

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 15, 2011

v

CHRISTOPHER DARNELL MCDANIEL,  
  
Defendant-Appellant.

No. 294821  
Wayne Circuit Court  
LC No. 09-012025-FC

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Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 9 to 20 years for the armed robbery conviction and 2 to 7½ years for the felon-in-possession conviction. He was also sentenced to a consecutive 2-year term for the felony-firearm conviction. We affirm.

I

Defendant first argues that the use of a pretrial photographic lineup was improper and that the photographic lineup procedures and photographic lineup itself were both unduly suggestive. Defendant also asserts that counsel was ineffective for failing to object to the admission of this evidence. We disagree. To preserve a challenge to pretrial identification procedures, the defendant must object below. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Here, defendant did not object to the pretrial identification procedures, and this issue is therefore unpreserved for appellate review. Review of unpreserved pretrial identification procedures is limited to determining whether defendant has demonstrated a plain error affecting his substantial rights. *Id.*; see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“Identification by photograph should not be used ‘when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup.’” *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995), quoting *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). A photographic lineup is permissible in place of a corporeal lineup if, among other things: (1) it is not possible to arrange a proper lineup, (2) the nature of the case requires

immediate identification, (3) there are insufficient number of persons available with the defendant's physical characteristics, (4) the witnesses are located a far distance from where the accused is in custody, or (5) the subject refuses to participate in a lineup and by his actions would seek to destroy the value of the identification. *People v Anderson*, 389 Mich 155, 187 n 23; 205 NW2d 461 (1973), overruled on other grounds *People v Hickman*, 470 Mich 602 (2004). Defendant was not in custody at the time of Tyrone O'Neal's or Gregory Bridges's viewing of the photographic lineup. Furthermore, it appears from the record that the police did not know defendant's location until after Bridges's identification of defendant in the photographic lineup. Thus, defendant was not in custody or under arrest at the time of the photographic lineups and he could not be compelled to participate in a corporeal lineup. See *Strand*, 213 Mich App at 104. The use of the photographic lineups was proper.

"A photographic identification procedure violates a defendant's right to due process of law when 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). A court must evaluate the fairness of an identification procedure in light of the totality of the circumstances to ascertain whether the procedure qualifies as so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Kuryleczyk*, 443 Mich at 311-312; *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

The totality of the circumstances does not suggest that O'Neal's participation in the creation of a composite sketch of the suspect resulted in a substantial likelihood of misidentification. O'Neal worked with Officer Alphonso Tinsley to create a sketch of the suspect based on O'Neal's description of the suspect. Thereafter, O'Neal viewed a photographic lineup and immediately identified defendant. Nothing occurred during the photographic lineup to suggest to O'Neal that he should select defendant's photograph. Rather, O'Neal stated that he selected defendant's photograph because he remembered defendant's face from the armed robbery. During the armed robbery, O'Neal had a clear view of defendant's face when the two were standing about seven or eight feet apart.

Nor does the totality of the circumstances establish that Bridges's viewing of the composite sketch before viewing the photographic lineup resulted in a substantial likelihood of misidentification. Postal Inspector Christopher Martin stated that he showed Bridges the sketch merely to help determine if the same suspect was involved in both armed robberies. Officer Troy Debets stated that although he was not aware that Bridges had seen the sketch prior to viewing the photographic lineup, Debets would not have conducted the lineup any differently. Sergeant William Jackson testified that there was not a professional standard regarding whether a complainant should view a composite sketch of a suspect before viewing a photographic lineup and the practice was not discouraged by the police department. Moreover, Bridges himself testified that the sketch did not have any influence on his identification of defendant in the photographic lineup. Nothing occurred during the photographic lineup to suggest to Bridges that he should select defendant's photograph. Bridges stated that he selected defendant's photograph because defendant was the individual who robbed him. Bridges testified that during the second armed robbery, he had a clear view of defendant's face.

A mere physical difference between the lineup participants does not render the photographic lineup procedure necessarily defective. *Hornsby*, 251 Mich App at 466. Rather,

such differences relate only to the weight of the identification and are “significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.” *Id.*

In reviewing the photographic lineup, there was nothing impermissibly suggestive about the other five participants in the photographic array that rendered defendant substantially distinguishable to the witnesses. The record indicates that the photographic lineup contained six color photographs of young, similarly-sized, African-American males. All of the participants had similar amounts of facial hair. Two of the participants were wearing white shirts, two of the participants were wearing dark shirts, and two of the participants were wearing sweatshirts with hoods. Furthermore, the variation in the complexions of the participants was not significant. Although participant number six had darker skin than defendant, participant number four and participant number five had lighter skin complexions, similar to defendant’s. On the basis of these facts, we cannot conclude that the trial court erred by admitting the identification evidence. See *id.*

The need to review whether an independent basis exists to support in-court identification testimony arises only when there is evidence that the pretrial identification procedures used were unduly suggestive. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Because the lineup procedures used in this case were not unduly suggestive, we need not review whether an independent basis existed for the in-court identification. See *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

We next turn to defendant’s claim that trial counsel was ineffective for failing to object to the admission of the identification evidence. Because no evidentiary hearing was held pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel’s assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel’s ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must overcome the strong presumption that defense counsel’s action constituted sound trial strategy. See *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Counsel’s decisions to not request a corporeal lineup or seek the suppression of identification evidence are generally matters of trial strategy. *People v Wilki*, 132 Mich App 140, 145; 347 NW2d 735 (1984).

Defendant has not proven that counsel’s failure to request a corporeal lineup or to seek suppression of the identification evidence constituted ineffective assistance of counsel. As previously discussed, the photographic lineup was properly used and the photographic lineup procedures were not unduly suggestive. Counsel is not obligated to raise a futile objection or make a meritless argument. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Furthermore, given the overwhelming evidence against defendant, including the testimony of O’Neal and Bridges, any deficiency in counsel’s performance did not prejudice defendant. We perceive no ineffective assistance of counsel on this basis.

## II

Defendant next argues that he was denied a fair trial by the admission of the composite sketch and that counsel was ineffective for failing to object to its admission. Defense counsel failed to object when the prosecution sought to admit the composite sketch into evidence, and affirmatively stated he had no objection to the admission of the sketch. Defendant has therefore waived appellate review concerning the admission of the composite sketch, itself. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Regarding defendant's ineffective assistance of counsel claim, we find that the composite sketch was properly admitted as demonstrative evidence to assist the jury with the material issue of identification. See *People v Castillo*, 230 Mich App 442, 444-447; 584 NW2d 606 (1998). Defense counsel was not ineffective for failing to make a futile objection. *Milstead*, 250 Mich App at 401.

## III

Defendant argues that he was denied the effective assistance of counsel when trial counsel failed to call an expert witness on the issue of eyewitness identification. We disagree. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not review defense counsel's decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Defendant has not shown that counsel's failure to call an expert witness on eyewitness identification constituted ineffective assistance of counsel. At trial, defense counsel thoroughly cross-examined O'Neal and Bridges regarding their in-court identifications of defendant and their selection of defendant from the photographic lineup. During closing argument, defense counsel asserted that no physical evidence linked defendant to the crime and reiterated the discrepancies in O'Neal's and Bridges's identifications of defendant. Defense counsel could have reasonably concluded that "the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Counsel's decision not to call an expert witness constituted sound trial strategy. *Id.* Moreover, counsel's performance in this regard did not deprive defendant of a substantial defense. Given the independent inculpatory evidence admitted in this case, counsel's failure to call an expert on the issue of eyewitness identification was certainly not outcome determinative. See *Chapo*, 283 Mich App at 371.

## IV

Defendant argues that the prosecution engaged in misconduct by improperly using the stipulated fact of defendant's prior conviction. He also contends that defense counsel was

ineffective for failing to object. Again, we disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Claims of prosecutorial misconduct are reviewed “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of [the] defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “[A]dequate safeguards’ can be erected to ensure that a defendant charged with both felon-in-possession and other charges arising from the same incident suffers no unfair prejudice if a single trial is conducted for all the charges.” *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); see also *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997). Specifically, these safeguards include: “(1) the introduction by stipulation of the fact of the defendant’s prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and (3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge.” *Green*, 228 Mich App at 691-692.

The parties stipulated to the fact that defendant had a prior felony conviction and was ineligible to possess a firearm. But during trial, the prosecution nevertheless commented on the nature of defendant’s prior felony conviction three times. First, while cross-examining Charles Doaty, one of defendant’s character and alibi witnesses, the prosecution asked:

Q. You told us that you gave some opinion testimony, didn’t you?

A. Yes.

Q. About whether or not [defendant] is a robber I think is the words the counsel used?

A. Yes.

Q. Are you aware of his gun conviction?

A. Yes.

Q. And does that fact that he’s a convicted felon affect your answer at all in regards to that, sir?

A. No.

Q. That doesn’t have an impact?

A. No.

In certain circumstances under MRE 405(a), a defendant may present favorable character evidence, but it must be in the form of reputation or opinion testimony. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). MRE 405(a) also permits the prosecution to either cross-examine the defendant’s character witness concerning specific instances of conduct or present rebuttal character witnesses who testify to the bad reputation of the defendant. *Id.* at 130-131. In

light of the fact that the witness initially opined that defendant was not an armed robber, the prosecutor was permitted to cross-examine Doaty regarding his knowledge of specific instances from defendant's past. There was no misconduct in this regard.

Second, while the prosecution was cross-examining defendant, the following exchange occurred:

[*Prosecution*]: Now, you have an affinity for small caliber—

[*Defense Counsel*]: Objection to the form of the question.

[*Prosecution*]: —semiautomatic weapons?

[*Defense Counsel*]: Objection, objection. Objection to the form of the question and objection to affinity. He can ask him a question, but to affinity, I don't think that's ever been established.

[*Trial Court*]: Let's rephrase the question.

[*Prosecution*]: Yes.

[*Prosecution*]: Your involvement in '07 for which we were interviewing you involved a .25 cal semiautomatic, correct, sir?

[*Defendant*]: I'm not sure of the caliber of the weapon, sir.

[*Prosecution*]: May I approach the witness, Your Honor.

[*Trial Court*]: Sure.

[*Prosecution*]: This a [sic] picture of it, sir. Is that the weapon you had?

[*Defendant*]: That's correct.

[*Prosecution*]: You dispute that it's a .25 caliber, sir?

[*Defendant*]: That's what the tag says, so no, I don't dispute it.

Third, during the prosecution's closing argument, the following exchange occurred:

[*Prosecution*]: You know also circumstantially [the witnesses] both say small caliber, medium caliber, semiautomatic. Although grudgingly, [defendant]—that's what he had once before. It was—

[*Defense Counsel*]: That's improper, Judge, and that's an improper argument.

[*Prosecution*]: No, it's not. We went through that on the record.

[*Defense Counsel*]: That's an improper argument.

[*Trial Court*]: He showed him a picture.

[*Defense Counsel*]: Right, but that's an improper argument.

[*Prosecution*]: Why is it improper?

[*Defense Counsel*]: Okay.

[*Trial Court*]: It's not improper.

[*Prosecution*]: Thank you, Judge. So that apparently is something that he's familiar with from November 17th, '07.

It was not plain error for the prosecution to inquire into the type of weapon defendant used in his prior felony conviction and to state that the use of a similar weapon in committing the instant crime circumstantially suggested that defendant was the armed robber. Such testimony was not prejudicial to defendant because defendant's use of Doaty as a character witness had already allowed the jury to learn that defendant's prior felony was a firearm-related conviction. Furthermore, a curative instruction generally eliminates any possible prejudicial effect that may have resulted from prosecutorial misconduct. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In this case, the trial court instructed the jury that defendant was innocent until proven guilty, that the prosecution was required prove each element beyond a reasonable doubt, and that the attorneys' statements, questions, and arguments were not evidence. It is axiomatic that jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). We perceive no outcome-determinative plain error requiring reversal. *McLaughlin*, 258 Mich App at 645.

Nor was defense counsel ineffective for failing to object to the allegedly improper prosecutorial remarks. As noted earlier, counsel is not ineffective for failing to make a futile objection. *Milstead*, 250 Mich App at 401.

## V

Defendant argues that the trial court should have given the jury limiting instructions regarding the eyewitness identification testimony, and that counsel was ineffective for not requesting such instructions. Defendant has waived review of this issue. Defense counsel did not object to the jury instructions as given and did not request additional jury instructions with regard to the issue of eyewitness identification. Instead, counsel affirmatively stated that he was satisfied with the instructions as read. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Regarding defendant's claim of ineffective assistance of counsel, counsel's decision regarding what jury instructions to request is a matter of trial strategy, and this Court will not second-guess such decisions with the benefit of hindsight. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). Counsel is not ineffective merely because a trial strategy does not succeed. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Furthermore,

given the overwhelming evidence against defendant, as already discussed, any deficiency in counsel's performance did not prejudice defendant. We find no ineffective assistance of counsel on this issue.

## VI

Lastly, defendant argues that certain other-acts evidence was improperly admitted into evidence and that defense counsel was ineffective for failing to object to it. We cannot agree.

Defendant waived review of this issue when defense counsel affirmatively stated that he had no reason to object to the admission of the other-acts evidence. See *Carter*, 462 Mich at 215. And with respect to defendant's claim of ineffective assistance of counsel, we note that decisions regarding whether to object to the evidence are presumed to be matters of trial strategy. *Unger*, 278 Mich App at 242. Defendant has not proven that counsel's failure to object to the admission of the other-acts evidence constituted deficient performance. Having thoroughly reviewed the trial transcripts and defendant's specific claims of error, we conclude that the challenged other-acts evidence was properly admissible in this case. See MRE 404(b); *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982). Counsel was not ineffective for failing to raise a futile objection. *Milstead*, 250 Mich App at 401.

Affirmed.

/s/ Kathleen Jansen  
/s/ Donald S. Owens  
/s/ Douglas B. Shapiro