STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 290486 Oakland Circuit Court
ANTHONY JOSEPH TAME, Defendant-Appellant.	LC No. 2008-223220-FH

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted first-degree home invasion, MCL 750.92; MCL 750.110a(2) (intent to commit larceny within). The trial court sentenced defendant to four to 40 years' imprisonment, consecutive to his parole revocations. Defendant appeals as of right. We affirm.

Defendant's conviction arose out of an attempted break-in at the apartment of Leslie French, who was one of defendant's co-workers. The attempt occurred on a summer morning while French was at work. Her boyfriend, Shane Arquette, was in the apartment and heard a noise at the door. He looked through the door peephole and saw the top of a man's head pressed against the door, as if listening for sounds within. As Arquette watched, the man walked away briefly and returned. While the man was returning, Arquette saw his face through the peephole. The man crouched down and tried to pry the door open for a few minutes, and then left.

Arquette went outside to see if he could spot the man. Within five minutes, Arquette saw the man hanging around outside the apartment building. Arquette called the police, but the man was gone by the time an officer arrived. Arquette gave the officer a description of the man he had seen. He further informed the officer that a few weeks earlier he had seen the same man outside his bedroom window holding a screwdriver, but had thought at the time that the man was a maintenance worker.

At the preliminary examination, Arquette testified that he contacted French while the officer was on the scene. French told Arquette defendant's name; Arquette told the officer that the perpetrator might be one of French's co-workers. Arquette testified that the officer asked whether Arquette was familiar with the Offender Tracking Information System (OTIS) website. When Arquette indicated familiarity with OTIS, the officer asked whether Arquette could access the internet to retrieve the name and photograph from the OTIS website. Arquette entered

defendant's name into the OTIS website, and the site returned defendant's profile. Arquette testified at the preliminary examination that the OTIS photograph depicted the man he had seen at the apartment door. Arquette went on to testify that he and French had previously discussed defendant and that he had entered defendant's name into the OTIS website, but that the site had no photograph of defendant at that time. At trial, Arquette did not reference the OTIS website. Rather, Arquette simply testified that he had identified a photograph of defendant. Arquette also expressly identified defendant in court.

Defendant now argues that his trial counsel was constitutionally deficient for failing to move to suppress the identification of defendant by Arquette, the only eyewitness to the crime, because the identification procedure used was unnecessarily suggestive and conducive to irreparable mistaken identification. Specifically, defendant takes issue with the use of the OTIS image. The record is somewhat vague with regard to whether defense counsel challenged the identification evidence on these grounds.[1] However, both parties agree on appeal that defense counsel did not file the requisite motion to suppress. Accordingly, because no *Ginther*[2] hearing was held, our "review of the defendant's claim of ineffective assistance of counsel is limited to

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[1] During the November 26, 2008, motion hearing, after the court had denied defendant's motion to quash, the following exchange took place:

> *Defense counsel*: Then a question arises, your Honor. The identification arose from the Complainant bringing up the OTIS web site and showing a picture of my client to the officer.
>
> *Court*: Well, that's not in front of me to—was that briefed?
>
> *Prosecutor*: No.
>
> *Defense counsel*: Well, it's not, your Honor, but it, it—
>
> *Court*: I'm going to want to hear some more and I want to take a look at that one. Let's get a trial date.
>
> *Defense counsel*: We have a trial date.
>
> *Prosecutor*: We have a trial date next week, your Honor, Tuesday.
>
> *Court*: Okay. Thank you. Did you want—do you want anything more on this case today?

The court's final response seems to indicate that it was going to consider the issue at a later time. However, there is nothing in the record to indicate that the issue was subsequently briefed, argued, or decided.

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

mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish ineffective assistance of counsel, defendant "must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). There is a presumption that defendant received effective assistance of counsel, "and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defense counsel's comments at the motion hearing indicated that counsel was aware of the general case law regarding photograph identification procedures. However, the case law predates the upsurge in access to electronic images. Since at least 1967, the courts have widely condemned the law enforcement practice of showing a single photograph or a single suspect to a witness. *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), overruled in part on other grounds *Griffith v Kentucky*, 479 US 314, 327-328; 107 S Ct 708; 93 L Ed 2d 649 (1987). In 1998, our Supreme Court explained that a photographic identification procedure can be so suggestive as to deprive a defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). In particular, the Court warned against the single-photograph identification method, stating, "[t]he display of [a] single photograph, combined with the statement that this was the man the police had arrested for [the crime], was highly suggestive." *Id*. After *Gray*, only a few published opinions have addressed photographic identifications, and we have located no published opinions that address a witness's use of OTIS to identify a suspect.

We note that the ubiquitous access to electronic images can present both a procedural minefield and a substantive goldmine. When a witness takes the initiative to search for an image of a suspect, the resulting information may be invaluable to law enforcement officials. However, the expanse of the search and the number of potential results can affect the validity of the identification. In the case at bar, the potential for misidentification was compounded by the officer's suggestion that Arquette enter defendant's name into the OTIS website—a site which lists each offender's criminal history. At least one jurisdiction has recognized the problematic nature of this type of electronic information, and has noted,

> [t]o avoid a witness's exposure to potentially prejudicial information concerning a suspect, the printout of a computer image should contain no such information. Specifically, the printout should make no reference to any criminal history of the suspect, nor should it contain any other potentially prejudicial information, such as "Boston Police Department Mugshot Form." [*Commonwealth v Vardinski*, 438 Mass 444, 447-448 n 6; 780 NE2d 1278 (2003).]

Absent new guidance from the courts or the legislature, the use of images from OTIS and similar offender information websites raises a host of legal issues that will cause careful law enforcement officials to avoid these websites in favor of more traditional, procedurally valid methods of identification.

In this case, however, we need not decide whether counsel should have objected to the OTIS identification, because we conclude there is no reasonable probability that the trial outcome would have been different had defense counsel posed the objection. The record demonstrates by clear and convincing evidence that Arquette had a valid independent basis for his in-court identification of defendant. Arquette saw defendant's face both through the peephole and outside in the daylight. The record contains no discrepancies between Arquette's initial description of defendant and defendant's actual appearance. In addition, there is no evidence that Arquette's observation of defendant was distorted by particularly strong emotions or other psychological influences. Cf. *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000); see also *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977) (plurality). Because Arquette's in-court identification of defendant bears several indicia of reliability and no apparent signs of unreliability, defense counsel's failure to object to the OTIS identification does not constitute error warranting reversal of defendant's conviction. See *People v McCray*, 245 Mich App 631, 641; 630 NW2d 633 (2001) (ineffective assistance claim fails when defendant does not establish reasonable probability that alleged errors in identification testimony would have altered trial outcome).

Defendant also argues that the prosecution failed to present sufficient evidence for a jury to find all of the elements of attempted first-degree home invasion beyond a reasonable doubt. Specifically, defendant argues that there was no evidence that he intended to commit a larceny after entering the apartment. This Court reviews de novo challenges to the sufficiency of evidence to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We defer to the trier of fact's assessment of witness credibility. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant is correct that the "intent to commit larceny cannot be presumed solely from proof of the breaking and entering." *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Here, however, the circumstantial evidence adduced at trial was sufficient to allow a rational juror to find that defendant had the requisite intent. French testified that defendant asked her where she lived. French continued that defendant knew her work schedule, but that defendant did not know that she had a roommate. The jury could reasonably have inferred from these facts that defendant tried to break into French's apartment while she was at work, because he believed the apartment would be empty. See *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970) (upholding conviction against sufficiency challenge when evidence demonstrated defendant attempted to break into a home under the mistaken impression that the complainant was not at home). In addition, the record indicates that defendant made two separate attempts to penetrate the apartment door and several additional attempts to enter the building after he knew that someone had seen him. Arquette also testified to an earlier attempt to enter the apartment through a window. The jury could reasonably infer from defendant's persistence that he intended to take something of value from the apartment. These facts are sufficient, when added to the fact of the attempted breaking and entering, for a jury to infer intent.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell