STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 292850 Oakland Circuit Court
CHARLES LAMONT GEETER, Defendant-Appellant.	LC No. 2009-225214-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of armed robbery, MCL 750.529. Because defendant was not denied a fair trial, defendant did not receive ineffective assistance of counsel at trial, the trial court did not err by refusing to replace defendant's attorney on the first day of trial, the trial court did not err by refusing to suppress the identification of defendant, and defendant was not denied due process at trial, we affirm.

Defendant's conviction stems from a Halloween 2008 robbery of a business in Oak Park. An employee, Janice Moore, and a customer, Cornell Barnes, were present at the time of the robbery and both identified defendant as the perpetrator. Defendant approached the counter and announced that he was robbing the store. He also passed Moore a note that read, "This is a robbery and I have a gun. If you don't give me all the money right now innocent customers and staff will get shot during this altercation." The police crime lab discovered a fingerprint belonging to defendant on the note. Moore identified defendant in a photographic lineup in December 2008, at the preliminary examination, and again at trial. Barnes identified defendant in a corporeal lineup at the Oakland County Jail in January 2009 and at trial. A jury convicted defendant of armed robbery, MCL 750.529. Defendant now appeals as of right.

Defendant first argues that his due process right to a fair trial was denied because the jury saw him dressed in jail clothing. During jury selection, defendant was dressed in jail clothes, consisting of a tan shirt and tan pants. It appears that other clothing was available, but it is not clear from the record why he did not wear them. What is clear, however, is that defendant did not bring the matter to the court's attention and request to change his clothing. Defendant's inaction constitutes a waiver of this right. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985), citing *People v Shaw*, 381 Mich 467, 475; 164 NW2d 7 (1969). Moreover, the fact that defendant appeared before the jury wearing jail clothing is not sufficient to make out a

constitutional violation. "[A]lthough the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Estelle v Williams*, 425 US 501, 512-513; 96 S Ct 1691; 48 L Ed 2d 126 (1976).[1]

Defendant also claims that his trial counsel's representation was constitutionally ineffective. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Counsel's performance only falls below the objective standard of reasonableness if he makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The second component requires the defendant to show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Defendant bears the burden of overcoming the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance, and constituted sound trial strategy. *Strickland*, 466 US at 689; *Carbin*, 463 Mich at 600.

Defendant asserts that his counsel should have insisted that the preliminary examination not be held until Moore attended a corporeal lineup. He asserts that the failure to do so was error because the identification at the preliminary examination was unduly suggestive. An identification procedure may violate a defendant's due process rights "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). To resolve this question, the Court may consider "the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

We have reviewed the record and the record evidence does not suggest a substantial likelihood of misidentification. In contrast, the evidence establishes that Moore had an unobstructed and close view of defendant's face at the time of the robbery. She first identified

[1] In addition, defendant cannot prevail on an alleged due process violation unless he shows that the error prejudiced his defense. *People v McGee*, 258 Mich App 683, 699-700; 672 NW2d 191 (2003). Here, it is questionable whether the jury could even tell whether defendant was wearing prison clothes. No markings identifying defendant as a prisoner are visible on the DVD recording of the trial proceedings, and, in fact it appears that defendant is wearing a tan shirt, tan pants, and a black suit coat.

defendant within two months of the incident, and nothing in the records indicates any uncertainty in her identification at the preliminary examination. Therefore, counsel was not deficient for not insisting that the preliminary examination be postponed until a corporeal lineup was held. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) ("[C]ounsel is not required to make frivolous or meritless . . . objections.").

Defendant also contends that his counsel was deficient because he failed to object to defendant's attire during jury selection. But defendant is unclear with regard to what counsel should have objected to, given that defendant has not asserted that the trial court required that he be dressed in a particular way. If defendant is alleging that counsel should have objected to defendant's insistence on wearing jail clothing, any error and subsequent prejudice would be the result of a misjudgment by defendant, not defense counsel. Indeed, the record shows that other clothes were available for defendant to wear that day.

If we presume that defense counsel failed to take any action to ensure that defendant was not dressed in jail clothing (a predicate fact not supported by the record), we can also presume that the decision not to act was based on counsel's trial strategy. Although the Supreme Court has recognized that jail clothing may prejudice a jury, it has also acknowledged that some defendants choose to wear prison garb in an attempt to win sympathy from the jury. *Estelle*, 425 US at 508.

As for defendant's argument that counsel should have moved to suppress Moore's identification, we point out that counsel argued the suppression motion filed by defendant at a pretrial hearing. Further, the record shows that the trial court properly admitted Moore's identification. As we stated, the record evidence does not suggest that a substantial likelihood exists that Moore misidentified defendant. *Colon*, 233 Mich App at 304-305. And, as we conclude in more detail below, defendant was not entitled to be represented at the time the photographic lineup was presented to Moore. *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004).

In any event, even if defense counsel had erred in any of the ways defendant contends he erred, defendant cannot demonstrate that he suffered sufficient prejudice to justify relief. Defendant must show a reasonable likelihood that if his counsel had not erred the result of the trial would have been different. *Carbin*, 463 Mich at 600. Given the overwhelming evidence adduced at trial, defendant simply cannot meet this burden. Two eyewitnesses identified him as the robber, and both had a clear view of his face during the robbery. Further, forensic professionals identified defendant's fingerprint on the threatening note passed by the perpetrator during the robbery.

Defendant also raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No.2004–6, Standard 4, none of which have merit.

In his Standard 4 brief, defendant submits that the trial court should have suppressed Moore's identification. "On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (internal citations omitted).

Defendant asserts that Moore's identification should have been suppressed because he was not represented by counsel at the photographic lineup. The Sixth Amendment of the United States Constitution guarantees a defendant the right to assistance of counsel at all "critical stages" of the criminal proceedings. *United States v Wade*, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). In *Kurylczyk*, the Michigan Supreme Court stated that "[i]n the case of photographic identifications, the right of counsel attaches with custody." *Kurylczyk*, 443 Mich at 302. The Court has since clarified that "the right to counsel attaches only at or after the initiation of adversarial judicial proceedings." *Hickman*, 470 Mich at 607. *Hickman* specifically involved corporeal lineups, but the Court clearly expressed its view that the right to representation should not be extended to any time prior to "the initiation of adversarial criminal proceedings." *Id*. at 603-604, 607. Therefore, the proper question in the current case is whether adversarial criminal proceedings began before the police conducted the photographic lineup. The record reflects that defendant was in custody in Wayne County at the time of the photographic lineup, but for reasons unrelated to this prosecution. The photographic lineup occurred in December 2008, and judicial proceedings in this case were not opened until February 12, 2009. Therefore, defendant was not entitled to be represented by counsel at the photographic lineup.

Defendant also argues in his Standard 4 brief that the trial court erred by refusing his request for new counsel on the first day of trial. An indigent criminal defendant may not choose his representation, but is entitled to substitute counsel if he can show adequate cause for replacing his original counsel. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). If the defendant requests substitute counsel because his appointed attorney is not performing adequately, "the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *Id*. at 441-442.

Defendant complains that the trial court should have granted his request because his attorney called him a "lying fool" in front of the judge. Counsel's comment came in response to defendant's assertion that counsel misrepresented to defendant that he had "put in" a motion or motions defendant wanted filed. In denying the request, the trial court stated, "Mr. Geeter, whether he did or he didn't, if he had put in the motions they would have all been denied anyway because there is no legal foundation for your argument." From the context of the discussion, it appears the motion defendant wanted "put in" was for disclosure of an unnamed informant. Although good cause for replacement of appointed counsel may be shown by a "legitimate difference of opinion" between defendant and counsel regarding a fundamental trial tactic, *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), defendant has not shown that this is the case with respect to the unidentified informant.

Defendant's argument before the trial court on why the alleged informant should be disclosed is as follows:

> Now, I have to address the Court because I said it was an informant here because the police sent my fingerprints along with the note to the crime lab. To well, their purpose was to get the note checked for prints to see whose prints were on it. So I was wondering how in the world would they know to send my name and prints along with the note to the crime lab when they haven't even checked it for prints, so someone had to tell them that my prints were on this note. How else

would they have known to send my prints before they even checked it for print? This is the informant that I want to know to be disclosed.

While counsel's remark was intemperate, defendant cannot show the requisite prejudice. The remark was not made in front of the jury. Moreover, as the trial court stated, "there is no legal foundation for your argument." Indeed, the argument is entirely speculative and based on invalid assumptions. We conclude that because defense counsel was performing adequately, the trial court was not required to appoint a new lawyer, particularly on the day trial was scheduled to begin. *Ginther*, 390 Mich at 441-442.

Defendant finally claims in his Standard 4 brief that the prosecution violated his due process rights by withholding information from its first discovery packet, and by the prosecutor suborning perjury. Defendant did not raise these arguments below, so our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The record does not reveal that the prosecution withheld any information from defendant. Moreover, defendant claims that he received the information on January 14, 2009, which is approximately a month before the beginning of the judicial proceedings. Furthermore, defendant cannot prevail on an alleged due process violation unless he shows that he was prejudiced by the error. *McGee*, 258 Mich App at 700. Because he received the information that was allegedly withheld before formal charges were filed against him, the fairness of his trial was not impacted.

The record does reveal an inconsistency in the testimony of two witnesses. Anita Zavala, the store manager of Advance America, testified that she gave a store surveillance video to Oak Park Police Department Detective Jason Ginopolis. However, Oak Park Police Department Officer Ryan Bolton testified that he received the video directly from Zavala. However, the inconsistency is not necessarily indicative of perjury. It appears from the testimony of Ginopolis that Zavala simply erred in her identification. Ginopolis testified on cross-examination that he first saw the video on November 3, 2008, not October 31, when he obtained it from the department's property room. He agreed with defense counsel's question that he had "nothing to do with the delivery of any of the evidence to the crime lab."

Further, defendant does not argue that this testimony was in any way important to the prosecution's case. The surveillance video itself did not lead to the identification of defendant. There is no reason to attribute this discrepancy to perjurious testimony. Further, defendant was not prejudiced in any way by this testimony, because he was identified by two eyewitnesses not implicated in this argument, as well as his fingerprint. And, defense counsel highlighted the discrepancy during his cross-examination of Ginopolis, and any benefit of the discrepancy would tend to help defendant.

Defendant also complains about an objection the prosecution made to questions about one of Ginopolis's reports. However, the prosecutor merely objected to the form of defendant's questions, because the report itself was not in evidence. Defense counsel responded "No

problem," to the objection, and questioned Ginopolis further about the report. This does not support defendant's claims of perjury.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio