

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 22, 2011

v

DAVID MAURICE HANEY,

Defendant-Appellant.

No. 297750
Wayne Circuit Court
LC No. 09-031112-FC

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and carjacking, MCL 750.529a. The trial court sentenced defendant as an habitual offender, fourth offense,¹ MCL 769.12, to concurrent prison term of 246 to 492 months for each conviction. Defendant appeals as of right. We affirm.

I. FACTS

The victim in this case drove her off-white Ford Crown Victoria to a Rite-Aid store in Detroit. After making her purchases and returning to her car, she noticed defendant walking beside the store. Defendant was wearing a dark-colored jacket that appeared to be a security jacket. As the victim was getting into her car, defendant came in between her and her open car door. Defendant pointed a gun at the victim and demanded her purse and her car keys. Defendant threatened to “blow [her] brains out if she did not comply. During this time, the victim was able to clearly see defendant’s face.

Defendant reached over the victim and started the car. Defendant ordered the victim to get out of the car and walk down a nearby alley. The victim ran behind the Rite Aid store. When she returned to the front of the store her car was gone. The victim had left all of her

¹ Although it is clear from the record that defendant was sentenced as an habitual offender, fourth offense, the judgment of sentence does not reflect that defendant was sentenced as an habitual offender.

belongings in the car, including her purse and her cell phone. The victim returned to the Rite Aid store and the police were called.

Following an interview with the victim during which the victim described defendant as a black male wearing a dark-colored security jacket, officers put the information received from the victim over the dispatch. Approximately 2 hours later, officers observed a Ford Crown Victoria that matched the plate and vehicle description of the carjacked vehicle given out by dispatch. Officers followed the vehicle for a couple of blocks and then activated the lights on the patrol car to perform a traffic stop. At that point, defendant jumped out of the Crown Victoria and began to speed walk in the opposite direction of the vehicle. An officer got out of the patrol car and chased defendant. As defendant fled, a weapon fell out of his waistband. The officer grabbed defendant, who was wearing a blue security jacket, and handcuffed him. Shortly thereafter, the officer recovered the weapon² that had fallen from defendant's waistband. A search of defendant's person revealed the victim's Metro PCS cell phone in defendant's pocket.

II

Defendant first argues that he was denied the right to confrontation and the right to present a defense by the trial court's restriction on the presentation and exploration of evidence in support of the defense theory. In particular, defendant argues that the trial court erroneously limited cross-examination of Investigator Jeffrey Jones regarding the use of the victim's credit cards after Jones answered that he had not investigated whether the victim's credit cards had been used. We disagree.

Because defendant did not preserve this issue, the Court's review of the purported denial of defendant's rights to confrontation, to present a defense, and to a fair trial is limited to whether defendant has shown a plain error affecting his substantial rights. *People v Steele*, 283 Mich App 472, 482; 769 NW2d 256 (2009); *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006); *People v McPherson*, 263 Mich App 124, 137-138; 687 NW2d 370 (2004). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The Court's review of the unpreserved evidentiary error is limited to whether defendant has demonstrated a plain error affecting his substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

The Confrontation Clause guarantees the defendant the right "to be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. However, the scope of cross-examination is within the discretion of the trial court. MRE 611(b); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Moreover, neither the Confrontation Clause nor due process grants a defendant an unlimited right to cross-examine a witness. *Canter*, 197 Mich App

² Michigan State Police lab reports identified the weapon as a nonfiring replica gun.

at 564. The court may exclude relevant examination if its probative value is substantially outweighed by its possibility of unfair prejudice, issue confusion, likelihood to mislead the jury, or simply waste time by undue delay. MRE 403. The court must exercise appropriate control over the mode and order of interrogating witnesses and presenting evidence. MRE 611(a); *People v Paduchoski*, 50 Mich App 434, 438; 213 NW2d 602 (1973). The court exercises such control so as to: “(1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” MRE 611(a); *Paduchoski*, 50 Mich App at 438.

The trial court did not commit plain error by limiting defense counsel’s cross-examination of Jones. The defense theory was that defendant was not the individual who robbed and carjacked the victim, and that the victim’s stolen Crown Victoria came into defendant’s hands during the approximately two hour period between the crime and the time defendant was found driving the vehicle. After defense counsel elicited testimony that Jones had not investigated whether the victim’s credit cards had been used by someone else, defense counsel attempted to question Jones about the reason why he chose not to investigate the use of the victim’s credit cards. At that point, the trial court disallowed any further questions by the defense about Jones’s lack of investigation into the credit card use, and ruled that defense counsel could make an argument during closing arguments about what such an investigation might have revealed.

The trial court did not deny defendant’s constitutional right to confrontation. The trial court allowed defendant to cross-examine Jones regarding the use of the victim’s credit cards. Once Jones answered he had not investigated whether the credit cards had been used, the defense had the necessary information to argue that Jones might have found the real perpetrator had he investigated into the possible use of the victim’s credit cards. As previously noted, the Confrontation Clause does not grant defendant an unlimited right to cross-examination. *Canter*, 197 Mich App at 564. The scope of cross-examination is within the discretion of the trial court, and cross-examination may be denied by the trial court with respect to collateral matters bearing on irrelevant issues. *Id.* Consequently, any further questioning of Jones about the use of the victim’s credit cards could certainly be considered irrelevant once Jones admitted that he had no knowledge about the use of the credit cards. The trial court afforded defendant sufficient latitude in confronting Jones when it allowed the question regarding Jones’s investigation into the use of the credit cards. Once Jones answered in the negative, any further questioning about the use of the credit cards was unnecessary. Any further questions in this regard would have resulted in speculative answers about what may have been found or what Jones may have done. Thus, the trial court did not deny defendant his right to confrontation.

Likewise, the trial court did not deny defendant’s constitutional right to present a defense. Once Jones testified that he had not investigated the use of the victim’s credit cards, defendant had sufficient information to argue the defense theory. Furthermore, the trial court allowed defendant to argue in closing argument what Jones might have found had he investigated into the use of the credit cards. The trial court did not deprive defendant of his right to present a defense.

Furthermore, because defendant’s rights to confrontation and to present a defense were not violated, defendant was not denied his right to a fair trial. The trial court has “wide discretion and power in matters of trial conduct.” *Conley*, 270 Mich App at 307. A trial court

denies a defendant's right to a fair trial if the actions of the court are "of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Id.* at 308. Because the trial court did not deprive defendant of his rights to confrontation or to present a defense, it cannot be said that the jury was unduly influenced. Thus, defendant was not denied his right to a fair trial.

Additionally, there was no evidentiary error committed by the trial court. The trial court allowed defendant to argue in closing argument what Jones might have found had he investigated into the use of the credit cards. However, defendant wanted to know *why* Jones had not investigated into the use of the credit cards. This information would be of no use to defendant's theory that the Crown Victoria came into defendant's hands after the carjacking and armed robbery took place. Any further questioning of Jones into the use and investigation of the credit cards would have been a needless consumption of time. Given the lack of investigation into the use of the credit cards, one cannot conclude that the trial court plainly erred in limiting further cross-examination of Jones regarding the use of the credit cards.

III

Defendant next argues that his constitutional right to the effective assistance of counsel was violated when defense counsel failed to request that the victim's in-court identification of defendant be suppressed. In particular, defendant argues that the victim's identification of defendant at the preliminary examination was unduly suggestive and, therefore, defense counsel should have argued that the in-court identification at trial was tainted and without an independent basis. We disagree. The determination of whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009). Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo. *Id.*

The two elements required for a defendant to prevail on a state or federal constitutional right to the effective assistance of counsel claim are: (1) the defendant must show that the defense attorney's representation fell below an objective standard of reasonableness, and (2) that this was so prejudicial to the defendant that the defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In regards to deficient performance, a defendant must overcome the strong presumption that the defense counsel's action constituted sound trial strategy under the circumstances. *Id.* To establish prejudice, "a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . .'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Furthermore, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, defense counsel's representation of defendant did not fall below an objective standard of reasonableness. Defendant argues that counsel was ineffective for failing to seek to suppress the victim's in-court identification of defendant. An identification procedure is evaluated in light of the totality of the circumstances, and is improper if it is "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Thus, an appellate court reviews whether a pretrial

identification was tainted “by examining the totality of the circumstances surrounding the challenged pretrial identification and determining whether those procedures were so impermissibly suggestive that they gave rise to a substantial likelihood of misidentification.” *People v Hampton*, 138 Mich App 235; 361 NW2d 3 (1984). The United States Supreme Court concluded that the test is whether the totality of the circumstances shows the identification to be reliable; the test is not simply whether the identification was suggestive. *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972).

This Court has concluded that preliminary examination identifications are not impermissibly suggestive under ordinary circumstances. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Such ordinary circumstances include an ample opportunity for the victim to observe the assailant, and the length of time between the commission of the crime and the preliminary examination. *Id.* In reviewing the existing record, defendant has not proven that defense counsel’s performance was deficient. The victim testified that she was able to clearly view defendant for 5 to 10 minutes during the commission of the crime, which afforded her an ample opportunity to view defendant. Moreover, defendant’s preliminary examination took place only 23 days after the crime took place. Because the preliminary examination identification was not unduly suggestive, there was no need to establish an independent basis for the in-court identification during trial, and there was no basis for defense counsel to seek to suppress the identification. *Id.* at 288. Trial counsel cannot be found ineffective for failing to bring a meritless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, defendant has not overcome the strong presumption that defense counsel’s action constituted sound trial strategy under the circumstances.

Additionally, even if there was an error on the part of defense counsel, any error was not prejudicial to defendant. Defendant was found in the victim’s stolen vehicle approximately two hours after the crime occurred and defendant had the victim’s cell phone in his pocket. Moreover, defendant was wearing the dark-colored security guard jacket that the victim had described to the police and that she identified during the trial, and a gun fell out of defendant’s wristband as Franklin approached defendant. Although the victim was unable to pick defendant out of a live lineup, Sergeant Johnell White testified that the victim was extremely nervous during the lineup and appeared to still be in the moment of the crime. Moreover, the information regarding the victim’s inability to pick defendant out of the live lineup was introduced at trial and heard by the jury. Under these circumstances, it cannot be said that defendant demonstrated a reasonable probability that, but for defense counsel’s errors, the result of the trial would have been different.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot