

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA LOPP,

Defendant-Appellant.

UNPUBLISHED

February 17, 2011

No. 295662

Wayne Circuit Court

LC No. 09-004221-02

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right from his convictions of one count each of assault with intent to rob while armed, MCL 750.89, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions arose out of three robberies that occurred on January 28, 2009. In the morning of that day, a woman was sitting in her black Dodge Magnum after dropping her daughter off at school. An armed man approached and demanded that she give him the car. The woman gave the man the keys and ran away. On the same day, after school, two students, Chenay Cornish and Artist Wright, were separately robbed after exiting the school bus. Defendant was convicted of robbing Cornish and Wright.

Cornish testified at trial that she saw a man with a gun get out of a black Dodge Magnum. The man aimed the gun at her and then went through her book bag. The driver of the car ordered the armed man to put her in the car. The man refused and got back into the car; the driver then drove the car away. Cornish later identified defendant as the driver of the car.

Similarly, Wright testified that as he was walking home from the bus stop, he saw a gun-wielding man get out of a black Dodge Magnum. Wright gave the gunman his book bag, coat, and cell phone. Wright looked into the car as he was being robbed because he wanted to identify the people involved. Wright subsequently identified defendant as the driver of the car.

On appeal, defendant argues he was denied effective assistance of counsel on two grounds. First, he claims his trial attorney was ineffective for failing to file a motion to suppress Cornish's and Wright's live lineup identifications of defendant. Second, he claims his trial attorney was ineffective for filing a notice of alibi defense that was ultimately determined to be false. We review claims of ineffective assistance of counsel as mixed questions of law and fact.

People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002). We examine the trial court's factual findings for clear error and review de novo the matters of law. *Id.* Here, defendant did not raise the issue in the trial court, so our review is limited to mistakes that are apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Both the United States and the Michigan Constitutions guarantee a defendant the right to assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the outcome was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052, 2068; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Knowles v Mirzayance*, ___ US ___; 129 S Ct 1411, 1420; 173 L Ed 2d 251 (2009); *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Defense counsel has wide discretion as to matters of trial strategy. *Odom*, 276 Mich App at 415.

We turn first to defendant's claim regarding the lineup. A lineup can be so suggestive that it denies an accused due process of law. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The fairness of the lineup is evaluated in light of the total circumstances. See *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). The test is whether, under the totality of circumstances, the identification procedure was reliable. *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985).

Factors relevant to the fairness of a lineup include the opportunity of the witness to view the culprit at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the culprit, the level of certainty demonstrated by the witness at the identification, and the length of time between the crime and the identification. *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972). Discrepancies as to physical characteristics among the lineup participants do not necessarily render the procedure defective. *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984). Rather, differences generally pertain to the weight of an identification and not to its admissibility. *Hornsby*, 251 Mich App at 466. Differences are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993) (Griffin, J); *Hornsby*, 251 Mich App at 466.

Contrary to defendant's argument, the procedure at issue here was not so impermissibly suggestive as to render the lineup identification irreparably unreliable. Wright and Cornish were very firm in their identification of defendant. Wright was approximately ten feet from the car during the robbery, while Cornish was approximately fifteen feet from the car. It was light outside during both armed robberies, and nothing blocked either victim's view of defendant in the driver's seat of the car. Cornish saw defendant through the partially open side window, and Wright saw defendant through the side window and the windshield. Although their attention was mainly on the armed robber, both victims took time to view the driver. Wright took a few seconds to get a good look at the driver because he wanted to be able to identify the driver. Cornish's attention was on the driver because the driver directed the armed robber to put her in

the car after nothing was found in her book bag to steal. The live lineup occurred just five days after the robberies.

During the lineup, both victims immediately identified defendant as the driver of the car. While both acknowledged, after reviewing a photograph of the lineup, that defendant was the only one with braids, both testified that their independent identifications were based on defendant's face. Wright specifically testified that his identification was based on defendant's face as the driver; he knew the driver was defendant. Cornish did not pay attention to the other people's hair in the lineup and her identification was based on defendant's face, not the braids.

In sum, the lineup was not so impermissibly suggestive as to render the identifications irreparably unreliable. Because the lineup was valid, defendant's claim that his trial counsel was ineffective for failing to challenge the lineup is without merit. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defense counsel is not required to raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000); *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Moreover, while defense counsel did not file a motion to suppress the lineup identification, he challenged the accuracy of the identifications made by Wright and Cornish, and argued that the two based their identifications on defendant's braids. Trial counsel's decision to challenge the accuracy of the identifications, rather than the identification procedure, was a matter of trial strategy which this Court cannot second-guess on appeal. *Odom*, 276 Mich App at 415.

We turn now to defendant's claim concerning the notice of alibi. Defendant's trial counsel filed the notice of alibi defense on May 7, 2009, claiming that defendant was with Dominique Wilkins during the time the offenses were alleged to have occurred. Following a police officer's interview of Wilkins in which she indicated defendant was not with her on the particular day, plaintiff filed a motion to admit defendant's false exculpatory statement. At the motion hearing, trial counsel moved to withdraw the notice of alibi and discussed the original basis for filing the notice. The trial court granted plaintiff's motion, finding that the request to withdraw the notice of alibi defense did not change the fact that defendant had filed false information with the court. In so doing, the court noted the filing was not a reflection on trial counsel, that counsel had received information and had acted on it in good faith by filing the notice of alibi defense.

The failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). "Even the failure to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.* at 642 (citations omitted).

Contrary to defendant's claims on appeal, the lower court record demonstrates that his counsel did in fact investigate the alibi defense before filing the notice of alibi. At the motion hearing, defense counsel stated that he filed the notice of alibi defense based on information he received on May 7, 2009, about Dominique Wilkins; he further stated that he made a telephone call to Wilkins to confirm the information he had received.¹ The trial court specifically determined that defense counsel acted in good faith when he filed the notice of alibi defense. Further, defense counsel argued at trial that the prosecution over-emphasized the importance of Wilkins' testimony at trial. Counsel pointed out that defendant told Wilkins about another man's responsibility for the robberies, that defendant was merely confused about which date he was with Wilkins, and that defendant never asked Wilkins to lie for him. With these arguments, defense counsel employed an appropriate strategy to address the false alibi issue.

Furthermore, even if defense counsel's decision to file the notice of alibi could be deemed improper, defendant cannot demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Frazier*, 478 Mich at 243. The trial evidence indicated that defendant made several phone calls to Wilkins and to another girlfriend in June 2009. In those phone calls, defendant purportedly stated that he was upset with Wilkins for her refusal to provide him with an alibi, and that he broke up with her because she told the police the truth. This evidence is plainly as damaging as the false notice of alibi. Defendant has not demonstrated that but for the filing of the notice of alibi he would not have been convicted.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

¹ Defendant attached an affidavit signed by Dominique Wilkins in which she avers she was not contacted by defense counsel prior to filing the notice of alibi defense. The affidavit is dated June 11, 2010. We cannot consider the proffered affidavit, because it is not part of the lower court record. Defendant may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).