STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2011
v	No. 289692 Wayne Circuit Court
JASON BLAKE AGNEW, Defendant-Appellant.	LC No. 08-005690-FC

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82, assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, second offense, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of two to eight years for the felonious assault conviction, 11 to 25 years for the assault with intent to rob conviction, and two to ten years for the felon in possession conviction, to be served consecutively to a five-year sentence for the felony-firearm, second offense, conviction. He appeals as of right, and for the reasons set forth in this opinion, we affirm.

Defendant and William Knight were tried jointly, before separate juries, for offenses that occurred during the attempted robbery of Will Brooks outside a party store on Joy Road near Braile Street in Detroit. While Brooks was inside the store, he saw two men loitering outside. The men left the area when Brooks left the store. One man stood in an alley across the street and looked back at the store. Brooks saw the other man loitering in the alley on the side of the store. As Brooks went to his vehicle, the second man rushed out from the alley and announced a robbery. Brooks, who was armed with a gun, exchanged shots with the man, who ran off. The man across the street then began firing at Brooks. Brooks returned the gunfire and the man ran off. Brooks identified Knight at a pretrial photographic lineup as the man who approached him. Brooks was unable to identify defendant at a pretrial corporeal lineup as the man across the street, but did identify him at the preliminary examination and again at trial. A witness reported seeing defendant drop a beer bottle as he ran from the scene. The mouth of the bottle was swabbed for possible DNA evidence. An analyst from the Detroit Police Department's crime lab testified that he was unable to obtain any DNA from the swab for comparison to a known sample of defendant's DNA.

Defendant first argues that because of known quality control problems with the Detroit Police Crime Lab, he is entitled to retesting of the beer bottle under MCL 770.16.

A defendant may petition the court for DNA testing of biological material identified during the investigation of the case and for a new trial based on the results of that testing if the defendant shows that DNA testing was done in the case, that the results of the test were inconclusive, and that testing with current DNA technology is likely to result in conclusive results. MCL 770.16(1). See also, *People v Barrera*, 278 Mich App 730; 752 NW2d 485 (2008). The court must order DNA testing if (1) the defendant proves by a preponderance of the evidence that the evidence to be tested is material to the issue of the defendant's identity as the perpetrator of or accomplice to the crime of which he was convicted, and (2) the defendant proves by clear and convincing evidence that biological material is available for testing, the material will be subject to DNA testing technology that was not available when the defendant was convicted, and the defendant's identity was at issue during the trial. MCL 770.16(4). If the court orders a test and the results are inconclusive or show that the defendant is the source of the material, the court shall deny the motion for new trial. MCL 770.16(7). If the results show that the defendant is not the source of the material, the court must determine whether a new trial is justified. MCL 770.16(8).

Although defendant did not show that the swab would be subjected to new testing technology not available at the time of trial, the prosecutor agreed to retesting. Therefore, this Court denied defendant's initial motion to remand for that purpose, but held the appeal in abeyance until the Michigan State Police Crime Lab submitted a report of the test results. *People v Agnew*, unpublished order of the Court of Appeals, entered August 27, 2010 (Docket No. 289692). The state police lab subsequently issued a report that stated, "No DNA typing results were obtained from . . . (Swab of beer bottle); therefore, no comparison can be made" to a known sample of defendant's DNA. Therefore, the new test results do not entitle defendant to a new trial. While defendant contends that he is entitled to have the bottle itself subjected to testing under MCL 770.16, the statute only provides for "DNA testing of biological material identified during the investigation leading to" the defendant's conviction, MCL 770.16(1), and the beer bottle is not biological material. Additionally, defendant has not shown that the beer bottle itself was not properly subjected to DNA testing. By collecting a sample from the mouth of the beer bottle, the Detroit Police Crime Laboratory tested that article. The sample was then retested by the State Police Crime Laboratory which confirmed the original DNA results. Accordingly, defendant has failed to supply this Court with a basis for relief under MCL 770.16.

Defendant next argues that trial counsel was ineffective because he failed to move to suppress Brooks's in-court identification testimony where Brooks first identified defendant at the preliminary examination, while he was seated next to an attorney of a different race. Defendant acknowledges that he did not raise this issue in an appropriate motion in the trial court. Therefore, our review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show "that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's

error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted). The defendant must also establish the factual predicate of his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The decision whether to object to evidence is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Normally, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). However, the failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996).

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Kevin 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.* (internal quotations and citation omitted).

The general rule is that an in-court identification is not unduly suggestive simply because the defendant is seated with defense counsel. *People v Michael Fuqua*, 146 Mich App 133, 143; 379 NW2d 396 (1985); *United States v Toney*, 440 F2d 590, 591 (CA 6, 1971). However, unusual circumstances may render a confrontation at a prior court proceeding so suggestive as to require suppression of identification testimony. *People v Solomon*, 47 Mich App 208, 217; 209 NW2d 257 (1973) (LESINSKI, C.J., dissenting), adopted 391 Mich 767 (1974). Unusual circumstances include situations where the witness identifies the defendant at a preliminary examination held more than two years after the offense and the police informed her before the hearing "that they had the right man," *id*. at 216-218; where a defendant of one race is seated next to counsel of a different race and the witness who identified him in court was unable to describe him immediately after the offense or identify him in a pretrial lineup, *Toney*, 440 F2d at 592 (MCCREE, J., concurring), and where a defendant of one race is seated next to counsel of a different race and the witness who identified him in court admits that his position next to defense counsel was an aid to identification, *United States v Archibald*, 734 F2d 938, 940-943 (CA 2, 1984), mod 756 F2d 223 (CA 2, 1984).

Defendant has not identified any unusual circumstances at the preliminary examination here that were unduly suggestive. Brooks identified defendant at a preliminary examination held just two weeks after the incident. Although defendant was represented by an attorney of a different race and was presumably seated next to him at the hearing, defendant was not the only person of his race in the courtroom. Although Brooks could not make a conclusive identification of defendant at a lineup, there is nothing in the record regarding his ability to describe him to the police. Nor is there anything in the record to indicate that anyone suggested to Brooks that defendant was the second gunman or that Brooks's identification was influenced by defendant's

location in the courtroom. Another witness at the trial testified to seeing defendant standing on Braile Street firing a gun in the direction of the store and other evidence indicated that defendant had borrowed what turned out to be the get-away car from a friend just half an hour before Brooks was attacked.

Even if this Court were to find that the identification at the preliminary examination was unduly suggestive, Brooks's identification testimony at trial would still be admissible if "an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure." *Williams*, 244 Mich App at 542-543 (internal quotation marks and citation omitted). Factors to be considered in determining whether an independent basis for the identification testimony exists include (1) whether the witness previously knew the defendant, (2) the witness's opportunity to observe the offense, (3) how much time elapsed between the offense and the disputed identification, (4) the accuracy of the witness's description of the defendant as compared to his actual description, (5) whether the witness made a previous proper identification of the defendant or failed to identify him, (6) whether the witness identified another person as the offender before the identification of the defendant, (7) whether the witness was affected by fatigue, nervous exhaustion, alcohol, drugs or undue stress caused by the offense, and (8) any idiosyncratic or special features of the defendant. *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977); *People v McCray*, 245 Mich App 631, 639-640; 630 NW2d 633 (2001), lv den 466 Mich 873 (2002).[1]

In order to safeguard defendant's right to the effective assistance of counsel, our analysis continues by assuming the identification at the preliminary examination had been unduly suggestive and that there was not an independent basis for Brooks's identification testimony at trial. Even with those assumptions, we can only conclude that counsel made an error in not moving to suppress Brooks's identification testimony. Whether that error rendered counsel ineffective depends on whether the outcome of the trial likely would have been different had Brooks's identification testimony been suppressed. *Horn*, 279 Mich App at 37-38 n 2. Assuming Brooks had been allowed to testify to the actions of Knight's accomplice without identifying him as defendant, the remaining evidence was still sufficient to enable a reasonable trier of fact to conclude beyond a reasonable doubt that defendant was Knight's accomplice. David Vroman, a forensic scientist with the Michigan State Police, was qualified as an expert in toolmark and firearms identification. He testified that the nine millimeter and .380 casings were fired by different guns but were not fired by Brooks's gun. This testimony directly supported Brooks's testimony that there were two persons shooting at him. Tiffany Chaney testified that she loaned defendant her car shortly before the attempted robbery of Brooks. She also testified that car was used as the would-be robbers' get-away vehicle as indicated by the fact that it was seen in the vicinity of the hospital where Knight sought treatment for his injuries and had blood on the backseat.

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[1] We note that defendant points out that Brooks failed to identify him at a corporeal lineup but does not discuss any other relevant factors to determine whether the circumstances as a whole weigh in favor of admission or exclusion of the identification testimony.

Brooks testified that toward the end of the episode, the second man who was across the street began shooting at him. Ed Nurse and Dirk Belue, who lived on Braile Street south of Joy Road also witnessed the incident. Nurse testified he saw defendant on Braile Street firing in the direction of the party store. Belue confirmed hearing gunshots coming from the direction of Nurse's house and saw a man with a gun in the area. Given the totality of such evidence, it is unlikely that the outcome of the trial would have been different had Brooks's identification testimony been excluded. Thus, even assuming trial counsel was ineffective for failing to move to suppress Brooks's in-court identification, reviewing the record as whole, we cannot conclude that defendant met his burden of showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Hoag*, 460 Mich at 5-6.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro