

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY SIMS,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 193198

Recorder's Court

LC No. 95-007280

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of carjacking, MCL 750.529a; MSA 28.797(a), armed robbery, MCL 750.529; MSA.797, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).¹ Defendant was sentenced to prison terms of fifteen to thirty years each for the carjacking and armed robbery convictions, five to ten years for the assault with intent to commit great bodily harm conviction and two years for the felony-firearm conviction. We affirm.

First, defendant claims that he was denied effective assistance of counsel. Generally, a motion for new trial or an evidentiary hearing is required before this Court will review a claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). However, where the record contains sufficient details relating to the alleged deficiencies in representation to allow this Court to adequately analyze the issue, the absence of a motion for new trial will not preclude appellate review. *People v Laidlaw*, 169 Mich App 84, 95; 425 NW2d 738 (1988). Although defendant did not file a motion for new trial or seek an evidentiary hearing in the trial court, we will review this issue because the record contains sufficient detail to do so.

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness counsel, made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, the deficiency must

actually be prejudicial to the defendant. *Id.* Effective assistance of counsel is

presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Specifically, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel, supra* at 58.

Defendant specifies six allegations of error on the part of his trial counsel. First, he claims that his counsel was deficient because he did not move to suppress the identification of defendant on the basis of an unfair lineup. As a preliminary matter, our review of the circumstances of the lineup leads us to conclude that the lineup was not so unnecessarily suggestive as to taint complainants' identification of defendant. "Unnecessarily suggestive" lineups are those which are done under circumstances which give rise to a substantial likelihood of irreparable misidentification. *People v Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973). The police are not required to construct a lineup of persons whose physical characteristics exactly match the defendant's. *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984). Recently, in *People v Sawyer*, ___ Mich App ___; ___ NW2d ___ (Docket No. 159960, issued 2/25/97), this Court stated that "[p]hysical differences between defendant and the other lineup participants goes to the weight of the identification not its admissibility." *Sawyer, supra*, slip op at 2. Consequently, making the suggested motion would likely have been unsuccessful. Defense counsel is not required to make meritless motions. *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

Moreover, it would appear that trial counsel's failure to move to suppress the lineup identification may have been sound trial strategy. By not moving to suppress the pretrial identification, defense counsel was able to cross-examine complainants regarding their ability to identify defendant from the lineup. This Court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). In light of the foregoing, it cannot be said that defendant was denied effective assistance of counsel by trial counsel's failure to move to suppress the lineup identification.

Next, defendant argues that trial counsel's representation fell below the standard of reasonableness when he failed to call as witnesses defendant's brother and his acquaintances regarding the theft of the vehicle. The decision whether to call witnesses is generally a matter of trial strategy. *Daniel, supra* at 58. Ineffective assistance of counsel can take the form of failure to call witnesses only 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 record is devoid of any information regarding the proposed substance of the brother's testimony. Further, defendant was not deprived of a substantial defense because defense counsel examined defendant regarding his contention that the brother, not defendant, had obtained the vehicle. Defendant thus has presented no evidence that trial counsel's failure to call various witnesses deprived him of a substantial defense.

Defendant next claims that trial counsel failed to adequately cross-examine one of the complainants regarding inconsistencies between his statements to police and his trial testimony. A review of the record reveals that complainant was the subject of rigorous cross-examination in an

attempt to impeach his testimony with respect to the events which he witnessed. Defense counsel attempted to impeach complainant's credibility by pointing out a number of the differences between his trial testimony and the statement he had given to police. Failure to impeach complainant on every detail of a written statement or trial testimony does not necessarily result in ineffective assistance of counsel. *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

Next, defendant argues that trial counsel's failure to object to the introduction of a shotgun shell constituted ineffective assistance of counsel. Defendant claims that a proper foundation was never laid by the prosecution regarding the relevance of a shotgun shell "when there is no evidence in the record that a shotgun was used in the perpetration of the crime." Contrary to defendant's representations, the record is replete with references to defendant's use of a long gun during the commission of the crimes. The proper foundation was, therefore, laid for the admissibility of the evidence. See, e.g., *People v Iron*, 26 Mich App 235, 239; 182 NW2d 342 (1970); *People v Cybulski*, 11 Mich App 244, 251; 160 NW2d 764 (1968). Trial counsel had no grounds to object to the admissibility of the shell that, as testified to by the police, was found on defendant's person at the time of his arrest. Thus, trial counsel's failure to object cannot constitute ineffective assistance of counsel.

Next, defendant argues that trial counsel erred when he failed to object to the prosecution's repeated references to defendant's incarceration in the county jail during the pendency of the case. Contrary to defendant's representations, his counsel did object to these references and the objection was overruled by the trial court. This claim of ineffective assistance is baseless.

The final claim made by defendant is that his trial counsel erred by failing to object to the prosecution's "repeated reference" to the fact that defendant, at the time of his arrest, was also wanted in the State of Florida on probation violations involving drug related offenses. First, the prosecutor did not make references of the nature described by defendant. The prosecution simply asked defendant's mother if she was aware that defendant "had trouble in Florida" and that he was "wanted there too." Moreover, these two questions could not be accurately characterized as "repeated references." Considering, the totality of the evidence presented, it cannot be said that the failure to object to these questions was determinative at all in the outcome of the case..

Defendant next argues that the evidence presented at trial was insufficient to support his convictions. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996).

The elements of carjacking are (1) the defendant stole or took a motor vehicle from another person; (2) the defendant did so in the presence of that person, a passenger in the motor vehicle, or any other person in lawful possession of the motor vehicle; and, (3) that the defendant

did so by force or violence, by threat of force or violence, or by putting another in fear. MCL 750.529a; MSA 28.797(a); CJI2d 18.4a. The elements of assault with intent to commit great bodily harm less than murder include (1) an assault, (2) with intent to do great bodily harm less than murder. *People v Mitchell*, 149 Mich App 36; 385 NW2d 717 (1986). The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a dangerous weapon or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon. MCL 750.529; MSA 28.797; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1996). A conviction of felony-firearm requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Williams (After Remand)*, 198 Mich App 537, 540-541; 499 NW2d 404 (1993).

In the instant case, the victim testified that, as she was preparing to return to her place of employment while her car warmed up, two men approached her and told her to get out of the car. The first thing she saw was a long gun pointed directly in and right up to her face. The dome light in her car was on and there was a street light. At the time of trial, the victim identified the man holding the gun as defendant. After being ordered to the ground, defendant put the gun to the victim's neck and asked where her money was. He then searched through her pockets.

As the victim was lying on the ground, she testified that she heard a co-worker come out of the building. The co-worker testified that defendant raised his long gun and fired it in his direction when he inquired about the victim whose car was running in the middle of the road. He further testified that, as he was looking for cover, he heard the sound of the car speeding off.

Subsequent to these events, both the victim and her co-worker in separate lineups identified defendant as the assailant.² Moreover, at the time of his arrest, defendant was in possession of the victim's vehicle. A search of defendant disclosed a shotgun shell consistent with the testimony of both the victim and her co-worker that their assailant possessed a long gun. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crimes of which defendant was convicted were proven beyond a reasonable doubt.

Finally, defendant argues that he must be resentenced where the trial court erroneously scored Offense Variable ("OV") 2, physical attack and/or injury, at twenty-five points. We disagree. The Michigan Supreme Court has recently recognized that "[t]here is no juridical basis for claims of error based on alleged misinterpretations of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, 454 Mich 145, 176-7; 560 NW2d 600 (1997).³

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman

¹ According to his trial testimony and that of other witnesses, defendant's real name is Sylvester McNeil, Jr. Apparently, at the time of his arrest, defendant gave to the arresting officers a driver's license bearing the name "Jeffrey Sims."

² With respect to the eyewitness' ability and opportunity to identify defendant, this was an issue of credibility. Assessing the credibility of a testifying witness is a function of the jury. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

³ The trial court assessed twenty-five points for OV2. "Terrorism" is defined by the guidelines as "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." Michigan Sentencing Guidelines (2d ed, 1988) at 26. Considering that defendant pointed a long-barreled gun directly into the victim's face, made her lay face down on the ground and then stuck the gun barrel into her neck, there was sufficient evidence to support a finding that defendant subjected her to terrorism.