

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 14, 2012

v

DWAYNE SILCOX,

Defendant-Appellant.

No. 300126
Wayne Circuit Court
LC No. 10-005795-FH

Before: SERVITTO, P.J., and TALBOT and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, possession of marihuana, MCL 333.7403(2)(d), and possession of a firearm while committing a felony (felony-firearm), MCL 750.227b. The trial judge sentenced defendant to two years' probation for the felonious assault and possession of marihuana convictions, and two years' imprisonment for the felony-firearm conviction. He appeals of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TRIAL

On April 30, 2010, at around 5:00 or 6:00 p.m., a white male riding a Sportster motorcycle with custom headers pulled out a "black-on-black pistol," aimed it at the complainant, Adam Kelemen, and told him, "I'll f***ing kill you." Kelemen was getting ready to pull out of the Mobile gas station in the area of Powers Road and Pelham Road in Dearborn Heights, Michigan. Kelemen described the man as a white male with a leather jacket, leather vest, helmet and sunglasses. He stated that the suspect's face was "obscured by his helmet and his sunglasses." After threatening Kelemen, the suspect pulled out of the gas station, north on Pelham Road and went immediately west on Hanover Street.

Kelemen immediately located a police officer, Officer Shaun Pawlus. Kelemen described the incident to Officer Pawlus and told him the direction that the suspect had headed. According to Officer Pawlus, Kelemen flagged him down at approximately 6:00 p.m. Kelemen described the motorcycle to Officer Pawlus as a "Harley-type motorcycle." Officer Pawlus went west on Hanover Street and immediately saw a motorcycle parked in defendant's shared driveway. He looked down the street and did not see any other motorcycles. Kelemen identified the motorcycle from a distance as the one used in the incident. It was registered to defendant.

As Officer Pawlus approached the house, a car pulled up with defendant and a woman, defendant's girlfriend at the time, Debra Price. The house was divided into four apartments. Price lived in the same house as defendant but in a different apartment. Defendant and Price got out of the car. Defendant confirmed that he owned the motorcycle and that he lived in one of the apartments in the house. Defendant stated that a man in the house had keys to the motorcycle and a gun. Officer Pawlus entered defendant's apartment with defendant and Price. Price left to go to her own apartment. Once inside the apartment, defendant walked quickly away from Officer Pawlus, and "stuffed" a gun under a pile of clothes. Defendant had a concealed weapon permit, but had failed to advise the officer that he was carrying a weapon. Officer Pawlus secured the loaded gun and arrested defendant. As he was walking defendant out of the apartment, Officer Pawlus saw two bags of marijuana on the coffee table in the living room. Officer Pawlus testified that at some point after defendant was arrested, defendant said, "I f***ed up."

Kelemen identified defendant at the scene.

Price testified that defendant told her that he had, "done something very bad . . . he had pulled his gun out and told a guy that, '[i]f you don't move out my way, I was gonna shoot you' or 'kill you;' one of them."

Defendant testified that he rode his motorcycle to work that day. He had blisters on his hands and was barely able to make it home from work on the motorcycle. His doctor told him to go to the hospital. He got home from work at about 3:20 p.m. and chained up his motorcycle. He then took Price, in his car, to her hair appointment. The hair salon was approximately four or five blocks from his house. According to Price, her hair appointment was at 4:00 p.m. Defendant went to a store across the street and cashed his check and took out a money order. He went back across the street to the salon and paid the hairdresser. Defendant then went and paid some of his bills and met his friend, Michael Brown, for a burger and a beer. Before he could start eating and after a small amount of his beer, Price called him to take her home from the salon. As they pulled up to the house, defendant was approached by Officer Pawlus. Defendant did not realize that Officer Pawlus had followed him into his apartment. He took his gun off and placed it on his clothes hamper because he was going to escort Price upstairs to her apartment and she did not like to have weapons in her apartment. Officer Pawlus found Price's marijuana (for which she had a medical license to possess) on the table and arrested him. Officer Pawlus escorted him to the squad car. Defendant's friend's identical motorcycle was parked outside. Defendant's friend carries a .45. Officer Pawlus refused to investigate the second motorcycle.

Defense counsel called three alibi witnesses: Vincent Nova, the owner of the store across the street from the hair salon; Matthew Lakits, the hairdresser from the hair salon; and Debra Price. Nova laid the foundation for a document that showed that defendant purchased a money order from his store on April 30, 2010, at 3:53 p.m. Lakits testified that he had done Price's hair at the salon on April 30, 2010, and that defendant had dropped her off. However, he could not remember what time he saw Price and defendant. Price testified that on April 30, 2010, defendant picked her up and took her to her hair appointment, went across the street to the party store to get some money, and came back and paid for her hair appointment. After her hair appointment he took her back to their house.

The jury found defendant guilty of felonious assault, possession of marihuana, and felony-firearm. Defendant was sentenced to two years' probation for the felonious assault and possession of marihuana convictions, and two years' imprisonment for the felony-firearm conviction. Defendant was represented by a new attorney at sentencing. During sentencing, the trial judge urged defendant to file a motion for a new trial because she thought there was "some serious problems" with the defendant's trial counsel.

The day after sentencing, the trial judge heard defendant's motion requesting a bond pending appeal. Defendant's new attorney argued that the competency of defendant's trial counsel was questionable, that defendant did not have a previous criminal history, and that he had already filed an appeal to this Court. The court granted the motion because she believed that defendant had a "pretty good shot on possibly [sic] a motion for a new trial."

On September 8, 2010, defendant appealed to this Court. On April 4, 2011, defendant filed a motion with this Court to remand to the trial court, arguing that his trial counsel was ineffective because he did not impeach a witness on a material issue, did not challenge an unduly suggestive identification of defendant, did not move for a mistrial when a juror revealed that she had overheard a conversation between a witness and another woman, and refused to interview or investigate an alibi witness that defendant told him about at trial. We remanded to the trial court for a *Ginther*¹ hearing and retained jurisdiction. *People v Silcox*, unpublished order of the Court of Appeals, entered May 11, 2011 (Docket No. 300126).

B. GINTHER HEARING

On June 24, 2011, the trial court held a *Ginther* hearing. Defense counsel called defendant and defendant's trial counsel, Casey Ambrose. Ambrose admitted to charging defendant money for his legal services despite being appointed counsel, and making defendant sign the title to defendant's car over to him. Ambrose stated that he did not submit a bill to the county for his legal services; he was not paid twice for the trial. Ambrose did not advise defendant about the Wayne County Prosecutor's Office Gun Committee. He did not remember defendant mentioning an alleged alibi witness, Michael Brown. Ambrose admitted that he failed to appear at a court hearing because he mixed up the dates. He is 87 years old and has trouble hearing. Ambrose did not ask for a lineup to identify defendant at the preliminary examination and defendant was the only person in the courtroom (with the exception of the judge, lawyers and court staff) for Kelemen to identify. There was no reason to ask for a photo or live lineup at the preliminary examination because Kelemen had already identified defendant outside defendant's apartment on the day of the incident. Ambrose did not remember if he asked the juror any questions about her encounter with Price.

Defendant testified that Ambrose called him claiming to be a specialist in his type of case. Defendant paid Ambrose \$1,750 and signed a contract. Later, Ambrose made defendant sign over his car. Defendant told Ambrose about his alleged alibi witness, Michael Brown. Brown was at the bar with defendant having a burger. Ambrose never told defendant about the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Wayne County Prosecutor's Office Gun Committee. Ambrose failed to show up to the final pre-trial conference. On cross-examination, defendant went back and forth about whether he would have pled guilty in a plea bargain involving the Wayne County Prosecutor's Office Gun Committee. Defendant then testified that Michael Brown pulled up to defendant's house, after Officer Pawlus had put him in handcuffs, riding an identical Harley-Davidson to the one defendant owns.

The trial judge denied defendant's motion for a new trial. She reasoned that despite her misgivings about Ambrose's trouble hearing and that the case went to trial instead of being settled with the Wayne County Prosecutor's Office Gun Committee, she did not see a basis for a new trial. She stated that defendant claimed he was not guilty which forced trial counsel to take the case to trial. She also stated that defendant's story regarding his alleged alibi witness was "ridiculous."

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that he received ineffective assistance of counsel at trial. Ineffective assistance of counsel claims are mixed questions of law and fact. We review a trial court's findings of fact for clear error, and review the ultimate constitutional issue arising from the ineffective assistance of counsel claim de novo. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness; (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and, (3) the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A. FAILURE TO SEEK MISTRIAL

On the first day of trial, Price spoke to one of the jurors outside. Price asked the juror about her lunch and then told her that it looked good. The juror did not respond. The juror then overheard Price speaking to another woman (a potential witness, Marsha White) about testifying. The juror stated, "[t]he other woman asked her what questions they asked. And then she said, well – the other woman was saying, well, you've got to just tell the truth. If something like that happened to me, I would want, you know, the truth to be told; and such-and-such like that." The prosecutor stated that she did not believe that the conversation was prejudicial. Defense counsel stated only that he was "flabbergasted." The trial court then continued the trial. Defendant contends that trial counsel was ineffective because he failed to move for a mistrial or inquire whether the juror could remain fair and impartial after the juror overheard the prosecution's witness discussing her prior testimony. We disagree.

