STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BUFFORD STURGILL,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 185247
LC No. 94-011302

Before: M. J. Kelly. P. J., and Hood, and H. D. Soet, * JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of robbery unarmed, MCL 750.530; MSA 28.798. Defendant was subsequently convicted in a bench trial of habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to fifteen to forty years in prison. We affirm.

Defendant first argues that he was denied a fair trial by a police officer's nonresponsive testimony that the officer knew defendant from a previous case.. Although defendant did not move for a mistrial, we will review this issue for manifest injustice because it involves a fundamental constitutional right. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

At trial, the prosecutor asked the witness, a police officer, whether he knew defendant prior to the instant offense. The officer answered, "Yes, I had a case with him back in '92." Defense counsel moved to strike the nonresponsive testimony and the trial court granted the motion. The trial court instructed the jury to disregard the nonresponsive testimony. The test to be used in determining whether a mistrial should be declared is not whether there were some irregularities, but whether the defendant had a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988). A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way. *Id*. at 299. An unresponsive answer to a proper question is not cause for granting a mistrial. *Id*.

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

We conclude that the officer's nonresponsive, volunteered testimony was not so egregious that the prejudicial effect could not be removed. The prosecutor did not elicit the testimony, contrary to defendant's argument. The testimony did not indicate that defendant was charged with or convicted of a crime. The testimony was a single isolated sentence. The testimony was stricken from the record and the jury instructed to disregard it. Defendant was not denied a fair trial.

Defendant also argues that his trial counsel's failure to move for a mistrial after the officer's nonresponsive testimony, combined with trial counsel's failure to impeach a critical witness, constituted ineffective assistance of counsel. Defendant did not request a *Ginther* hearing; therefore our review of this issue is limited to the record before us. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

To determine if defendant was denied the effective assistance of counsel, this Court must determine if defendant can prove both prongs of the test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which is (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced. Defendants must overcome a strong presumption that counsel's performance was effective. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

We find that both of defendant's alleged instances of ineffective assistance of counsel fall within the realm of trial strategy for which this Court will not substitute its judgment. Our review of the record indicates that defense counsel's decision not to impeach a witness with information that defendant was in jail for approximately five years strategically kept potentially prejudicial information from the knowledge of the jury. We also conclude that it was defense counsel's decision whether to move for a mistrial at that stage of the trial or better strategy to proceed to verdict.. Defendant was not denied the effective assistance of counsel.

Defendant next argues that the trial court erred when it denied his motion to suppress an in-court identification. We disagree. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993);cert den 510 US ___; 114 S Ct 725; 126 L Ed 2d 689 (1994).

The victim first identified defendant as his second assailant at his first assailant's arraignment. The victim saw defendant shackled to two other men, one of which was the first assailant who had already been identified by the victim. The third man was African-American. If a witness is exposed to an impermissibly suggestive pretrial lineup or show up, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Kurylczyk, supra*, 443 Mich 303, 318. To determine whether the in-court identification would result from a sufficiently independent basis, the trial court must hold a hearing and consider all relevant factors. *People v Kachar*, 400 Mich 78,96-97; 252 NW2d 807 (1977); *People v Steiner*, 136 Mich App 187, 194; 355 NW2d 884 (1984). Appropriate factors include: 1) the witness's prior knowledge of

the defendant; 2) the witness's opportunity to observe the crime; 3) the length of time between the crime and the disputed identification; 4) discrepancies between the pretrial identification description and the defendant's actual appearance; 5) any prior proper identification of the defendant or failure to identify the defendant; 6) any prior identification of another as the culprit; 7) the mental state of the witness at the time of the crime; and 8) any special features of the defendant. *People Kachar, supra,* 400 Mich 95-96.

We agree with the trial court that there was an independent basis for the victim's identification of defendant and that identification was not tainted. The victim testified that he was able to observe the faces of both of his attackers before and during the assault. The victim gave an accurate description of defendant after the assault. The victim identified one of his assailants immediately after the assault. The victim immediately and spontaneously identified defendant as the second assailant at the arraignment without prompting or solicitation from the police. The trial court's decision to admit the in-court identification was not clearly erroneous.

Next defendant claims that he was entitled to an instruction on the necessarily included offenses of larceny from the person and assault and battery, even though he failed to request such instructions.. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052, *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). Our review of the record reveals that counsel for defendant indicated at trial that he was satisfied with the jury instructions as given. We find no manifest injustice.

Defendant argues that his sentence of fifteen to forty years for habitual offender, fourth offense, is excessive and disproportionate.. The principle of proportionality requires that the sentence imposed be proportionate to the seriousness of the circumstances surrounding the offense and the background of the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). The facts of this case show that defendant's previous convictions were for felonious assault, manslaughter, and receiving and concealing stolen property valued over $100. These convictions demonstrate defendant's propensity for violence and use of force. In the course of the instant unarmed robbery, defendant beat and bloodied an elderly gentlemen. Defendant expressed his desire to kill the gentlemen. This is a serious offense. We conclude that defendant's sentence is proportional to both the seriousness of the offense and the background of defendant. We also conclude that defendant's sentence is not excessive.

Finally, defendant argues that there was an insufficient factual foundation to sustain his enhanced sentence. Defendant complains that no evidence of his previous convictions was placed on the record. Again, we disagree. The presentence investigation report indicated that defendant was convicted for receiving and concealing stolen property valued over $100. Defendant admitted to the court at sentencing that he was guilty of manslaughter and felonious assault. Defendant pleaded guilty to being an habitual offender, fourth offense. This is sufficient evidence of defendant's previous convictions pursuant to the 1994 amended version of MCL 769.13; MSA 28.1085.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet