STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 308027 Oakland Circuit Court
DEMARCUS QUAMAINE CURRY, Defendant-Appellant.	LC No. 2011-238509-FC

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 30 to 80 years for the armed robbery conviction, 12 to 80 years for the AWIGBH conviction, and 6 to 80 years for the felon-in-possession conviction. He was also sentenced to consecutive five-year prison terms for the felony-firearm convictions. We affirm.

Defendant's convictions arise from the robbery and nonfatal shooting of Fred Fink outside an apartment complex in Pontiac, Michigan. The prosecution presented the testimony of Fink, a self-described Vicodin addict, who had arranged over the telephone to purchase Vicodin from a man named "Jesse." Fink later identified defendant as "Jesse." On September 7, 2011, after exchanging some telephone calls, defendant told Fink to meet him at the Newman Apartments in Pontiac to complete the transaction. A friend drove Fink from his residence in Rochester, Michigan, to the Newman Apartments. When Fink arrived, defendant was standing on the sidewalk. After greeting one another, defendant told Fink to follow him to the back of the apartments to complete the transaction. As they walked, defendant shook something in his pocket that sounded like pills in a bottle. While the men were between two buildings, defendant stopped, brandished a firearm, and demanded Fink's money. When Fink refused, defendant shot him in the leg twice. Fink then reached for the gun and defendant shot him in the leg a third time. Fink tried to run, but he fell to the ground and defendant demanded that Fink give him the "money or else." Fink gave defendant his money, and defendant fled. Two independent witnesses, who heard gunshots and observed defendant fleeing the area, directed the police to an apartment that belonged to defendant's girlfriend. An undercover police officer who was

conducting surveillance on an unrelated case observed defendant enter the apartment. Defendant barricaded himself in the apartment before eventually surrendering. A firearm was recovered from the bushes outside the apartment's sliding door. Witnesses linked defendant to the firearm, and clothing consistent with the witnesses' description of the perpetrator was found inside the apartment where defendant was apprehended. The defense argued misidentification and attacked the credibility of the trial witnesses.

I. SUGGESTIVE PRETRIAL IDENTIFICATION

Defendant first argues that Fink's identification testimony was tainted by an impermissibly suggestive photographic lineup, which consisted of a single photograph of defendant. He contends that the trial court erred by denying his pretrial motion to suppress the identification testimony. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

Although defendant correctly asserts that photographic identifications generally should not be used where the accused is already in custody, see *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995), the record discloses that defendant was not in custody at the time of Fink's identification. Rather, according to the detective's report on which defendant relied in support of his motion to suppress, shortly after Fink was shot, defendant had barricaded himself inside an apartment and Fink's identification assisted law enforcement in determining whether they were "entering the right house." Thus, defendant was not in custody at the time of the photographic identification.

Photographic identification procedures can violate a defendant's due process rights if they are so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An improper suggestion may arise when a witness is shown only one person because the witness is tempted to presume that the photograph is of the assailant. *Id.* In this case, Fink was shown one photo. This alone might have been impermissibly suggestive. However, the inquiry does not end there. Even if a pretrial identification procedure is unduly suggestive, suppression of the witness's identification testimony is not required when there is an independent basis for the identification. *Id.* at 114-115. The independent basis inquiry requires a factual analysis, and the validity of a witness's in-court identification must be viewed in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *Id*. The following factors are considered in determining whether an independent basis exists for the admission of an in-court identification:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state;

and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

It is not necessary that all factors be given equal weight. *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977).

Even assuming that it was impermissibly suggestive to show Fink a photograph of only one person, there was a sufficient independent basis to support the admission of Fink's in-court identification of defendant. Although Fink did not have a prior relationship with defendant, he had a substantial opportunity to observe him from a close distance. When Fink arrived at the meeting place, he observed defendant standing on the sidewalk. It was early afternoon and "broad daylight." Fink explained that he "walked right up to" defendant and they had a face-to-face conversation. Defendant confirmed that he was the person to whom Fink had spoken on the phone earlier that day. According to Fink, he could clearly see defendant's face, there was nothing between him and defendant, and nothing covered defendant's face. Fink explained that after following defendant from the sidewalk to the area between the buildings, they "were [again] right together face to face," and close enough to shake hands. In addition to being able to clearly observe defendant's face, Fink was able to describe defendant's height, weight, and wardrobe. Although the detective that interviewed Fink did not note that Fink mentioned a noticeable scar on defendant's face, Fink recalled that he mentioned defendant's scar to someone. In addition, Fink identified defendant within hours of the offense; he testified that he could hear and see clearly and had a clear state of mind. Fink testified that he was certain of his identification of defendant, and he had never identified anyone other than defendant as the assailant. Considering Fink's substantial opportunity to observe defendant and the totality of the circumstances, we conclude that there was a sufficient independent basis for Fink's identification.

II. OTHER-ACTS EVIDENCE

Defendant next argues that the trial court abused its discretion by admitting (1) an officer's testimony explaining why the police were outside the apartment looking for defendant, and (2) evidence of defendant's prior possession of the firearm used in the charged shooting. We review for an abuse of discretion the trial court's decision to admit evidence. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id.* (citation omitted).

A. THE CHALLENGED TESTIMONY

Taiwan Pritchett testified that on September 1, 2011, he and defendant were in Pontiac when defendant gave him a black handgun to carry. Pritchett and defendant then went to Auburn Hills, after which they returned to Pontiac and went to defendant's brother's house where Pritchett returned the gun to defendant. Pritchett turned himself in on September 6, and last saw the gun on September 1. Pritchett identified the gun that was seized from outside the apartment where defendant was apprehended as the same gun that defendant gave to him on September 1. Pritchett had also observed defendant with the same gun before September 1.

A Special Investigation Unit (SIU) officer testified that shortly after an armed robbery at a Motel 6 on September 1, he was asked to watch for defendant and Pritchett. On September 7, his team was conducting undercover surveillance outside the apartment of defendant's girlfriend. The officer heard gunshots and observed defendant come from the area where Fink was shot and enter his girlfriend's apartment.

B. ANALYSIS

Defendant challenges the admissibility of the officer's testimony under MRE 404(b). However, res gestae evidence constitutes an exception to MRE 404(b). *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). Evidence of a defendant's other acts that are blended or connected to the crime for which the defendant is charged is generally admissible to explain the circumstances of the crime charged so that the jury can hear the "complete story." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). MRE 404(b) does not preclude the admission of evidence intended to give the jury an intelligible presentation of the full context in which disputed events occur. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

In this case, the officer's testimony that a robbery occurred less than a week before the charged offense gave context to the SIU officer's presence outside the apartment. The evidence explained why, on the day of the shooting, the police were situated outside the apartment, which placed the officer in a position to observe defendant as he came from the area of the shooting. It also explained why the undercover officer was able to identify defendant. There was no other evidence of record tending to explain why the officer was in the area looking for defendant. The evidence was admissible as part of the res gestae of the charged offenses, independent of MRE 404(b), and the trial court did not abuse its discretion by admitting it.

Likewise, Pritchett's testimony was admissible as direct evidence linking defendant to the gun seized outside the apartment, independent of MRE 404(b). A defendant's possession of a weapon of the kind used in a charged offense is "direct, relevant evidence of his commission of that offense," and is admissible under MRE 401, without reference to MRE 404(b). *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). The fact that a defendant's prior gun possession may also reveal a separate act, wrong, or crime does not bring the evidence within MRE 404(b). *Hall*, 433 Mich at 580-583. Pritchett's testimony was admissible to link defendant to the handgun recovered from the bushes outside the apartment where defendant was arrested. Pritchett's testimony that defendant possessed the same firearm six days earlier made it more probable that the handgun found immediately outside the apartment was the gun that defendant used to shoot Fink. See MRE 401. The evidence "logically linked" defendant to the charged offenses, *People v Murphy (On Remand)*, 282 Mich App 571, 581-582; 766 NW2d 303 (2009), and made his participation in the crime more probable than it would have been without the evidence, *Hall*, 433 Mich at 580-581.

In addition, the evidence was not unduly prejudicial under MRE 403. The probative value of Pritchett's testimony was high because defendant's possession of the handgun was a critical issue. Moreover, the prosecutor focused on the proper purposes for which the evidence was relevant and admissible, and the trial court gave a cautionary instruction to the jury concerning the limited use of the evidence, thereby limiting any potential for unfair prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581

NW2d 229 (1998). The probative value of the evidence was not substantially outweighed by the risk of unfair prejudice, and the trial court did not abuse its discretion by admitting Pritchett's testimony.

III. OFFENSE VARIABLES 8 AND 10

Defendant argues that he is entitled to resentencing because the trial court erroneously scored offense variables (OVs) 8 and 10. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

A. OV 8

"Offense variable 8 is victim asportation or captivity." MCL 777.38(1). Fifteen points may be assessed for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger . . . ." MCL 777.38(1)(a). Although the term "asportation" is not defined by statute, this Court has determined that there must be some movement of the victim but "there is no requirement that the movement itself be forcible. Rather, the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Thus, the movement of a victim to a place of greater danger, even if voluntary and willing, constitutes conduct that falls within OV 8. *Id.* at 647-648. Among other things, a victim has been moved to a "place of greater danger" when the victim is moved to a location where he is secreted from observation by others or where others are less likely to see the defendant commit the crime. *Id.* at 648.

In this case, defendant directed Fink to meet him at the apartment complex in Pontiac. After Fink arrived at the location, he and defendant briefly conversed on the sidewalk, a seemingly public area, and defendant told Fink to follow him to the rear of the complex to complete the drug transaction. Defendant led Fink from the sidewalk to an area between two buildings, which provided defendant with the opportunity to execute the robbery in a place less visible to witnesses. Although defendant asserts that he was not directly responsible for moving Fink, the term "asportation" as used in MCL 777.38(1)(a) does not require that the movement be forcible; rather, it "can be accomplished without the employment of force against the victim." *Spanke*, 254 Mich App at 647. The trial court did not err by assessing 15 points for OV 8.

B. OV 10

Under MCL 777.40(1)(a), 15 points may be assessed for OV 10 if "[p]redatory conduct was involved." "Predatory conduct" means "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). It encompasses only "those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape

without detection.'" *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (citation omitted). In determining whether a defendant engaged in predatory conduct, trial courts should consider: (1) whether the defendant engaged in conduct before committing the offense, (2) whether the defendant directed that conduct toward "one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation," and (3) whether the defendant's primary purpose in engaging in the preoffense conduct was victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

The record evidence establishes that defendant engaged in preoffense conduct directed at a particular victim for the purpose of victimization, i.e., to rob the victim. Defendant, using a false name, initiated telephone calls to Fink, a self-described Vicodin addict, and arranged to sell Vicodin pills. Using the bogus verbal agreement, defendant lured Fink from Rochester to Pontiac to complete the transaction. Once in Pontiac, defendant shook something that sounded like pills in a bottle to cause Fink to further believe that defendant was in possession of the drugs. Fink followed defendant to the more isolated location where defendant committed the robbery. In light of this evidence, the trial court did not clearly err by finding that defendant engaged in predatory conduct against a vulnerable victim within the meaning of OV 10. The court properly assessed 15 points for OV 10.

IV. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant raises additional issues in a supplemental brief filed *in propria persona*. Specifically, defendant argues that prosecutorial misconduct denied him a fair trial and that he was denied the effective assistance of counsel.

A. THE PROSECUTOR'S CONDUCT

Because defendant did not object to the prosecutor's conduct at trial, his claims of prosecutorial misconduct are unpreserved and our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). We will not reverse if the allegedly prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

1. DEFENDANT'S POSSESSION OF HIS GIRLFRIEND'S CELL PHONE

We find no merit in defendant's arguments that the prosecutor made representations of fact, unsupported by the evidence, that he was in possession of his girlfriend's cell phone when he was arrested, or that the prosecutor impermissibly argued that he used that phone to call Fink. Defendant correctly asserts that a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, however, the parties stipulated that the phone possessed by defendant when he was apprehended was his girlfriend's phone. A detective also testified that Fink's cell phone record logged three incoming calls from the phone number belonging to defendant's girlfriend. Because the prosecutor's statements were supported by the evidence, the prosecutor did not engage in misconduct. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

2. PROSECUTOR "TESTIMONY"

Defendant next argues that the prosecutor improperly "testif[ed]" by answering a question for a witness, which led to the witness answering the question dishonestly. This claim of error is based on the following exchange that occurred during defense counsel's cross-examination of a fingerprint analyst regarding the failure to perform gunshot residue testing on defendant and his clothing:

> *Defense counsel:* Okay. And so this wouldn't have been something for you to do but it perhaps could have been done by some other person in the Sheriff's Department Crime Lab?
>
> * * *
>
> *The prosecutor:* Your Honor, it's outside of her expertise, number one; number two, the Sheriff's Office and the State Police, there's not an agency in Michigan that does that type of testing for a variety of reasons.
>
> *Defense counsel:* Is that testimony?
>
> *The court:* I was going to ask are you testifying.
>
> *The prosecutor:* Part of my objection is that she doesn't have the foundation—
>
> *The court:* Well, the question is, are there people in the Sheriff's Department who do gunshot residue testing.

It is apparent that the prosecutor was not attempting to testify during this exchange, but rather to make a legitimate objection to defense counsel's attempt to question a fingerprint analyst about gunshot residue testing, an area beyond her field of expertise. Furthermore, defendant did not request a curative instruction with regard to the prosecutor's statement. The witness thereafter testified that the crime lab does not do gunshot residue testing on live human beings, but she did not know whether testing was conducted on the clothing items. This testimony diminished the significance of the prosecutor's statement. Additionally, in its final instructions, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the properly admitted evidence, and that the jury was to follow the court's instructions. These instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

3. HABITUAL OFFENDER NOTICE

Defendant next argues that he was improperly sentenced as an habitual offender because the prosecutor failed to timely file the habitual offender notice and a written proof of service under MCL 769.13. The record does not support defendant's argument. Moreover, the failure to file proof of notice may be harmless where the defendant did in fact timely receive actual notice of the sentence enhancement. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999). The purpose of MCL 769.13 is to ensure that a defendant receives notice at an early

stage in the proceedings that he could be sentenced as an habitual offender. *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000).

The lower court docket entries show that defendant was arraigned in court on October 5, 2011, and a notice of intent to seek enhancement of defendant's sentence as a fourth habitual offender was filed at that time. Thus, the record indicates that defendant timely received actual notice of the sentence enhancement, although no written proof of service for the notice appears in the file. Further, at the sentencing hearing, neither defense counsel nor defendant gave any indication that they were surprised by the enhancement or made any mention of a lack of notice. Indeed, at the beginning of the sentencing proceeding, defense counsel noted a correction in defendant's criminal history, but noted that "the habitual 4th is correct." Because the record indicates that a notice of intent to seek sentence enhancement was timely filed more than two months before trial, there is no indication that defendant was unaware of the notice, and defense counsel acknowledged that defendant's fourth habitual offender status was correct, we perceive no plain error.

4. LACK OF TIMELY NOTICE OF TAIWAN PRITCHETT

Defendant next argues that the prosecutor failed to provide proper notice of his intent to call Taiwan Pritchett as a witness. Not less than 30 days before the trial, the prosecutor shall provide a list of all witnesses he intends to produce at trial, but may add or delete witnesses upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(3) and (4). The purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. *See People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). But even if MCL 767.40a is violated, a defendant must show prejudice from the violation. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994).

Defendant acknowledges that on November 30, 2011, eight days before trial, the prosecutor filed a notice of intent to admit evidence that defendant committed another armed robbery with Pritchett. The trial court allowed the prosecution to present the res gestae evidence, which included testimony from Pritchett. The prosecutor attached a witness list to the first amended information filed on December 1, 2011, and the second amended information filed on December 6, 2011. In each instance, Pritchett was identified as a witness that the prosecution intended to call at trial. On the first day of trial, December 8, 2011, the prosecutor stated on the record that the defense had received notice of Pritchett. Defense counsel did not dispute this statement. We find no basis to conclude that the prosecutor acted improperly or that defendant was unfairly prejudiced by Pritchett's status as a witness.

5. PRESENTING PERJURED TESTIMONY

Defendant also argues that the prosecutor engaged in misconduct by knowingly allowing Jessica Smith to present perjured testimony at trial. A prosecutor must inform the trial court and a criminal defendant when a government witness offers perjured testimony. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). A prosecutor may not knowingly use false testimony to obtain a conviction, and must correct false evidence when it is presented. *Id.* at 277. But absent proof that the prosecutor knew that trial testimony was false, reversal is not warranted. See *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001).

Smith, a resident of the apartment complex, was one of two witnesses who testified that, after hearing gunshots, she observed defendant leaving the area. Defendant's claim that Smith presented false testimony is based solely on alleged inconsistencies between Smith's trial testimony and her prior written statement to the police. Although defendant emphasizes that Smith's prior statement did not identify defendant by name, Smith explained at trial that she verbally informed the police of defendant's identity that day and told them where defendant's girlfriend lived. Perjury consists of a willful false statement made under oath. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The mere existence of conflicting statements is insufficient to establish that the prosecutor knowingly permitted false testimony. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Here, the alleged inconsistencies were disclosed to the jury. *Id*. It was for the jury to determine whether Smith's trial testimony, including her identification of defendant, was credible. *Davis*, 241 Mich App at 700. The prosecutor did not knowingly present false testimony.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Our review of this unpreserved issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, a defendant must overcome the strong presumption that counsel's performance was sound trial strategy. Second, a defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceedings would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

1. FOURTEEN-DAY RULE VIOLATION

We reject defendant's argument that defense counsel was ineffective for failing to move for dismissal because his preliminary examination was not held within 14 days of the district court arraignment, contrary to MCL 766.4. The lower court record indicates that the preliminary examination was originally scheduled for September 15, 2011, but that "defendant waive[d] 14 days" and the preliminary examination was rescheduled for September 28, 2011. Because the 14-day requirement was waived, any motion to dismiss would have been futile.

2. FAILURE TO REQUEST A CORPOREAL LINEUP

Defendant further argues that defense counsel was ineffective for failing to request a corporeal lineup before Fink's in-court identification. "A right to a lineup arises 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).

In this case, although identification was a material issue, there is no basis for concluding that a corporeal lineup would have resolved any mistaken identification. Indeed, it is likely that a live lineup would have only strengthened the credibility of Fink's pretrial identification, which

was already bolstered by strong physical evidence. The record discloses that Fink had a substantial opportunity to observe defendant from a close distance under favorable conditions. Defense counsel could have reasonably determined that holding a live lineup would be injurious to the defense. Defense counsel's decision not to request a corporeal lineup, and to instead focus on suppressing Fink's pretrial identification, was not objectively unreasonable.

3. FAILURE TO ADEQUATELY IMPEACH FINK

Defendant argues that defense counsel should have attacked Fink's credibility when Fink testified that he looked at six photographs before identifying defendant, even though he had viewed only one. Decisions regarding how to impeach witnesses are matters of trial strategy. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The record discloses that defense counsel did use Fink's testimony that he viewed six photos to attack his credibility. After Fink testified, counsel elicited other evidence that Fink had actually been shown only one photograph, and then used that discrepancy to attack Fink's credibility during closing argument. Defendant does not indicate what other questions counsel could have asked to further undermine Fink's credibility. The record does not support defendant's claim that defense counsel was ineffective for failing to further impeach Fink's credibility.

4. FAILURE TO CALL AN EXPERT ON EYEWITNESS IDENTIFICATION

Defendant has not made an offer of proof regarding the substance of any testimony that an expert would have offered. A defendant cannot establish his claim of ineffective assistance of counsel by merely speculating that an expert would have testified favorably. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Moreover, defendant has failed to overcome the presumption that defense counsel's decision not to call an expert witness was reasonable trial strategy. *Id*. Our Supreme Court has specifically observed that "questions of eyewitness identification" involve "obvious human behavior from which jurors can make 'commonsense credibility determinations.'" *People v Kowalski*, 492 Mich 106, 143; 821 NW2d 14 (2012). Here, defense counsel aptly challenged the strength and reliability of the identification testimony. Defendant has failed to show that defense counsel's strategy was objectively unreasonable or that he was prejudiced by the absence of an expert on eyewitness identification.

5. FAILURE TO CALL AN EXPERT ON THE EFFECTS OF MEDICATION

Defendant lastly argues that defense counsel was ineffective for failing to call an expert "to fill in the jury on the effect" of the Vicodin that Fink ingested on the day of the shooting, as well as any medication that Fink ingested at the hospital before identifying defendant. Again, defendant has not submitted an offer of proof, and his mere speculation that an expert could have provided favorable testimony on these matters is insufficient. *Payne*, 285 Mich App at 190. Moreover, we note that defense counsel did attempt to challenge Fink's perceptive abilities as a result of taking Vicodin. In addition, counsel elicited testimony that Fink was given pain mediation at the hospital and, in closing argument, asserted that the drugs affected Fink's perception. We perceive no ineffective assistance of counsel in this regard.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen