STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2009
v	No. 282941 Wayne Circuit Court
TYRONE MARVIN BRANDON, Defendant-Appellant.	LC No. 07-012121-FC

Before: Wilder, P.J., and Meter and Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 11 to 15 years for the armed robbery conviction, and two to five years for his felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, and sentences, but reverse and remand for further proceedings concerning the trial court's treatment of information contained in defendant's presentence report.

In June 2007, Dianna Williams was robbed at gunpoint while sitting in a cargo van. She had stopped to pick up her employees, who were delivering handbills that morning. A man, whom Williams later identified as defendant, reached into the driver's side window of the van and pointed a gun in Williams's face. Williams gave $20 or $25 to the man, but he was not satisfied. He reached into her pants pocket to take additional money, which she was carrying to pay her employees, and then fled with the money and keys to the van.

On appeal, defendant argues that the evidence was insufficient to establish his identity as the person who robbed Williams and that therefore, his convictions should be vacated. Alternatively, defendant seeks a new trial on the ground that the trial court's finding that he was the robber is against the great weight of the evidence. We disagree.

Due process demands a directed verdict of acquittal where the evidence is insufficient to sustain a conviction. *People v Lemmon,* 456 Mich 625, 633-345; 576 NW2d 129 (1998). We review the evidence "in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson,* 475 Mich 1, 5; 715 NW2d 44 (2006). We will not interfere with the fact-

finder's role of determining the weight or credibility of evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

When the trial judge is the trier of fact in a bench trial, we also review the trial court's findings of fact under the clearly erroneous standard. *Robinson, supra* at 5. "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A defendant may raise a claim that a bench-trial verdict was against the great weight of the evidence without moving for a new trial in the trial court. See MCR 7.211(C)(1)(c) (in a case tried without a jury, "appellant need not file a motion for remand to challenge the great weight of the evidence in order to preserve the issue for appeal"). A new trial is warranted only if the "evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, *supra* at 627. Generally, conflicting evidence or credibility issues are insufficient grounds for a new trial. *Id.* at 643. Absent exceptional circumstances, such as where testimony contradicts indisputable physical facts, defies physical realities, or has been seriously impeached in a case marked by uncertainties and discrepancies, deference is given to the fact-finder's determinations. *Id.* at 642-644.

In reviewing defendant's challenges to the sufficiency and weight of the evidence regarding his identity, we note that this Court previously denied defendant's motion for peremptory reversal, based on the prosecution's inability to produce photographs that were introduced as exhibits at trial. Where a defendant is not at fault for a missing record, the material question on appeal is whether the record is adequate for meaningful appellate review. *People v Adkins*, 436 Mich 878; 461 NW2d 366 (1990). The prosecution's failure to produce the exhibits must so prejudice the defendant, that his right to enjoyment of the constitutional right to appeal has been impeded. *People v Drake*, 64 Mich App 671, 679-680; 236 NW2d 537 (1975). The sufficiency of the record depends on the "questions that must be asked of it." *People v Wilson (On Rehearing)*, 96 Mich App 792, 797; 293 NW2d 710 (1980).

Here, we are satisfied that the missing exhibits do not impede defendant's right to appeal. There was no dispute at trial that the exhibits were photographs of defendant. The first exhibit was defendant's photograph in a "mug book," which Williams identified as the perpetrator. The other two photographs, while admitted as prosecution exhibits, were introduced at the request of defendant's trial counsel. It was undisputed at trial that they depicted defendant's appearance at the time of his arrest and booking for a different matter on June 16, 2007, nine days before Williams was robbed.

The trial court's description of the photographs in its findings of fact sufficiently allow for our review of defendant's argument on appeal. For purposes of review, we shall accept the trial court's description of the booking photographs as depicting that defendant's head was closely shaven, but not bald. We shall also accept defendant's trial counsel's description of defendant's appearance at the time of trial as including a tattoo on his left forearm and scar on his neck. We will also assume that defendant had the "bald spot" referred to by his trial counsel in closing argument.

