

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN AL CAPONE GARRETT,

Defendant-Appellant.

UNPUBLISHED

January 4, 2011

No. 293248

Wayne Circuit Court

LC No. 08-014156-FC

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 10 to 17 years for each robbery conviction, 7 to 20 years for the home invasion conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from his participation in a robbery at a residential house where three individuals were working on October 7, 2008. One of the complainants, Steve Hess, knew defendant from a juvenile detention center that they both attended and identified him before trial as one of the robbers. However, the police were not successful in locating Hess to testify at trial. The two other complainants, Billy Cash and Meho Basic, testified at trial and identified defendant as one of the two robbers. The defense theory at trial was misidentification. Defendant argued at trial that the complainants' identification was not credible and inconsistent.

I. CASH'S IN-COURT IDENTIFICATION

Defendant first argues that the trial court erred in permitting Cash's in-court identification of him as one of the robbers. "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.*

"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). If an identification procedure is impermissibly suggestive, evidence

concerning the identification is inadmissible at trial unless an independent basis for the in-court identification can be established. *Id.* at 542-543. 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); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). “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).

Here, defendant does not argue that a pretrial identification procedure was improper or unduly suggestive. Rather, defendant’s argument is premised on the fact that no pretrial lineup was ever conducted, and that Cash first identified him in a courtroom setting. A defendant has no constitutional or statutory right to a pretrial identification. *People v Farley*, 75 Mich App 236, 238; 254 NW2d 853 (1977). Because there was no pretrial identification procedure that was unduly suggestive, it is not necessary to determine whether there is an independent basis for Cash’s in-court identification. Nonetheless, the record establishes that there was an independent basis for Cash’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 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).]

It is not necessary that all factors be given equal weight. *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977).

In this case, Cash testified that he had an opportunity to view defendant a few hours before the robbery, and again during the robbery. The first visit occurred during a normal setting, when defendant came to the house to inquire about its availability and engaged in a business conversation with Cash. It was daylight and defendant stood approximately four feet from Cash. When defendant returned to the house the second time, Cash engaged in further conversation with him before he committed the robbery, telling him not to stand on the new tile. Cash testified that he observed the tattoo markings on defendant’s neck and left hand, which were special identifying characteristics that were noticeable. Moreover, Cash testified that he was certain of his identification of defendant, and he never identified anyone other than defendant. Considering Cash’s prior encounter with defendant and the nature and circumstances of that encounter, that Cash again had ample opportunity to observe defendant immediately before and during the offense, Cash’s ability to identify distinguishing marks on defendant, the level of certainty in Cash’s identification of defendant, and that there was no evidence that Cash had ever identified anyone else, the record clearly establishes that there was an independent basis

for Cash's in-court identification. Accordingly, the trial court did not err in allowing Cash's in-court identification at trial.

II. WAIVER OF JURY TRIAL

Defendant next argues that his jury waiver was invalid because it was not knowingly and voluntarily made. We disagree.

A trial court's determination that a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). "The adequacy of jury trial waiver is a mixed question of fact and law." *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009). In order for a waiver of the constitutional right to a jury trial to be valid, it must be both knowingly and voluntarily made. *Id.* MCR 6.402(B) sets forth the procedure for securing a proper jury trial waiver:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

"By complying with the requirements of MCR 6.402(B), a trial court ensures that a defendant's waiver is knowing and voluntary." *Cook*, 285 Mich App at 422.

The record shows that defendant's jury waiver complied with MCR 6.402(B). Further, the colloquy between defendant and the trial court clearly indicates that defendant understood his right to jury trial and voluntarily waived that right. Defendant does not argue that he was not informed of his right to a jury trial, but rather complains that the trial court failed to explain various aspects of that right, such as that he could participate in jury selection, that a jury is composed of 12 members of the community, that a jury verdict must be unanimous, or how various evidentiary rules might apply at a jury trial. However, a court is not required to provide such advice. See *Leonard*, 224 Mich App at 595-596; *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992). Further, the trial court ascertained that defendant understood what it meant to have a trial by jury by confirming that he had discussed it with defense counsel, and by asking defendant if he had any questions. The trial court did not err in finding that defendant knowingly and voluntarily waived his right to a jury trial.

III. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that his conviction for first-degree home invasion must be vacated because there was insufficient evidence that the structure that he entered was a "dwelling." We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising

from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact’s] verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004).

