

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK FOWLER,

Defendant-Appellant.

UNPUBLISHED

April 21, 2005

No. 241580

Wayne Circuit Court

LC No. 01-010557-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DERRICK FOWLER,

Defendant-Appellee.

No. 253103

Wayne Circuit Court

LC No. 01-010557-01

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life without parole for the murder conviction and eighteen to thirty years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right in Docket No. 241580. While this matter was pending on appeal, this Court granted defendant's motion to remand.¹ On remand, the trial court granted defendant's motion for a new trial based on ineffective assistance of counsel. The prosecution appeals that order by leave granted in

¹ See *People v Fowler*, unpublished order of the Court of Appeals, entered September 5, 2003 (Docket No. 241580).

Docket No. 253103. The appeals have been consolidated for consideration by this Court. We affirm the trial court's decision granting defendant a new trial.

Defendant was convicted of participating in the shooting death of James McCray and the nonfatal shooting of Bruce Cooper. Both men were shot as they sat in McCray's Monte Carlo automobile in Detroit on August 4, 2000. According to witnesses, a group of four armed men in a black sedan, briefly spoke to McCray and Cooper, and then got out of the car and began shooting. McCray died after receiving nineteen gunshot wounds. Cooper suffered severe injuries as a result of the shooting, but survived.

The principal issue at trial was the identity of the fourth gunman. Shortly after the shooting, Cooper could only describe the fourth gunman as having braids.² He only observed the gunmen for a brief period of time before he was shot and climbed underneath the Monte Carlo for protection. Despite Cooper's statements that he would not forget any of the faces of the gunmen, he was unable to identify one suspect during a lineup and was unable to identify two others at their preliminary examinations. Defendant, who was the last of the four suspects to be tried, was identified by Cooper as the fourth gunman at his preliminary examination and at trial. Cooper was not asked to identify defendant at a lineup.

Another eyewitness to the shooting gave conflicting identification testimony at trial. She first testified that defendant was not one of the gunmen, but later changed her testimony and said defendant was involved in the shooting. Another witness identified a different person as the fourth gunman. Each of these latter two witnesses knew defendant before the shooting. DNA was detected on evidence connected to the shootings, but defendant was excluded as a source of the DNA.

I. Great Weight of the Evidence

Defendant argues that the great weight of the evidence failed to establish his identity as the fourth gunman. Although Cooper identified defendant at trial as the fourth gunman, defendant maintains that Cooper's identification was tainted by his observation of defendant at the preliminary examination and that Cooper otherwise would not have identified him. Conversely, Akeia Williams testified that the fourth gunman was Keith Hollie. Although Sharonda Williams eventually identified defendant as the fourth gunman, she originally testified that the fourth gunman was Keith Hollie. DNA recovered from evidence associated with this crime did not connect defendant to the shooting.

The trial court held that because Cooper was permitted to identify defendant as the fourth gunman, the jury's verdict was not against the great weight of the evidence. "This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

² The defense presented testimony that defendant did not wear his hair in braids and had shaved his head because he had a receding hairline.

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *McCray, supra*. Although there was some conflict between the witnesses about the identity of the fourth gunman, we cannot say that the conflict was so great that it resulted in a miscarriage of justice. Cooper was allowed to identify defendant as the fourth gunman at trial and his testimony, although questionable and challenged, is enough to support the jury's verdict. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (citation omitted). Because defendant only established that the witnesses' identification testimony was conflicting, he failed to meet his burden of showing that the jury's verdict was against the great weight of the evidence. The trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis.

II. Ineffective Assistance of Counsel

A. Standard of Review

Questions of ineffective assistance of counsel are governed by a mixed standard of review. First, where the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Second, whether the facts establish ineffective assistance of counsel involves a question of constitutional law, which is reviewed de novo. *Id.*

In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

B. Failure to Call an Expert Witness on Identification Testimony

Defendant also argues that he is entitled to a new trial because his attorney was ineffective for not calling an expert witness on identification testimony.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Further, this Court will not assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Davis, supra*.

"Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Here, defendant has not overcome the presumption that trial counsel engaged in sound trial strategy by not calling an expert witness to bolster his misidentification defense. Counsel evaluated the prosecution's case and decided that expert testimony was unnecessary for the jury to find that Cooper's identification was unreliable. The record supports that counsel's decision was not unsound strategy. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). The trial court did not err by denying defendant's motion for a new trial on this basis.

C. Failure to Challenge Cooper's Identification of Defendant

The trial court agreed with defendant that defense counsel was ineffective for not moving to suppress Cooper's in-court identification of defendant and granted defendant's motion for a new trial on this basis. The prosecution now challenges that decision in Docket No. 253103.

In granting defendant a new trial, the court held that defense counsel was ineffective for (1) not requesting a lineup before the preliminary examination, (2) failing to move to suppress Cooper's identification of defendant at the preliminary examination, and (3) failing to move to suppress Cooper's identification of defendant at trial. The trial court concluded that had the jury not considered Cooper's identification of defendant, it may have reached a different verdict, particularly because the only other witness who identified defendant as the fourth gunman vacillated in her identification of defendant.

A decision to grant a defendant's request for a lineup lies within the trial court's discretion. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001). "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is reasonable likelihood of mistaken identification that a lineup would tend to resolve." *Id.*

We agree with the trial court that defense counsel was ineffective for failing to move for a lineup. Identification was the principal issue in the case. Given Cooper's problems identifying the codefendants and his inaccurate and limited description of the fourth gunman, there was a reasonable likelihood that a lineup might resolve an issue of mistaken identification in this case. In addition, because the preliminary examination may have been impermissibly suggestive, conducting a lineup before the preliminary examination was critical.

The trial court also held that the preliminary examination was unduly suggestive and amounted to a due process violation. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To establish a due process violation, the "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

"Not all preliminary examination confrontations are impermissibly suggestive." *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984). To determine if a preliminary

examination identification violated due process, the trial court should consider all relevant factors concerning the identification. *People v Solomon*, 47 Mich App 208, 218-219; 209 NW2d 257 (1973) (dissent of Lesinski, C.J.), adopted 391 Mich 767 (1974). Some of the factors considered in *Solomon*, *supra* at 219, include (1) the amount of time between the offense and the confrontation; (2) how much time the witness spent with the perpetrator; (3) whether the witness was told that the right person was in custody; and (4) the witness' failure to provide any identifying characteristics of the suspect.

The charged offense was committed on August 4, 2000. Defendant's preliminary examination was not held until September 19, 2001. Thus, more than a year elapsed between the offense and Cooper's first observation of defendant. During the offense, Cooper had an opportunity to observe the fourth gunman for only a few minutes, at most. During some of this time, Cooper was underneath the Monte Carlo to protect himself. He therefore had a limited view of the gunmen's faces. Additionally, he was unable to provide much identifying information about any of the gunmen. Cooper was unable to identify the three other defendants at their preliminary examinations or at a photo array. Although Cooper claimed that defendant wore his hair in braids during the offense, other testimony indicating that defendant was balding and had shaved his head rendered this description suspect. Thus, the facts suggest that Cooper did not have an accurate recall of any of the gunmen. In addition, there was evidence that it was suggested to Cooper before defendant's preliminary examination that the police had caught the right man.

Considering all the relevant factors surrounding the shooting and Cooper's ability to identify the perpetrators, it appears that by the time of defendant's preliminary examination, Cooper's confidence in his ability to identify the fourth gunman had increased, but the objective facts made any identification less reliable. Given the amount of time that had passed since the offense, Cooper's medical problems and past inability to accurately describe the perpetrators, it was unlikely that he could accurately identify defendant as the fourth gunman if not for the preliminary examination where defendant was the only party present charged in this crime. We therefore conclude that the trial court did not err in finding that the preliminary examination amounted to an impermissibly suggestive identification procedure. Accordingly, Cooper should not have been permitted to identify defendant at trial as the fourth gunman absent an independent basis for that identification.

The remedy for an unduly suggestive identification procedure is the suppression of the in-court identification unless there is an independent basis for its admission. *People v Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000).

The Court then reiterated the factors, originally set forth in the nonbinding case of *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977), that a court should weigh in determining if an independent basis exists for the admission of an in-court identification: (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and

psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v*] *Gray*, [457 Mich 107, 116; 577 NW2d 92 (1998)];see also CJI2d 7.8. In *Kurylczyk, supra* at 307-308, the Court also noted that delays as long as eighteen months after a crime do not necessarily invalidate an eyewitness identification. [*Davis, supra* at 702-703.]

Here, the evidence failed to establish a basis for concluding that there was an independent basis for Cooper's identification of defendant at trial. Cooper observed the fourth gunman only briefly, at most only a few minutes before he ducked underneath the car to protect himself. Further, there were four armed perpetrators, so Cooper's attention was not focused on a single perpetrator. As noted previously, Cooper was unable to provide details about the descriptions of any of the perpetrators other than their race and that they wore their hair in braids, an attribute that other testimony revealed was suspect as applied to defendant. Considering the stress and excitement of the offense, the amount of time that had elapsed since the offense was committed, and Cooper's medical problems shortly afterward, the totality of the circumstances fail to show that Cooper had an independent basis from which to identify defendant at trial. Because Cooper was the only witness who squarely placed defendant at the scene of the shooting, had Cooper's identification of defendant at trial been suppressed, the result in this case may have been different.

The prosecution argues that the trial court did not find that defendant was prejudiced as a result of counsel's failure to move to suppress Cooper's in-court identification of defendant. We disagree.

The trial court made the following comments when ruling on defendant's motion for a new trial:

If the jury had not had access to Bruce Cooper's questionable identification of the defendant, they [sic] may have reached a different verdict, particularly in light of Sharonda Williams' vacillating opinion as to who she saw in the car on that day. The fault lies not with the jury, but on how the evidence on which it was based -- on which it based its verdict was obtained.

Although the trial court made these comments when ruling on defendant's motion for a new trial based on the great weight of the evidence, the court noted that all three issues raised by defendant were closely tied together, and the comments establish the requisite prejudice for defendant's ineffective assistance of counsel claim.

The prosecution also argues that this Court should consider additional evidence that was not admitted at the evidentiary hearing, including statements and testimony from two codefendants, Larry Hollie and Shawn Davis, both of whom implicated defendant in this crime. There is no indication in the record that this evidence was presented to the trial court at defendant's evidentiary hearing.³ Documents or other evidence that were not presented in the

³ It appears, however, that Davis' affidavit and testimony and Larry Hollie's statement were attached to the prosecution's motion for rehearing.

trial court will not be considered by this Court on appeal. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).

Furthermore, the new evidence that the prosecution wants this Court to consider would not have been admissible against defendant at his trial. The codefendants' statements implicating defendant do not appear to be admissible evidence because neither codefendant was a witness in this case. Therefore, considering their hearsay statements denies defendant his right to confront these witnesses. *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968). See also *People v Michael Bell (On Second Remand)*, 264 Mich App 58, 61-63; 689 NW2d 732 (2004). The prosecutor has not cited any authority that allows a court to consider inadmissible evidence when reviewing the effectiveness of counsel's performance. Such evidence should not be considered because the court must decide if counsel's actions deprived the defendant of a fair trial by affecting the jury's verdict. *Johnson, supra*. Inadmissible evidence cannot support the jury's verdict.

For these reasons, we conclude that the trial court did not err in finding that defense counsel was ineffective for not challenging Cooper's in-court identification of defendant. The trial court's decision to grant defendant a new trial is therefore affirmed.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski