

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
January 28, 2014

v

JIMMIE LEE HARRISON JR.,  
  
Defendant-Appellant.

No. 311288  
Saginaw Circuit Court  
LC No. 11-036152-FC

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Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant, Jimmie Lee Harrison Jr., appeals as of right from his jury convictions of entering without breaking, MCL 750.111; extortion, MCL 750.213; armed robbery, MCL 750.529; and unlawful imprisonment, MCL 750.349b. We affirm.

**I. BASIC FACTS**

This case arises out of an after-hours incident that occurred at a bar in Saginaw, Michigan. The victim, a bartender, identified defendant as the person who entered the bar where she worked shortly after closing time under the guise of asking to use the restroom. He then assaulted her and robbed the bar. The victim described defendant as a patron whom she had come to know on a first-name basis during the two or three months before the robbery. The victim gave defendant's first name to the police that same night. Shortly after, the victim viewed a photo array consisting of six photographs. The photo array contained six African-American men arranged in two rows of three persons. Individuals in the top row were shown standing in front of a dark background. Defendant was in the middle of the bottom row and was shown wearing a white T-shirt and standing in front of a dark background. The other two individuals in the bottom row were shown standing in front of white backgrounds. Defendant was the only individual wearing a white T-shirt. The victim unequivocally identified defendant as the perpetrator of the incident. The victim also identified defendant as the perpetrator during the trial.

**II. ANALYSIS**

**A. PRETRIAL IDENTIFICATION**

Defendant argues that the pretrial identification was so impermissibly suggestive that it rendered the victim's in-court identification unreliable. We disagree.

As defendant did not raise this issue in the trial court, we review this unpreserved claim for plain error. See, generally, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A photographic identification procedure can be so suggestive that it deprives the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of the procedure is evaluated in light of all the circumstances. *People v McDade*, 301 Mich App 343, 357; 836 NW2d 266 (2013). The test is whether the procedure was so impermissibly suggestive that it resulted in a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). Factors to consider include the witness's opportunity to view the perpetrator at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the perpetrator, the level of certainty demonstrated by the witness, and the length of time between the offense and the confrontation. *Id.* at 306. If a pretrial identification procedure was unduly suggestive, testimony regarding the procedure is inadmissible at trial. *Id.* at 303. Moreover, the witness cannot make an in-court identification of the defendant unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the illegal identification. See *Gray*, 457 Mich at 115.

The evidence showed that at the time of the incident the victim had known defendant as a somewhat regular customer at the bar for approximately two months. She knew him by his first name, and she knew his voice, including the particular way he pronounced her name. They had had several conversations in the past, and defendant had shared with her his financial woes and desire for employment, including with the bar.<sup>1</sup> On the night of the incident, defendant patronized the bar; he watched and chatted with the victim as she counted the money in her cash register and the Keno drawer at the end of the night. He was the last to leave at closing time, and the victim escorted him to the door. When he returned after closing, defendant had partially covered his face, but the victim testified that she still recognized him. He repeatedly referred to the victim by name during the robbery and knew the money bag was in the office. The victim identified defendant to the police before she looked at the photo array, and she immediately and unequivocally identified defendant as the perpetrator when she was shown the photo array.

A detective testified that he compiled the photo array using a computer system commonly used by law enforcement agencies and showed it to the victim approximately two days after the incident. The detective stated that the victim viewed the photo array and immediately and positively identified defendant as the perpetrator.

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<sup>1</sup> During one conversation, the victim had given defendant a pencil and a piece of paper upon which he could write his name and telephone number as he solicited work from another patron. The victim shared this lead with the police to assist in tracking down defendant.

Defendant has made no showing that the pretrial identification procedure was unduly suggestive. Therefore, the victim's testimony regarding the pretrial identification was admissible at trial, see, generally, *Kurylczyk*, 443 Mich at 303, and her in-court identification of defendant was proper, see, generally, *Gray*, 457 Mich at 115.

## B. ISSUES RAISED IN DEFENDANT'S STANDARD 4 BRIEF

Defendant filed a Standard 4 brief that raises several arguments, which we conclude lack merit.

### 1. PRELIMINARY-EXAMINATION CONTINUANCE

Defendant contends that he did not receive a fair preliminary examination because the trial court ordered a continuance that placed the preliminary examination more than 14 days after the arraignment. We disagree. A preliminary examination may be adjourned beyond 14 days for good cause. MCL 766.4; MCL 766.7; MCR 6.110(B). Here, the trial court granted the continuance because the victim was unavailable on the day the preliminary examination was to commence due to a prearranged vacation. This fact constituted good cause for a continuance. See *People v Horne*, 147 Mich App 375, 377-378; 383 NW2d 208 (1985) (determining that the unavailability of an essential witness due to a vacation constitutes good cause for an adjournment).

### 2. SUPPRESSION OF SURVEILLANCE VIDEO

Defendant also contends that his constitutional rights were violated because the prosecution suppressed a surveillance video from the bar that would show that defendant was not wearing the clothing that the victim described the offender as wearing. Defendant correctly recognizes that the prosecution may not suppress evidence that is favorable to a defendant. See *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). But the record clearly shows that no surveillance video existed because the surveillance system was not functional. The prosecution could not turn over evidence that did not exist. Accordingly, defendant has not shown that his right to obtain exculpatory evidence was violated.

### 3. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecution committed misconduct by allowing preliminary examination to occur after the 14-day period without good cause, allowing the suggestive photographic lineup to be admitted into evidence, and suppressing evidence of the surveillance tape. We disagree. As already discussed, good cause existed for the continuance of the preliminary examination, the pretrial identification was not impermissibly suggestive, and no surveillance tape existed to suppress.

### 4. PERJURED TESTIMONY

Defendant also argues that the victim committed perjury when she testified and that the prosecution's intentional use of this perjured testimony violated his due process rights. Defendant explains that the victim committed perjury because she previously stated in a police report that the perpetrator wore a black mask but testified in court that he had his white shirt

pulled over his face. This unpreserved argument lacks merit. A reversal is unwarranted unless there is proof that the prosecutor knew that the victim's trial testimony was false. See *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). The mere existence of contradicting evidence is insufficient to prove that a prosecutor knowingly permitted false testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Here, there is insufficient proof that the victim lied and that the discrepancy is anything more than the inconsistency of a witness's accounts. There is nothing to suggest an intentional misrepresentation of the facts. Furthermore, the defense cross-examined the victim about this inconsistency. See, generally, *id.* "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Defendant has not demonstrated plain error affecting his substantial rights. See, generally, *Carines*, 460 Mich at 763-764.

## 5. PREVIEWING STATEMENT AND IN-COURT IDENTIFICATION

Defendant argues that Donald Beck's in-court identification of defendant violated his constitutional rights because it was based on the victim's identification of defendant to Beck as the perpetrator. Defendant insists that the victim violated the previewing statement that she signed at the time of her photo identification of defendant, which required her not to discuss the case with another witness or indicate in any way whether she identified someone. We reject this argument. Beck never testified at trial that he witnessed defendant rob the bar. Beck simply testified that he knew defendant as a patron at the bar, discussed job opportunities with defendant, received defendant's telephone number, knew the DJ employed at the bar, knew the victim as a bartender, and was told by the victim that defendant robbed the bar and that the police needed defendant's telephone number. There is no error.

## 6. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that he was deprived of the effective assistance of counsel because of his attorneys' deficient performance with regard to the pretrial identification, the continuance of the preliminary examination, the surveillance video and witnesses who could testify to its existence, and the victim's perjured testimony. We disagree. As previously discussed, the pretrial identification was not impermissibly suggestive, and there was an independent basis for the victim's in-court identification of defendant. Counsel is not required to make a meritless motion or futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Further, there is no surveillance video; the record evidence shows that the surveillance system was not functional. The failure to procure a nonexistent video is not ineffective assistance. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position); see also *People v Hoag*, 460 Mich 1, 7; 594 NW2d 57 (1999) (explaining that a defendant has the burden of establishing the factual predicate of his or her claim of ineffective assistance of counsel). The failure to challenge the continuance of the preliminary examination was not unreasonable where good cause existed for the continuance and defendant has not demonstrated that he suffered prejudice because of the continuance. See *Goodin*, 257 Mich App at 433; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The exculpatory witness to whom defendant refers apparently is a person whom defendant thinks could have testified that the surveillance video system was functional. As pointed out above, the evidence showed that the system was inoperable. Finally, counsel at

trial cross-examined the victim about her inconsistency in her description of the perpetrator and, thus, acted reasonably. Accordingly, defendant has failed to overcome the strong presumption that his attorneys provided effective assistance. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); see also *Carbin*, 463 Mich at 599-600.

Affirmed.

/s/ David H. Sawyer  
/s/ Jane M. Beckering  
/s/ Douglas B. Shapiro