

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ADAMS,

Defendant-Appellant.

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UNPUBLISHED

October 4, 1996

No. 185852

LC No. 94-004808

Before: Saad, P.J., and Corrigan and R.A. Benson,\* JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to concurrent terms of twelve to twenty years' imprisonment on the armed robbery convictions and a two year term on the felony-firearm conviction. We affirm.

Defendant first claims that his convictions are against the great weight of the evidence because one of the complainants misidentified him during a photo showup. Defendant failed to preserve this issue because he did not move for a new trial. *People v Richard Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). In any event, the complainant properly identified defendant at a subsequent corporeal lineup, at the preliminary examination and at trial. The record also reflects that the complainant had an independent basis for his in-court identifications. Defendant's conviction was not against the great weight of the evidence.

Next, defendant contends that trial defense counsel was ineffective because he did not seek admission of the photo showup identification record and did not call the officer in charge of the showup as a witness. Again, defendant has failed to properly preserve this issue for review by failing to seek a new trial or an evidentiary hearing. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Our review is limited to the existing record. *Id.*

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\* Circuit judge, sitting on the Court of Appeals by assignment.

The record before us reflects that defendant's trial counsel provided effective assistance. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced him. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.*

Counsel's failure to call the investigating officer only constitutes ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* The prosecution amply established that the complainant had a basis independent of the photo showup for his identification of defendant. A defense of mistaken identity on the basis of the photo showup would not have affected the outcome of the trial.

Counsel's decision not to introduce the photo showup identification record may have been trial strategy, contrary to defendant's contention. An action appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994) (Mallett, J., concurring). The record is silent regarding whether trial counsel actually intended to enter the photo showup sheet into evidence; indeed, placing the sheet into evidence may have harmed defendant. After the prosecution proved defendant's identity as the perpetrator, a police investigator on cross-examination contradicted defendant counsel's theory regarding one of the sheets. Moreover, counsel questioned the complainant about the identification record. On this record, we cannot say that failing to introduce the sheet itself amounts to ineffective assistance of counsel.

We reject defendant's contention that his twelve-year minimum sentences for the armed robbery convictions are disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant's sentences fall within the sentencing guidelines range of five to fifteen years and are presumed proportionate. *People v Tyler*, 188 Mich App 83, 85; 468 NW2d 537 (1991). Moreover, defendant has presented no circumstances, apart from his lack of a criminal record, to overcome the presumption of proportionality. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Lack of a criminal history is not a sufficiently unusual circumstance to overcome the presumption of proportionality. *Daniel, supra* at 54.

Moreover, the nature of the crime justified the sentence imposed. Defendant pulled a gun on the complainants and threatened them with death if they did not hand over their money; the complainant complied and lost several hundred dollars. The court also stated on the record that defendant's failure to appear for a previously scheduled sentencing and proffered polygraph examination weighed heavily in its sentencing decision. The court therefore did not abuse its discretion in imposing sentence.

Finally, defendant claims that the trial court improperly scored the sentencing guidelines. Because defendant did not argue this point in his brief, he has not properly presented this issue for

review. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Affirmed.

/s/ Henry William Saad

/s/ Maura D. Corrigan

/s/ Robert A. Benson