For purposes of the crime of home invasion, a “dwelling” is a structure or shelter that is used permanently or temporarily as a place of abode. MCL 750.110a(1)(a); *People v Powell*, 278 Mich App 318, 320; 750 NW2d 607 (2008). A structure that is temporarily vacant, but to which the inhabitant intends to return, remains a dwelling. *Id.* at 322. Neither the duration of the absence nor the habitability of the structure precludes the establishment of the structure as a dwelling. *Id.* Thus, in *Powell*, this Court held that the fact that a house had been damaged by a fire, condemned, and declared not habitable at the time of the offense did not mean that it could not be a dwelling for purposes of second-degree home invasion, so long as the inhabitant intended to return. *Id.*

In this case, although no one was living in the structure at the time of the offense, the evidence showed that it was a residential house that the three complainants were improving to make it “move-in” ready. Cash testified that defendant asked him if the house was for rent, and he advised defendant that it had already been rented. Viewed in a light most favorable to the prosecution, the evidence showed that the structure, although temporarily vacant, was used as a place of abode and, accordingly, was a dwelling within the meaning of MCL 750.110a(2). Accordingly, the evidence was sufficient to sustain defendant’s first-degree home invasion conviction.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that he is entitled to a new trial counsel because trial counsel was ineffective. After conducting an evidentiary hearing, the trial court denied defendant’s motion for a new trial on this ground.

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. We review the trial court’s factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel’s performance was below an objective standard of reasonableness and that it is “reasonably probable that the results of the proceeding would have been different had it not been for counsel’s error.” *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). 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 first argues that trial counsel improperly conceded his guilt by admitting that defendant was present at the scene, which was inconsistent with his alibi defense. Defendant relies on the following questions by defense counsel during her cross-examination of Cash:

Q. Okay. And in fact there was a period of time when Mr. Garrett was out of your presence with the young worker in the backyard, correct?

A. Yes.

* * *

Q. Okay. You had very limited conversation with Mr. Garrett that morning, correct?

A. Correct.

Although a complete concession of a defendant's guilt renders counsel ineffective, *People v Krystopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988), the record here does not support defendant's claim that trial counsel conceded defendant's guilt to the charged offenses. Viewed in context, the challenged questioning was not intended as an admission that defendant was present at the house, but rather to raise questions concerning Cash's identification of defendant as the person at the house. Counsel referred to defendant by name in the questions because Cash had already identified the person as defendant. Counsel's decisions about what questions to ask and how to argue are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rocket*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Furthermore, in denying defendant's motion for a new trial, the trial court stated that it did not view counsel's questions as an admission that defendant was present at the house, and that it was aware that the defense theory at trial was that defendant was not present when the crimes were committed. Thus, defendant was not prejudiced by the manner in which counsel questioned Cash.

Defendant next argues that trial counsel was ineffective for failing to move to suppress Meho Basic's identification testimony. We disagree. There is no evidence of a pretrial identification procedure that was improper or unduly suggestive. See *Kurylczuk*, 443 Mich at 302. Moreover, as with Cash, the record shows that there was an independent basis for Basic's in-court identification. See *Davis*, 241 Mich App at 702-703. Like Cash, Basic had an opportunity to observe defendant on two separate occasions. On the first occasion, Basic greeted defendant and was able to see his face. Subsequently, during the robbery, Basic observed defendant when defendant confronted him and demanded money while pointing a gun at his head. Basic testified that defendant did not have his face covered, that the lighting in the room was good, and that he had no problem seeing defendant's face. Basic had a conversation with defendant about his wallet during the robbery. Basic also saw that defendant had a tattoo on his neck, explaining that he saw it when defendant was standing "exactly in front of [him]." Further, Basic was certain of his identification of defendant and never identified anyone other than defendant. Given this record, defendant has not demonstrated a reasonable probability that any

motion to suppress would have been successful. Counsel was not required to make a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant's third ineffective assistance of counsel claim is that trial counsel was ineffective for failing to adequately challenge the complainants' identification testimony at trial. We find no merit to this argument. The record discloses that, throughout the trial, defense counsel consistently and vigorously argued the primary defense theory of misidentification. Counsel elicited several weaknesses in the complainants' identifications of defendant, including differences between their descriptions of the robber on the night of the incident and defendant's actual appearance at trial. Counsel also highlighted problems with defendant's identification as one of the robbers, and elicited testimony intended to undermine the reliability of the identification testimony, such as the fact that the incident was brief and occurred under stressful conditions. Counsel questioned the complainants about their respective locations and vantage points when defendant was supposedly at the house, and presented a police statement that purportedly showed that Basic had not mentioned a tattoo. In closing argument, trial counsel summarized the testimony, and again argued that defendant's identification as one of the robbers was not established beyond a reasonable doubt. Although defendant contends that counsel could have further questioned Cash and Basic about their police statements, and could have called the police officers who took their statements, decisions concerning how to question witnesses and what evidence to present are matters of trial strategy, which this Court will not second guess. *Rockey*, 237 Mich App at 76. The record here does not establish that trial counsel's performance fell below an objective standard of reasonableness. *Frazier*, 478 Mich 231, 243.

Next, defendant argues that trial counsel was ineffective for failing to call "Wayne" and "Shawn" as alibi witnesses. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

At the evidentiary hearing, trial counsel testified that defendant told her that he was with Shawn at the time of the robbery, but did not know Shawn's last name or give her a phone number, address, or any other method to contact Shawn. According to counsel, defendant stated that he had no information on Shawn because he was a person who he "had just hung out with from time to time." Counsel also testified that defendant's mother told her that she did not know Shawn, did not know his last name, and did not know how to contact him. Trial counsel further testified that she was never contacted by any other potential witnesses on behalf of defendant.

In contrast, defendant's mother testified that Shawn is her nephew and she knew how to contact him. She did not provide any information to trial counsel because she was not asked. Shawn testified that he had known defendant all of his life, and that he and defendant were close friends as well as cousins. Shawn stated that he shares the same last name as defendant's mother, and that defendant knew his last name. He stated that, if trial counsel had questioned him, he would have told counsel that defendant was with him at the time of the robbery, and that there were a lot of other people there. Shawn explained that he did not attend any court proceedings because he was waiting for someone to contact him. Defendant testified that he told trial counsel about "Shawn Lackey, Rico, Wayne, [his mother], Erica Lackey, [and] Shanice

Lackey,” and how to contact each potential witness. Defendant admitted that he did not say anything to trial counsel at trial when none of these witnesses were called to testify.

As the trial court below observed, resolution of this claim depended on how the court resolved the conflicting accounts of trial counsel, who testified that defendant was unable to provide any contact information for any potential alibi witnesses, and defendant and defendant’s witnesses, who testified that trial counsel was provided with the names and contact information for potential alibi witnesses. The trial court determined that defendant’s witnesses were not credible. This Court gives deference to a trial court’s superior ability to judge the credibility of witnesses who appeared before it. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Moreover, as the trial court observed, defendant’s testimony at the evidentiary hearing was inconsistent with his testimony at trial. At trial, defendant clearly testified that he did not know Shawn’s last name. Defendant also testified at trial that he rode with a friend named Kevin to the gas station where he met up with Shawn and Wayne. Defendant did not mention being with Kevin at the evidentiary hearing. In light of this record, and affording deference to the trial court’s superior ability to evaluate credibility, we find no clear error in the trial court’s finding that defendant failed to provide defense counsel with Wayne’s or Shawn’s last name or how to contact either of them. Thus, defendant has failed to establish that trial counsel was constitutionally ineffective for failing to call either Shawn or Wayne at trial.

Defendant next argues that trial counsel was ineffective for failing to object to an officer’s testimony that he had frequent contacts with defendant and knew of the tattoo on his neck. Contrary to what defendant argues, this evidence was not offered to prove defendant’s identity as one of the robbers. Rather, it was offered only to explain why the officer went to a particular place to locate defendant after hearing that one of the suspects had “Jay” tattooed on his neck. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). Further, the officer did not testify how he knew defendant, or disclose the nature of his contacts with him. Under these circumstances, defense counsel’s failure to object was not objectively unreasonable, particularly considering that defendant was being tried before the court and not a jury, thereby alleviating any concern that the evidence might be considered for an improper purpose. “A judge, unlike a juror, possesses an understanding of the law which allows him to . . . decide a case based solely on the evidence properly admitted at trial.” *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

Defendant next argues that trial counsel was ineffective for failing to request the appointment of an expert witness on the reliability of eyewitness identification. Considering the circumstances surrounding defendant’s identification, and the fact that defendant was being tried before the court, we agree with the trial court that this case was not one where expert testimony would have been particularly useful, let alone necessary to enable defendant to “safely proceed to trial” such that appointment of an expert would have been warranted. MCL 775.15; *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). Rather, under the circumstances, it was reasonable for defense counsel to challenge defendant’s identification through argument, cross-examination, and other evidence at trial. Thus, defendant has failed to

show either that trial 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.

Defendant lastly argues that trial counsel was ineffective for allowing Hess' identification statement that was used during the *Wade*¹ hearing to be available to the same judge who tried the case. Hess identified defendant before trial as one of the robbers, but did not testify at trial. In denying this claim below, the trial court explained that its determination that defendant was one of the robbers was based solely on the identification testimony of Cash and Basic, and that it did not consider any statements by Hess. Because the record discloses that Hess' statement did not affect the trial court's verdict, this ineffective assistance of counsel claim cannot succeed.

V. SCORING OF OFFENSE VARIABLE 4

In his final issue, defendant argues that he is entitled to resentencing because the trial court erroneously scored ten points for offense variable (OV) 4 of the sentencing guidelines. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Ten points may be scored for OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In this case, Basic testified that defendant pointed a gun at his head as he robbed him. According to the victim's impact statement prepared for sentencing, Basic's wife reported that Basic experiences trouble sleeping and suffers from emotional shock, fear, and anger as a result of defendant's assault. She believed that Basic required professional assistance to manage his emotional state. This evidence adequately supports the trial court's finding that Basic sustained a serious psychological injury that may require professional treatment. Thus, the trial court did not abuse its discretion in scoring ten points for OV 4.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

¹ *Wade v United States*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).