The alleged discrepancies between defendant's appearance in the photographs and at trial, and the testimony provided by Williams and Raymond Poindexter do not establish a basis for vacating his convictions or ordering a new trial. Although Williams estimated the length of

the perpetrator's hair as "about one inch," the trial evidence does not disclose how much defendant's hair could have grown in the nine days after his booking photographs were taken. Even assuming that it would have been physically impossible for defendant's hair to reach the estimated length that Williams gave, the accuracy of her description, as compared to defendant's actual appearance, is only one factor affecting the reliability of her identification testimony. See *People v Davis,* 241 Mich App 697, 702-703; 617 NW2d 381 (2000). "[A] great number of variables will affect not only the accuracy of perception but also will influence the amount and substance of what is retained in memory." *People v Anderson,* 389 Mich 155, 210; 205 NW2d 461 (1973), overruled in part on other grounds by *People v Hickman,* 470 Mich 602; 684 NW2d 267 (2004).

Here, Williams was adamant at trial about her attention being focused on defendant's face. She testified, "[m]y identification was not by the hair, my identification was looking him straight in the eye and studying his face." Similarly, when asked whether she saw any unusual scars or disfigurations, she testified, "I was staring at a gun and his face." She had no doubt about her identification of the photograph after the robbery and her in-court identification of defendant at trial, albeit when shown the photograph at trial, she could not remember it from any particular place. Poindexter, who claimed to be seated in the front passenger seat of the van during the early morning robbery, also made an in-court identification of defendant at trial, although he gave a more general estimate of the perpetrator's hair length than Williams. According to Poindexter, the hair was "short to medium" in length. He also described the perpetrator as having a "salt and pepper" mustache, while Williams described the chin and mustache area as "scruffy."

"[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *Davis, supra* at 700. Viewing the evidence in a light most favorable to the prosecution, Williams's identification testimony alone was sufficient for the trier of fact to find beyond a reasonable doubt that defendant was the person who committed the robbery. Nonetheless, Poindexter also identified defendant at trial. Further, the verdict was not against the great weight of the evidence. While we recognize that eyewitness identification evidence presents the potential for misidentification, *Davis, supra* at 701, there is no basis in the existing record for finding that this case presents the type of physical impossibility or other exceptional circumstances that can justify removal of credibility issues from a fact-finder. Therefore, we defer to the trial court's resolution of the weight of the evidence and the credibility of the witnesses. *Lemmon, supra* at 642-643.

Defendant next argues that Williams's in-court identification of him at trial should have been suppressed as evidence because it was the product of unduly suggestive identification procedures. Although defendant filed a motion to suppress Williams' identification testimony based on her identification of defendant's photograph from the mug book, he later withdrew the motion and did not argue that any other pretrial identification procedure was unduly suggestive. Therefore, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

"If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon,* 233 Mich App 295, 304;

591 NW2d 692 (1998). A photograph identification procedure results in a deprivation of a suspect's liberty, without due process of law, if it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

Here, the trial testimony indicated that Williams's initial identification of defendant's photograph was made after viewing hundreds of photographs in mug books. Although Detective Grainger testified that each photograph had personal information about the individual, there is no evidence that Williams pulled out any photographs to examine the personal information. Further, there is no indication that allowing Williams and one of her employees, Antwan Cargile, to go through the mug books together and without supervision had any suggestive effect on Williams's identification. Instead, Williams testified that she was drawn to the face in the photograph. She indicated that Cargile concurred in the identification, but when asked who made the initial selection, she testified: "To be totally honest with you I wasn't paying attention to it. When I seen that picture I knew it was him, and like I explained to the officer, that's him, he's just a little bit thinner in the face, that's him. There's no doubt in my mind."

And while a display of a single photograph of a defendant to a witness may be suggestive procedure, *Gray*, *supra* at 111, there is no evidence that Williams's certainty regarding her identification of defendant resulted from Detective Grainger showing her a more recent photograph of defendant after she identified the photograph in the mug books. Detective Grainger only testified that Williams was shown a picture on a computer screen and that she recognized it as well.

We are also unpersuaded that Williams's in-court identification of defendant at the preliminary examination resulted from an unduly suggestive procedure. The record indicates only that Williams was asked if she saw the perpetrator in the courtroom and that she responded by pointing defendant out as the "gentleman here with the green shirt." Cf. *Colon, supra* at 304-305 (suggestive atmosphere found where defendant was wearing prison garb at the preliminary examination); see also *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996) (totality of circumstances considered in determining if a complainant's identification at the preliminary examination violates a defendant's right to due process).

Furthermore, the trial testimony indicates that there was an independent basis for Williams's in-court identification. *Davis, supra* at 702-703. Therefore, we reject defendant's unpreserved claim that Williams's identification testimony should have been suppressed.

We also reject defendant's claim that the trial court erred by in denying his motion for Williams to attend a live lineup before trial. "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000), reversed & remanded on other grounds 465 Mich 884; 636 NW2d 137 (2001). Considering that Williams had already identified defendant during the photograph identification procedure and at the preliminary examination, we find no abuse of discretion in the trial court's denial of defendant's motion. *Id*.

Next, the record does not factually support defendant's claim that Poindexter's in-court identification at trial resulted from a suggestive identification procedure at the preliminary

examination. The record of the preliminary examination indicates that Cargile, not Poindexter, testified for the prosecution. Further, there is no indication in the record that defendant moved for Poindexter to attend a live lineup before trial. The record of the pretrial hearing at which the trial court considered defendant's motion for a live lineup indicates that it was directed only at individuals who participated in the photograph identification procedure. (M Tr, pp 4-5.) Therefore, defendant's argument with respect to Poindexter's identification testimony is unpreserved and we find no basis for appellate relief because defendant has not shown a plain error affecting his substantial rights. *Carines, supra* at 763.

Because defendant did not move for a new trial or *Ginther*[1] hearing in the trial court, we have limited our consideration of defendant's additional claim that trial counsel was ineffective for withdrawing the motion to suppress the identification testimony to mistakes apparent from the record. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). To establish such a claim, defendant must show that the trial court's performance was deficient and caused prejudice. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

It is apparent that Williams's identification evidence was material to the trial court's finding that defendant was the person who committed the robbery. Although trial counsel withdrew the motion to suppress this evidence, as explained previously, we find no record support for defendant's argument that the evidence should have been suppressed. "Counsel is not ineffective for failing to make a futile objection." *Chambers, supra* at 11. Therefore, defendant has failed to show that he was denied the effective assistance of counsel.

Next, defendant argues that the trial court erred by failing to strike a statement in the presentence report that he absconded from parole on July 17, 2007. This Court reviews a sentencing court's response to a claim of inaccuracy in a defendant's presentence investigative report (PSIR) for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). An abuse of discretion is a ruling that it outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Where a court finds challenged information to be inaccurate or irrelevant, it must strike the information from the presentence report, before sending it to the department of corrections. MCL 771.14(6); *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003).

A trial court must respond to a defendant's challenge to the accuracy of the information contained in a PSIR. *Spanke, supra* at 648. The court has wide latitude in its response. *Id.* In its response, the court may make a finding of the accuracy of the information, accept the defendant's version, or disregard the challenged information. *Uphaus, supra* at 182. But whenever a sentencing court either disregards the allegations of inaccurate information, or determines that the information is inaccurate, *it must strike or correct* the disputed information before sending the PSIR to the department of corrections. *Spanke, supra* at 649; MCL 771.14(6); MCR 6.425(E)(2). And if the sentencing court chooses to disregard the challenged

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

information, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. *Spanke, supra* at 649.[2]

Here, when the trial court stated that it could not determine, factually, the accuracy of the allegation that defendant was on absconding status in July 2007, it was obligated to strike as irrelevant the disputed information before sending the PSIR to the department of corrections, or conduct a hearing to determine whether the allegation was accurate. *Spanke, supra* at 649; MCL 771.14(6); MCR 6.425(E)(2). The trial court's failure to do so was an abuse of discretion. Therefore, we remand to the sentencing court to (1) articulate whether the information is relevant; and (2) if the information is relevant, determine whether the information is accurate or inaccurate. If the sentencing court finds that the challenged information is either irrelevant or inaccurate, it shall strike or correct the challenged information in the PSIR, before sending the revised PSIR to the department of corrections.

Defendant also challenges other information in the presentence report regarding his criminal history, but because defendant did not challenge this information below and instead accepted the remainder of the report as written, any error was extinguished. *People v Carter*, 426 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[2] When alleged inaccuracies would have no determinative effect on the sentence, the trial court's failure to respond to an objection may be considered harmless error. *McAllister, supra* at 473-474, reversed & remanded on other grounds 465 Mich 884. Here, however, we cannot determine whether the alleged inaccuracy would have no determinative effect on the sentence, because the trial court did not state that it was disregarding the alleged inaccuracy.