for plain error affecting defendant's substantial rights. *Carines, supra*.

A. Challenged Testimony

Defendant challenges portions of the testimony of the victim and two officers. During the victim's direct examination, the following exchange occurred:

Q. Okay. And what if, any, police investigation actually got going on this incident . . .

* * *

Q. Okay, and what, if anything, did you tell [Lieutenant Green] that might have furthered the investigation into who had assaulted you that night?

A. I got a name that they said was T-Slow. I took it as someone calling me says a guy named T-Slow that lives in Beecher; that's who it was, he described the first suspect to a T. And to - - from talking to him on the phone and - - and that's what it was.

Q. Okay. And that information that you received, who did you receive that from?

A. It was a guy, Mack, had called - - a guy that - - I - - I -- I sort of know but I was getting so many calls, and he was like this Mack, and A, B, and C, and - - and talking . . . I was just getting numerous of calls - -

* * *

Q. Okay. And what had you said to Mack - - to gather this information that you had passed along to the Lieutenant?

A. I told him about the car.

Q. Okay.

A. I told him about the Expedition and - - and he described it to me. I said that's him.

Q. Okay. And that's how you got a name?

A. That's how I got the - - got the name. He told me and then when I said the vehicle was in, he said that's such and such. He also said his brother just got out of jail.

* * *

Q. All right. Now from this juncture forward, what do you do with that information?

A. That's when I called Lieutenant Green.

In discussing the investigation, Lieutenant Green testified as follows:

Q. Okay. And when there's not an arrested person for a crime, describe to the jury what you try to do in taking a formal complaint in an investigation situation like this.

* * *

Q. Okay. And did you ever gain any of that type of information, either at the time of the formal statement or later that narrowed you into an identification of the suspect?

* * *

A. I obtained a street name of one of the suspects, that of T-Flow. I obtained a description of the suspect vehicle, the two suspects fled in after the incident. I also obtained information that the suspects were possibly related.

Q. Okay. And, upon obtaining this information, what did you do next?

A. At this time, disseminated the information I received involving the suspects. From that information, I obtained identification of one of the suspects involved.

* * *

Q. Okay. And who did you - - what name did you put with this, based on the information gathered so far?

A. With the name T-Flow, identified the - - one of the suspects as Tommy Flowers.

Q. Okay. And, when you got that name, what did you do next?

A. At that time . . . I then located the address I believe Tommy Flowers was residing. At that time, I conducted a - - a drive by the residence. Then, at that time, I observed the suspect vehicle that was described by the victim in parked directly in the driveway of the residence . . .

* * *

A. During the surveillance, I observed a second male occupying the vehicle - - the suspect was later identified as Gordon Flowers. At that time, I provided the victim with a photo array displaying Gordon Flowers.

Sergeant Muddy testified that in preparing a search warrant affidavit, he received information from the victim and an officer:

> The information I received was that there were two suspects and possibly related, possibly brothers. One had just recently gotten out of prison, was informed that there may be narcotics being sold out of his residence. We were

looking for a gun. As far as evidence and the - - the diamond chain that was allegedly stole - - stolen during that assault.

B. Analysis

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted in it, does not constitute hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994); *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). Such a statement "is not offered for a hearsay purpose because its value does not depend upon the truth of the statement." *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974) (citation omitted). A statement offered to show why police officers acted as they did is not hearsay. *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982).

Here, the challenged statements identifying the street name of the perpetrator were not offered to prove the truth of the matters asserted, i.e., that T-Flow or T-Slow and his relative assaulted the victim. Rather, the statements were offered to explain the course and chronology of the police investigation. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (testimony was not offered to establish the truth of the informant's tip, but rather was properly offered to establish and explain why the detective organized a surveillance of the defendant's home). This was relevant because the victim was not familiar with the defendants or their names before this incident, and the victim's subsequent identification was the crux of the case. Because these statements did not constitute hearsay, defendant has failed to demonstrate a plain error.

To the extent that the challenged testimony went beyond simply explaining the police investigation and improperly referencing that one suspect was recently released from prison and that narcotics were possibly being sold out of the residence, defendant has not shown that any error was outcome determinative. *Carines*, *supra*. As previously indicated, the prison reference was not prejudicial because defendant had already stipulated that he had previously been convicted of a felony. Further, the brief reference to narcotics was not likely to affect the outcome of the proceeding. *Id.* The victim identified defendant at trial, and was certain that he was one of the perpetrators. He also identified both defendants in photographic arrays "right away" and in corporeal lineups. The victim explained that he was within 8 to 12 inches of the perpetrators during the five-minute assault, could clearly see defendant's face, and that defendant was standing "right up in front" of him with the gun at his chest. Testimony and photographic evidence was presented showing that the parking lot was well illuminated. The victim also described defendant as being in a gray Dodge Straus with a personalized license plate, and evidence revealed that such a car belonged to his girlfriend. Also, the victim testified that the defendants fled in a Ford Expedition, and the same type of vehicle was seized from the residence. Defendant is not entitled to appellate relief.

C. Effective Assistance of Counsel

In a related claim, defendant summarily asserts that defense counsel was ineffective for failing to object to the challenged testimony. Because defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different, he cannot establish a claim of ineffective assistance of counsel. *Effinger*, *supra*.

VI. Cumulative Error

Lastly, we reject defendant's argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999), lv den 461 Mich 966 (2000).

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens