

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 29, 2013

v

JERMAINE MAURICE STARKS,  
Defendant-Appellant.

No. 307105  
Wayne Circuit Court  
LC No. 11-001403-FC

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Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of three counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of 7 to 15 years for the armed robbery convictions and a consecutive term of two years for the felony-firearm conviction. We affirm.

I. PHOTOGRAPHIC ARRAY

On appeal, defendant argues that the identification procedure enabling two of the victims to identify him from a photographic array was unduly suggestive. Therefore, he contends, the identification evidence should have been suppressed. We disagree.

We review a trial court's findings of fact at a suppression hearing for clear error and review de novo its conclusions of law and ultimate ruling regarding a motion to suppress. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). Preserved constitutional errors do not constitute grounds for reversal as long as they are harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

According to defendant, the photographic array was unduly suggestive because the police told the two victims that the men who had robbed them were in custody before they were shown the photographs. Defendant also contends that the array, itself, was unduly suggestive because he is the only one looking down and not wearing a black shirt in his photograph. The trial court denied defendant's motion to suppress and found that a full evidentiary hearing was unnecessary because there was no factual support for defendant's claims.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). “The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). When evaluating the totality of the circumstances, the relevant factors include the opportunity for the witness to see the criminal at the time of the crime, the witness’s degree of attention, the accuracy of a witness’s prior description, the witness’s level of certainty at the pretrial identification procedure, and the length of time between the crime and the identification. *People v Kurylczuk*, 443 Mich 289, 306; 505 NW2d 528 (1993) (GRIFFIN, J.). Physical differences among those participating in an identification procedure usually apply to the weight of the identification, not its admissibility, and “are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.” *Hornsby*, 251 Mich App at 466.

We find nothing in the identification procedure to support defendant’s claim of undue suggestiveness. The photographs revealed no discrepancy among the participants so glaringly apparent as to form a basis for the exclusion of the identification evidence. All the photographs show young, black males of varying complexions with short, dark hair. While it is true that defendant is the only one looking down, another participant is the only one looking to the side. Although defendant’s shirt appears lighter in color than those of the other five participants, the photographs are headshots and show minimal clothing. Defendant’s shirt, like the shirts of at least two other participants in the photographic array, is barely visible. In addition, defendant was described as wearing black or dark clothing at the time of the robbery and defendant is not the only participant with a distinction in shirt color. Another participant is pictured with a portion of a white undershirt below his black shirt. Although the participants did not completely mirror each other, there is nothing that significantly distinguishes defendant from the other participants when they are all viewed together. Accordingly, defendant has shown no error in the trial court’s denial of his motion to suppress based on the ground that he was improperly distinguishable from the others in the photographic array.

While never asserted or addressed below, defendant also claims that the photographic array was unduly suggestive because the police told the two victims before the photographic array that the gunman was in custody. Improper suggestion may occur when a witness is told or believes that the police have apprehended the right person or the witness is shown just one person or a group in which one person is singled out. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). However, “the fact a victim is told the attacker is in the lineup does not alone render a lineup unduly suggestive.” *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

On cross-examination at the preliminary hearing, one of the victims, Donte Young, confirmed that before he viewed the photographic array, the police told him that they had found the person who committed the robbery. However, the police did not tell him that the suspect was in the photographs they were showing him. Another victim, Jalen Smith, had been told by police that they had arrested one of the robbers. Thus, it is true that both Young and Smith had been informed by the police that they had a suspect before viewing the photographic array. While this pre-array announcement that the robber had been apprehended may have permitted some level of suggestion in Young’s and Smith’s identifications of defendant, remand is not warranted.

Both Young and Smith independently identified defendant from the photographic array. There was no hesitation in the victims' identifications. There was a six-person photographic array on which Young circled defendant's picture and wrote below it, "Subject number four was the person who robbed us at gunpoint on Kelly and Old [H]omestead. He was the one with the gun[.]" Smith also circled defendant's picture and wrote, "Number 4 was the one who robbed us with the gun." Young and Smith got a good look at defendant because he was standing nearby, nothing was obstructing or covering his face, and there was lighting in the area. At trial, both witnesses were positive that defendant was the one who robbed them. On the same night as the robbery, Young and Smith gave similar, detailed descriptions of defendant to the police. At trial, the court found it particularly noteworthy that, in Young's description of defendant to police on the night of the robbery, he said that defendant had "acne or facial hair." The trial court took notice that, indeed, defendant had the distinguishing characteristic of acne on his face. It is also significant that the timing between the crime and the identification was only one day. Under the totality of the circumstances, combined with the victims' certainty of their identifications, the trial court did not err by denying defendant's motion to suppress the identification evidence.

## II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his trial counsel rendered ineffective assistance of counsel by (1) failing to ardently argue for suppression of the photographic identification evidence, (2) failing to call an expert witness in the field of eyewitness identification, (3) failing to ask defendant about the validity of a statement made by the officer in charge, and (4) failing to move for judicial disqualification and permitting waiver of a jury trial.<sup>1</sup> We disagree.

Because no *Ginther*<sup>2</sup> hearing was conducted, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "[T]his Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id.*

There is a presumption of effective counsel, and the defendant has the burden of proving otherwise. *Id.* To succeed on a claim of ineffective assistance of counsel, the defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). The defendant bears

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<sup>1</sup> Defendant also claims that trial counsel was ineffective for failing to call his accomplice as a witness. Defendant has asserted this claim in his statement of facts alone, and has offered as support for this claim only his own unsigned and undated affidavit. Therefore, we will not address this argument on appeal. See MCR 7.212(C)(5) and (7); *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the burden of overcoming a strong presumption that counsel's performance constituted sound trial strategy. See *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not second-guess matters of trial strategy nor will it use the benefit of hindsight when determining counsel's competence. *Id.*

First, defendant claims that his trial counsel was ineffective because she failed to move for an evidentiary hearing and did not ardently argue for the suppression of the photographic identifications. Defendant's trial counsel was not ineffective because she did, in fact, move to suppress the photographic identifications of defendant and argued that position before the trial court. Although she did not include as a ground that the police informed Young and Smith that the robbers were in custody, defense counsel moved for suppression based on the suggestiveness of the photographic array and the resulting misidentification of defendant. Both defense counsel's brief in support of the motion and her argument at the hearing are short; nevertheless, they appear sufficient to raise and explain the issue. Indeed, the trial court noted that the motion was "[v]ery well put together," and it ruled on the merits of the motion in deciding that an evidentiary hearing was unnecessary. Accordingly, defendant has failed to overcome the presumption that his trial counsel's representation was effective on this ground.

Second, defendant contends that his trial counsel was ineffective for not producing an expert witness in the field of eyewitness identification. Defendant asserts that an expert witness was crucial since the only evidence against him consisted of the victims' eyewitness identifications.

Defendant has made no offer of proof regarding the substance of the evidence an expert witness in eyewitness identification could offer. A defendant cannot establish his claim of ineffective assistance of counsel using speculation that an expert would have testified favorably. *People v Payne*, 285 Mich App 181, 190; 744 NW2d 714 (2009). Moreover, defendant has failed to overcome the presumption that his counsel's decision not to call an expert witness was trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). In addressing matters that require expert testimony, our Supreme Court recently stated that "questions of eyewitness identification, fading memories, witnesses' body language, and the like involve obvious human behavior from which jurors can make 'commonsense credibility determinations.'" *People v Kowalski*, 492 Mich 106, 143; 821 NW2d 14 (2012). Accordingly, trial counsel's strategy was not improper.

Furthermore, any error in failing to call an expert witness was harmless. This was a bench trial where the judge is presumed to have a greater understanding of the law and to rule based on the law rather than emotion. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). In particular, the judge, sitting as the trier of fact, determines the reliability of witnesses. *People v Kanaan*, 278 Mich App 594, 621; 751 NW2d 57 (2008). Given that the victims had the opportunity to view defendant during the robbery and shortly afterward, all three victims gave similar descriptions of defendant, and two victims independently identified defendant as the gunman from a photographic array, it is unlikely that expert testimony in this area would have changed the outcome of the trial.

Third, defendant claims that trial counsel was ineffective for not asking him about the validity of a statement made by the officer in charge. During trial, the officer in charge was

called as a rebuttal witness and was questioned about whether he knew that officers from his department had talked to defendant at a certain time. The officer said, “Oh, are you talking about when he shot his father?” Defense counsel responded, “I don’t know about him shooting his father, but I’m asking you.” Then, the officer admitted that he was “aware” of the interview. Defendant contends that trial counsel should have recalled him and questioned him to elicit testimony that he had not shot his father.

Whether trial counsel should have elicited further testimony on this issue was a matter of trial strategy. Moreover, “[a] judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial.” *Taylor*, 245 Mich App 305, quoting *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). The trial judge is presumed to have known that any evidence of other acts by defendant could not be admitted to prove defendant’s character or criminal propensity. MRE 404(b). In addition, there is nothing on the record to indicate that the trial court relied on this information in deciding defendant’s case. It was not the alleged shooting of his father that affected defendant’s credibility with the trial court. Rather the court found that, among other inconsistencies in his testimony, defendant’s admission to lying to the police in a previous encounter belied his credibility. Because the trial court’s decision was not affected by the disputed testimony, defendant has not shown that any error affected the outcome of the proceedings. We perceive no ineffective assistance of counsel in this regard.

Fourth, defendant argues that trial counsel was ineffective for failing to move to disqualify the trial judge because the judge knew that defendant had another pending case and that defendant had been implicated by his accomplice. Rather than requesting judicial disqualification, defense counsel advised defendant to waive his right to a jury trial and seek a bench trial.

The record indicates that the judge had knowledge of two pending charges against defendant for home invasion and some knowledge of the proceeding against defendant’s accomplice. However, the full extent of that knowledge is not apparent. At a pretrial motion hearing, trial counsel advised the court that defendant’s accomplice had implicated defendant in the confession he gave to the police. At the same hearing, it was stated on the record that defendant had two pending cases for home invasion wherein defendant’s fingerprints were found at the scenes. After granting defendant’s request for new appointed counsel and before trial, the judge asked defendant if he was satisfied with his replacement counsel’s services. Defendant replied in the affirmative. Immediately thereafter, defendant entered a voluntary and knowing waiver of his right to a jury trial. At no time did defendant offer an objection in the trial court based on judicial bias or prejudice.

As noted, a trial judge is presumed to know the law. *Taylor*, 245 Mich App at 305. “Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel.” *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). It is presumed that the trial court knew that any other-acts evidence contained in the accomplice’s statement was inadmissible to prove the defendant’s character or criminal propensity. MRE 404(b).

It was not unreasonable for defense counsel to rely on the trial judge's presumed understanding of the law and knowledge of the differences between admissible and inadmissible evidence to decide that a motion for disqualification was not necessary. Further, the record provides no basis for determining that the trial judge's verdict was influenced by improper considerations. When the judge made his findings of fact, he did not mention the home invasion charges or the accomplice's implication of defendant. Rather, the judge considered the credibility of the three victims and how consistently they testified. The trial judge found that "the details all matched up in each of their testimony," and "[t]heir descriptions are consistent." He further found that their testimony was corroborated by another witness. Defendant has not established that he was prejudiced by trial counsel's failure to file a motion for disqualification. Accordingly, this ineffective assistance of counsel claim is without merit.

On all grounds, defendant has failed to overcome the presumption of effective counsel. Thus, we conclude that he is not entitled to a new trial on this ground.

Affirmed.

/s/ Michael J. Talbot  
/s/ Kathleen Jansen  
/s/ Patrick M. Meter