Trial counsel's failure to question the juror or move for a mistrial was not prejudicial. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant

and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). The witness spoke to the juror about her lunch. The juror did not respond. The juror then overheard a conversation between Price and a potential witness. Neither of these communications went to the substance of Price’s testimony. Although the juror did not inform the court of the exact wording of the entire conversation that she overheard, her statement, “such-and-such like that,” implies that the conversation continued along the same lines as before: telling the truth on the stand and what questions she was asked on the stand. Defense counsel was not obligated to make a meritless motion. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

B. FAILURE TO INVESTIGATE

Defendant argues that trial counsel failed to investigate defendant’s alibi witness, Michael Brown. This argument lacks merit. “A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

Defendant failed to produce an affidavit from Brown stating that he would testify as defendant claims, nor did defendant produce Brown at the *Ginther* hearing. In fact, at the *Ginther* hearing, defendant implied that Brown was the one that committed the crime. Defendant stated that Brown pulled up to his house on an identical Harley-Davidson a few minutes after he arrived home. Defendant would have a difficult time getting an alleged alibi witness to testify on his behalf if he was trying to shift the blame for the crime to this same witness. Furthermore, the trial judge did not believe defendant’s story about Brown and called it “ridiculous.” Counsel is not required to argue a meritless position. *Ericksen*, 288 Mich App at 201. Therefore, trial counsel was not ineffective for not investigating and producing the witness.

C. CROSS-EXAMINATION

Defendant next argues that trial counsel was ineffective because he did not know how to impeach Kelemen about what time the incident occurred. We disagree.

Defense counsel did not understand the procedure to impeach Kelemen with his testimony from the preliminary examination and continued to not understand the impeachment procedure for four transcript pages. Eventually, however, Kelemen admitted that at the preliminary hearing he testified that the incident occurred at 4:00 p.m., whereas at trial Kelemen claimed that the incident actually occurred at 6:00 p.m. Thus, while defense counsel’s initial questioning was somewhat inept, it was not prejudicial. Defense counsel eventually elicited the impeachment statement from the witness. The outcome of trial would not have been any different if trial counsel had been immediately effective with his impeachment.

D. FAILING TO OBJECT TO IDENTIFICATION TESTIMONY

Finally, defendant argues that his trial counsel was ineffective because he failed to challenge the unduly suggestive identification of defendant and failed to request a photo or live lineup. We disagree.

A defendant has a right to a lineup “when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve.” *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000).

Kelemen identified defendant at defendant’s house after defendant was placed in handcuffs. Kelemen identified defendant from down the street and admitted that the suspect’s face was partially obstructed by sunglasses and helmet during the incident. Kelemen’s second identification occurred at the preliminary examination where only the judge, the lawyers and the court staff were present. However, had trial counsel asked for a live lineup or objected to an overly suggestive identification procedure, it would not have made a difference in the outcome of the trial. Kelemen identified defendant’s motorcycle. Price testified that defendant admitted to her that he had committed the assault and Officer Pawlus testified that defendant admitted to “f***ing up” after he was arrested. This testimony was enough to identify defendant as the man who committed the crime. Therefore trial counsel’s failure to object or ask for a live or photo lineup was not prejudicial.

III. UNDULY SUGGESTIVE IDENTIFICATION

The police did not conduct a live lineup or a photo lineup. Kelemen identified defendant at the preliminary examination. Defendant argues that this type of identification was unduly suggestive and violated defendant’s due process rights. We disagree. Defendant did not move to suppress the identification evidence at the preliminary examination or in a motion to suppress. See *People v Genter, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004). We review unpreserved evidentiary issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In order to establish that an identification was unduly suggestive:

[t]he defendant must show that in light of the totality of circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. Simply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective. [*People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).]

The factors to determine if there is a likelihood of misidentification include: the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

Kelemen identified defendant at his apartment a short time after the crime occurred. Kelemen also identified the motorcycle which had distinctive custom headers on it. Price and Officer Pawlus testified that defendant admitted guilt or culpability. This evidence is enough to show that even without Kelemen’s identification of defendant at the preliminary examination,

there was enough evidence to identify defendant as the man that pulled the gun on Kelemen. Even if Kelemen's identification of defendant was unduly suggestive because there was a high likelihood of misidentification, any error in the identification was not prejudicial.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly