

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20060460-CA	
v.)		
)	F I L E D	
Hector Talavera,)	(March 22, 2007)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2007 UT App 98</td></tr></table>	2007 UT App 98
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Third District, Tooele Department, 051300511
The Honorable Randall N. Skanchy

Attorneys: David J. Angerhofer, Sandy, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Greenwood, Davis, and Orme.

GREENWOOD, Associate Presiding Judge:

Defendant Hector Talavera appeals his jury convictions for aggravated robbery, a first degree felony, see Utah Code Ann. § 76-6-302 (2003); aggravated assault, a third degree felony, see id. § 76-5-103 (2003); and theft, a class A misdemeanor. See id. § 76-6-404 (2003). We affirm.

Defendant argues defense counsel was ineffective for (1) failing to show a surveillance video at trial that may have established Defendant was not the person who robbed the convenience store, and (2) failing to object or move to strike the results of a photo lineup that included Defendant's picture and was based on a tip from a person not present during the robbery.

"An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." State v. Clark, 2004 UT 25, ¶6, 89 P.3d 162. To demonstrate ineffectiveness, "defendant must show: (1) that counsel's performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." Id.

(citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288, ¶38, 55 P.3d 1131.

Defendant first argues that defense counsel provided ineffective assistance by not showing the jury a surveillance video of the convenience store at the time it was robbed. We agree with the State that because Talavera did not produce the video, or make any representation of what the video would show, Defendant cannot prove either that counsel was deficient for not showing the video or that failure to show the video prejudiced him. See Washington v. Moore, 421 F.3d 660, 662 (8th Cir. 2005) (rejecting ineffective assistance of counsel claim when counsel did not introduce a surveillance tape of a department store robbery because without being able to view the tape, the court had "no reason to think that the tape would have helped [defendant's] cause").

The defendant next argues that his counsel performed ineffectively by failing to object to a photo lineup that included Defendant's picture. Police included Defendant in the photo lineup based on information provided by a woman who entered the convenience store after the robbery and, after hearing a description of the robber that included mention of an unusual tattoo on his upper lip, suggested Defendant's name. Defendant argues that the woman's involvement "compromised" the investigation and was highly prejudicial to Defendant.

In order to show that Defendant's due process rights were violated by a photo array identification, he must demonstrate that the "'pretrial photographic identification procedure used . . . was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" State v. Lopez, 886 P.2d 1105, 1111 (Utah 1994) (alteration in original) (quoting State v. Thamer, 777 P.2d 432, 435 (Utah 1989)). In addressing this issue, "the main question is whether the photo array emphasized the defendant's photo over the others." Id. If the photo array "was impermissibly suggestive, any in-court eye witness identification 'must be based on [an] untainted, independent foundation to be reliable.'" Id. (alteration in original) (quoting Thamer, 777 P.2d at 435).

Although Defendant claims defense counsel was ineffective for not objecting to the introduction of the photo lineup at trial, he points to no evidence suggesting that the photo array procedures impermissibly suggested he was the suspected culprit. He does not claim that the photo array emphasized his photo over the others or that the photos were manipulated in any way.

Further, Defendant does not claim that the eyewitness identification at trial was inadmissible based on the alleged taint of the photo lineup. Without citing any relevant authority, Defendant argues that the photo identification was unreliable simply because a person not present at the robbery provided officers with a tip that helped identify Talavera as a possible suspect. This does not evidence a pretrial procedure "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" Lopez, 886 P.2d at 1111 (quoting Thamer, 777 P.2d at 435) (upholding a photo lineup that displayed the defendant's picture based on tips from those not present during the attack). To the contrary, it indicates efficient and appropriate investigation by the police.

For the foregoing reasons, we conclude that Defendant's attorney did not provide ineffective assistance of counsel and affirm the conviction.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge