STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2014
v	No. 312475 Oakland Circuit Court
MICHAEL RAY BOWYER, Defendant-Appellant.	LC No. 2012-240846-FH

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree home invasion, MCL 750.110a(2). Specifically, defendant argues that the trial court erred when it permitted the pre-trial photographic identification of defendant to be introduced at trial, and that his counsel was ineffective for failing to retain an expert to testify about the unreliability of eyewitness identifications. We affirm.

I. STATEMENT OF FACTS

On March 15, 2012, at approximately 8:30 a.m., David Ferguson was awakened by the sound of a thump. Upon investigation he found an intruder, who he later identified as defendant, in the second bedroom of his home. Ferguson testified that defendant was facing him for about two or three seconds, said "wow," and started coming toward him to get to the stairs that led to the main floor. As defendant approached the stairs, he was about five feet from Ferguson. Ferguson chased defendant down the stairs and out of the house. Ferguson was able to see defendant run away for about 500 yards and, while running away, defendant looked back which allowed Ferguson to get "another glimpse of him."

Ferguson then returned to his home and called 911. In addition to informing the police what items were taken, Ferguson provided a description of the intruder. Ferguson gave the same description at both the preliminary examination and trial. In short, Ferguson described the intruder as a white male, about 6'2" tall, about 175 pounds, and between the ages of 22 and 26. Ferguson also indicated that the intruder had a mustache and was wearing a red cap, a green winter coat, and work boots. Later that day, Ferguson was shown a black and white photographic array containing six individuals, but was told that the suspect may or may not be in the array. Ferguson immediately identified defendant as the intruder.

On that same morning, Ferguson's neighbor, Patricia Leonardi, observed an individual fitting the same description. She testified that she was in her home when she heard a knock on the door, which she ignored because she was on the phone. However, she later observed an individual, with a red cap on, walking toward her backyard. She motioned for him to come to the front door. When she opened it, he asked her if she needed any yard work done, and she told him that she did not. Although she was on the phone, Leonardi was face-to-face with the individual at her front door and it was a bright day. She also identified defendant from a photographic array.

At trial, Detective Drew Sneary, testified that both Ferguson and Leonardi identified defendant immediately. He also confirmed that the identifications were made independently of each other without either Ferguson or Leonardi having contact with one another before making the identification.

Defendant's counsel cross-examined both Ferguson and Leonardi about their identifications. He also called as a witness the first officer on the scene, Officer Adams, who testified that he was told by both Ferguson and Leonardi that they were not sure whether they would be able to identify a suspect. However, he also testified that he was not present for the identifications and that he would not be surprised if they were able to identify the suspect.

Defendant presented an alibi defense. His alibi witness was his live-in girlfriend and mother of his child. She testified that she had been with defendant from March 14, 2012 to March 16, 2012, and that he never left their home on the day of the offense. The girlfriend's father also testified that defendant was at their home when the father left for work at 7:15 a.m., and he woke up defendant before leaving for work so defendant could care for his son.

Following closing statements and jury instructions, the jury returned a guilty verdict.

II. ANALYSIS

A. PHOTOGRAPHIC IDENTIFICATIONS OF DEFENDANT

Defendant first argues that the trial court committed clear error when it failed to grant his motion to suppress the photographic identification of defendant made by Ferguson and Leonardi. Specifically, defendant claims that the identifications made by them were unduly suggestive. We disagree.

A trial court's determination in a suppression hearing regarding the admission of identification evidence will generally not be reversed unless clearly erroneous. *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013); *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Issues of law relevant to a motion to suppress are reviewed de novo. *McDade*, 301 Mich App at 356. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*., citing *Barclay*, 208 Mich App at 675.

We addressed this issue in *McDade*, 301 Mich App 343. There, the defendant, a suspected shooter, was identified through a photo array by three separate individuals. *Id*. at 348-350. The first individual, Lenell Ewell, was shown a photographic lineup at the hospital the day he was shot. At that time, he identified an individual other than the defendant and the defendant

was not included in the original lineup. *Id*. at 348. Two days later, the police again spoke to Ewell. As soon as the officer arrived, Ewell informed the officer that he had mistakenly identified the wrong individual when he saw the lineup the first time. The officer then showed Ewell a different photographic lineup, one that included the defendant. After reviewing the photographs "very, very carefully," Ewell told the officer that he had "a funny feeling," and that he did not "know why [but that he was] getting [a] strange feeling" that the shooter was the defendant. *Id*. at 348-349.

Five days after the shooting, and three days after Ewell identified the defendant, a different officer showed a different witness to the shooting a photographic lineup. That individual, Carleton Freeman, also identified the defendant. However, before doing so, Freeman had requested an opportunity to review additional photographs. In identifying the defendant, Freeman stated that he "want[ed] to say it's him" or "[i]t got to be him." *Id*. at 349. Five days after Freeman's identification, a third individual, James Warren, was shown a photographic lineup that included the defendant. Warren requested to see a second page of photographs before making any identification but was told "there were no other pages available." *Id*. Warren also kept repeating the word "tall" before making an identification, and the officer conducting the lineup admitted that, while the "defendant was the shortest person in the lineup grouping," "because of the composition of the different photographs, [the] defendant's head appeared closer to the top of the picture frame than did the heads of the other persons shown." *Id*.

In *McDade*, this Court denied the defendant's challenge to the witnesses' photographic lineup identifications and his argument that the identifications "were based on an unduly suggestive photographic lineup and that were communicated to the police under unduly suggestive circumstances." *McDade*, 301 Mich App at 356. "A photographic identification procedure or lineup violates due process guarantees when it is so impermissibly suggestive as to rise to a substantial likelihood of misidentification." *Id*. at 357. The *McDade* Court quoted *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993), where our Supreme Court stated that the suggestiveness of a photographic lineup "must be examined in light of the totality of the circumstances. As a general rule, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness." The *McDade* Court noted that the defendant in that case

> lists a number of differences between defendant and the other individuals included in the photographic array, which defendant claims merits suppression and reversal . . . . However, with the exception of the "height" argument, defendant fails to explain how these differences would result in a substantial likelihood of misidentification, as opposed to merely constituting "noticeable" differences. If one were to accept defendant's complaints about the slight physical differences or variations, it would make it nearly impossible for the police to compose a lineup, forcing authorities to search for "twin-like" individuals to match against a defendant. [*McDade*, 301 Mich App at 358 (citation omitted.)]

In this case, unlike in *McDade*, there was no initial misidentification and no request to see additional photographs. Both Ferguson and Leonardi were able to identify defendant as the suspect immediately after seeing the array. Defendant's only argument regarding the lineup

being unduly suggestive is the differences in facial hair and hair color. However, neither Ferguson nor Leonardi provided a description of the hair color. Accordingly, we conclude that the fact that the black and white photographic lineup contained a variation in hair color, in this case in which neither eyewitness identified hair color and the suspect was wearing a red hat covering his hair, does not constitute an unduly suggestive lineup.

Further, a review of the photo array establishes that, in addition to defendant, there were at least two other individuals who had facial hair. As noted in *McDade*, 301 Mich App at 357, this Court has previously rejected a defendant's argument that because "he was the only person in the lineup with a goatee, the lineup was tainted," holding that it could not "conclude that, because of the mere fact that the defendant herein had a goatee, the lineup was unduly suggestive so as to deprive him of due process of law." *People v Hughes*, 24 Mich App 223, 225; 180 NW2d 66 (1970). We conclude that because defendant was one of three individuals who had facial hair, defendant cannot establish that the lineup was unduly suggestive based on the differences in facial hair among the individuals in the lineup. Accordingly, defendant has failed to show any error, let alone clear error, in the trial court's decision to admit the photographic pretrial identification lineup into evidence.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that his trial counsel was ineffective because he failed to retain an expert to testify about the unreliability of eyewitness testimony. We disagree. Because a *Ginther* hearing was not conducted, our review is for errors apparent on the record.[1]

To establish ineffective assistance of counsel, a defendant must establish his counsel's performance "fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant bears a heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), citing *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *Payne*, 285 Mich App at 190, citing *Ackerman*, 257 Mich App at 455. Generally, an attorney's decision to not call a particular witness will only "constitute ineffective assistance of counsel [] when it 'deprives the defendant of a substantial defense.'" *Payne*, 285 Mich App at 190, quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

In this case, defendant's counsel focused his trial strategy on both misidentification and alibi. With regard to the alleged misidentification, defendant's counsel cross-examined Ferguson and Leonardi in an effort to discredit their identification of defendant as the intruder. He also

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

attempted to attack the credibility of Ferguson and Leonardi's identification by calling Officer Adams, the first officer on the scene, who testified that both Ferguson and Leonardi informed him that "they were unsure if they could identify the suspect." Our Supreme Court, albeit in dicta, noted in *People v Kowalski*, 492 Mich 106, 143; 821 NW2d 14 (2012) that "questions of eyewitness identification . . . involve obvious human behavior from which jurors can make 'commonsense credibility determinations.'" Here, defendant has failed to rebut the presumption that his counsel's decision to attack the identification by cross-examination and through other witnesses was sound trial strategy.

Further, defendant has not shown that he would have been able to afford an expert witness or that the trial court would have appointed one to him. In *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997), we held that "a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert." Defendant had several tactics available to him to attack the credibility of the identification during the trial. And defendant has failed to provide this Court with an affidavit or other offer of proof, including the name of a proposed expert who would have testified in a manner favorably to defendant. In *Ackerman*, 257 Mich App at 455, this Court held that "[d]efendant offer[ed] no proof that an expert witness would have testified favorably if called by the defense . . . defendant has not established the factual predicate for his claim." In summary, defendant's ineffective assistance of counsel argument fails. See *Payne*, 285 Mich App at 190.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly