STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 12, 2009
v	No. 286326 Wayne Circuit Court
DEANDRE MANTRELL MCDONALD, Defendant-Appellant.	LC No. 07-024782-FC

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 10 to 30 years in prison for the armed robbery conviction, one to four years in prison for the felonious assault conviction, and two years in prison for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the trial court erred when it denied his motion to suppress evidence of a voice recognition lineup. This Court reviews a trial court's factual findings regarding a motion to suppress evidence for clear error. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). However, we review de novo a trial court's conclusions of law and ultimate decision regarding whether to suppress the evidence. *Id.*

An identification procedure violates due process when it is "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "In order to challenge an identification on the basis of lack of due process, 'a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.'" *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).

Defendant contends that the voice lineup at issue was unnecessarily suggestive because, compared to the other participants in the lineup and defendant, one participant was noticeably older and another participant was noticeably larger. As this Court explained in *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983), familiarity and peculiarity are the most common, but not the only, bases for making voice identification. Further, "physical differences

between the suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness." *Id.* at 727.

In this case, the witness who participated in the lineup testified that he not only eliminated the two outlying participants because of their physical differences, but also eliminated them because their voices were distinct from that of the robber. Indeed, the witness was positive that defendant was one of the masked robbers at the store where he works as a cashier. The witness stated that he first encountered defendant during the robbery; nevertheless, he heard defendant make several comments, including demands for the money. During this time, the witness noted a raspy or scratchy quality to the robber's voice, which he then recognized in defendant's voice at the lineup. Given these facts, we cannot conclude that the physical differences between the lineup participants were so impermissibly suggestive as to lead to a substantial likelihood of misidentification. *Hayes,* 126 Mich App at 725.

Defendant also suggests that the lineup was unnecessarily suggestive because the armed robber spoke in a raised voice during the robbery and the participants spoke in normal tones at the lineup. Again, the witness was reasonably certain of his identification because he recognized a peculiar raspy quality in the armed robber's raised voice, which mirrored defendant's voice at the lineup. The difference in volume between the armed robber's voice and defendant's voice at the lineup did not render the lineup defective and inadmissible; rather, the difference in tone was a matter of the weight for the jury. See *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The trial court did not err when it denied defendant's motion to suppress.

Defendant also argues, in passing, that there was no evidence that he was properly represented by counsel during the voice recognition lineup and that this error warrants reversal. We review unpreserved claims such as this one for plain error. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999). At the preliminary examination, an officer testified that an attorney observed the voice recognition lineup on defendant's behalf. Defendant does not acknowledge or refute this testimony. Absent any contrary evidence showing that defendant was denied the right to counsel at the lineup, defendant failed to establish plain error. *Id.*

Defendant next argues that his convictions for armed robbery and felonious assault based on the same conduct violates double jeopardy. Generally, double jeopardy claims present a question of law, which we review de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). To determine when multiple punishments are barred on double jeopardy grounds, Michigan courts generally apply the same elements test set forth in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). The *Blockburger* test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004) (citation omitted).

In *People v Chambers*, 277 Mich App 1, 9; 742 NW2d 610 (2007), this Court examined the elements for armed robbery and felonious assault, and concluded that "double jeopardy

issues are not implicated when a defendant is convicted and sentenced for both armed robbery and felonious assault" because "each offense has an element that is not required for the other." Therefore, using the same elements test, defendant's convictions do not offend double jeopardy.

Defendant also suggests that his convictions offend double jeopardy because the evidence that he struck the cashier in this case supported both convictions. This Court rejected a similar argument in *Chambers*: "it is the legal elements of the respective offenses that must be focused on and examined, not the particular factual circumstances giving rise to the charges." *Id.* at 9 n 8. Thus, this argument too is without merit.

Defendant also argues that there was insufficient evidence to support his convictions. Specifically, defendant contends that there was insufficient evidence from which the jury could conclude that he was the perpetrator. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In doing so, this Court must review "'the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.'" *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992). The prosecutor must establish beyond a reasonable doubt that the defendant was the perpetrator of the charged offense. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). "Identity may be shown by either direct testimony or circumstantial evidence." *Id.*

At trial, Maurice Chapman testified that he helped defendant commit the robbery at issue. Chapman further stated that it was defendant who held the cashier at gunpoint and struck him with his weapon. "A jury may convict on the basis of accomplice testimony alone." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Nevertheless, defendant questions the credibility of Chapman and suggests that his testimony should not be considered. However, the jury was free to accept or reject Chapman's testimony and this Court will not second-guess that decision. *Wolfe*, 440 Mich at 514-515.

Likewise, there was also significant additional evidence establishing defendant as a perpetrator. Although Chapman and his accomplice wore masks, the cashier and a security guard, estimated that Chapman's accomplice was five feet, nine inches tall, weighed between 120 and 130 pounds, and had a light brown complexion, which resembled defendant's general description. The cashier also recalled that Chapman's accomplice had a raspy voice and immediately identified defendant's voice in the lineup. Furthermore, soon after the robbery, the police followed footprints from the store to a nearby home where they arrested Chapman and defendant and recovered $630 hidden in the basement. The police also recovered a mask, sweatshirt, and boots from a rear bedroom and noted that defendant wore distinctive jeans resembling the armed robber's jeans.

Defendant further claims that the cashier's identification was unreliable. At trial, defendant's counsel questioned the reliability of the identification on a variety of grounds. He noted that the volume and hurried nature of statements at the robbery might have differed from statements at the lineup. He also argued that the witness eliminated participants in the lineup based on physical characteristics, not voice recognition. Thus, the jury was aware of these factors and presumably weighed the evidence accordingly. And we will defer to that assessment. *Wolfe*, 440 Mich at 514-515.

Finally, defendant suggests that other persons at the home where he was arrested may have worn the clothing recovered in the rear bedroom and possessed the proceeds of the robbery. However, "'the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.'" *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002) (citation omitted). In light of Chapman's testimony and the witness' identification, it was reasonable to infer that defendant disposed of some of his clothing in the rear bedroom and hid the money stolen from the store in the basement. There was sufficient evidence that defendant was the perpetrator to support his convictions for armed robbery, felonious assault, and felony-firearm.

Defendant next argues that his 10 to 30-year sentence for armed robbery constitutes cruel and unusual punishment. A sentence imposed within the statutory guidelines range must be affirmed unless the trial court erred in calculating the guidelines range or relied on inaccurate information in determining the sentence. MCL 769.34(10). However, this limitation is not applicable to claims of constitutional error, such as the prohibition against cruel and unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

At sentencing, the trial court calculated a minimum sentencing guidelines range of 81 to 135 months for defendant's armed robbery conviction. Defendant's ten-year minimum sentence for the armed robbery conviction falls within that range. "[A] sentence within the guidelines range is presumptively proportionate" and "a sentence that is proportionate is not cruel or unusual punishment." *Powell*, 278 Mich App at 323. In order to overcome the presumption of proportionality, "a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Defendant maintains that his sentence was cruel and unusual because it was supported by questionable evidence. This Court has already rejected the notion that a sentence imposed after a conviction that was supported by sufficient evidence could constitute cruel and unusual punishment if the evidence was weak. *Powell*, 278 Mich App at 323. As we have already noted, there was sufficient evidence to support defendant's convictions; therefore, this claim is without merit.

Defendant also maintains that his sentence was cruel and unusual because he is young and risks incarceration for much of his adulthood. In *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997), our Supreme Court rejected an argument that an offender's age by itself renders a particular sentence cruel and unusual:

> Persons who are sixty years old are just as capable of committing grievous crimes as persons who are twenty years old. We find no principled reason to *require* that a judge treat similar offenses that are committed by similarly depraved persons differently solely on the basis of the age of the defendant at sentencing where the Legislature has authorized the judge to impose life or *any* term of years.

Defendant has failed to establish that his sentence was cruel or unusual.

Finally, defendant claims that he was denied the effective assistance of counsel on a number of grounds. Specifically, defendant contends that his trial counsel failed to interview and call certain witnesses and failed to properly advocate for him concerning the voice identification. To establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below and objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the result would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

After reviewing the record, we conclude that defendant has not established that he was deprived of the effective assistance of counsel with regard to the interviewing or calling of any witness. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002) (noting that this Court's review is limited to the facts in the record). There is no indication on the record that defendant's trial counsel was unprepared as a result of a failure to interview any witness. Likewise, defendant does not identify the witnesses who should have been called or describe their potential testimony. In the absence of such evidence, defendant cannot show that the failure to call these witnesses affected the outcome of his trial. *Yost*, 278 Mich App at 387. Moreover, a review of the record reveals that defendant's trial counsel effectively challenged the reliability and admissibility of the identification evidence. Defense counsel moved for a hearing and urged the trial court to suppress evidence of the voice recognition lineup because it was unduly suggestive. Further, after the trial court admitted this evidence, defense counsel attempted to discredit it by cross-examining the cashier regarding his identification and questioning the reliability of the identification during closing argument. Therefore, defendant's claim of ineffective assistance of counsel is without merit.

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly