

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANDELL DURAN TURNER,

Defendant-Appellant.

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UNPUBLISHED

April 13, 2006

No. 259069

Wayne Circuit Court

LC No. 04-006170-01

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of carjacking, MCL 750.529a. He was sentenced to 81 months' to 20 years' imprisonment. We affirm.

Defendant first argues that the trial court committed clear error when it denied his motion to suppress the complainant's photographic identification. Defendant argues that he was entitled to a corporeal lineup because he was in custody at the time, and he further argues that the photographic lineup was unduly suggestive. We disagree. A trial court's decision whether to admit identification evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Ordinarily, an accused should not be identified by photograph if he or she is in custody unless a legitimate reason for doing so exists. *Kurylczyk, supra* at 298. Although defendant was in custody at the time, he was in custody for an unrelated offense, which is not "custody" for the purposes of a photographic lineup. *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986). Further, significant physical distance between the locations of the witness and the accused is a legitimate reason for using a photographic lineup. *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). Here, defendant was housed some 300 miles away from Wayne County where the carjacking occurred. Use of a photographic lineup was justified. Defendant has abandoned his argument that the lineup was unduly suggestive by failing to provide any supporting argument, so we do not address it. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant next argues a cornucopia of instances in which he was denied effective assistance of counsel. We disagree.

Because defendant did not raise the issue of ineffective assistance of counsel in an appropriate motion in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must show that his 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). In other words, defendant must show a reasonable probability that the outcome of his trial would have been different if not for counsel's unprofessional errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant first argues that trial counsel should have objected to testimony from defendant's accomplice that the accomplice identified defendant while both were in jail. However, defendant himself introduced the evidence that they were both in jail. Defendant did so to show that the accomplice was motivated to identify someone as *his* accomplice, regardless of truth, and that the accomplice had the means to do so because they were both in jail at the same time when the accomplice learned that defendant was being charged with carjacking. This evidence was offered in support of defendant's theory that he was being framed for the crime. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Matuszak, supra* at 58.

Defendant next argues that trial counsel should have objected to the accomplice's testimony that he obtained defendant's photograph from the Michigan Department of Corrections (MDOC) website. Defendant's cross-examination of the accomplice elicited testimony that the accomplice had obtained defendant's photograph from the internet. This was appropriate, pursuant to defendant's theory that he was being framed. The prosecution's redirect examination properly established where on the internet the accomplice found the photograph. A party waives review of the admission of evidence that was made relevant by his own placement of a matter in issue. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Trial counsel was not required to raise a meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant next argues that trial counsel was ineffective for failing to advise him properly about the risks of testifying that he had a criminal record. The record does not show that trial counsel provided improper advice about these risks. Rather, the record shows that defendant's criminal history was an integral part of his trial strategy. Trial counsel indicated in his opening statement that defendant would testify that he had several past convictions relating to the theft of cars because it would show that defendant knew how to steal cars and did not, therefore, need to commit a carjacking. We will not find ineffective assistance solely because a trial strategy ultimately fails. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

Defendant next argues that trial counsel was ineffective for failing to object when the prosecutor twice elicited brief testimony from the accomplice that he was testifying pursuant to a plea agreement that required him to testify truthfully about defendant's role in the carjacking. Defendant argues that this constituted improper vouching for the accomplice's credibility. Introduction of an accomplice's promise to testify truthfully is not necessarily error unless "used by the prosecutor to suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 33; 650 NW2d 96 (2002). The record does not show that the prosecutor suggested that the government had any special

knowledge whether the accomplice was testifying truthfully. Any objection by trial counsel would have been futile.

Defendant argues that trial counsel was ineffective for failing to object to the prosecution's motion to admit two of defendant's previous criminal convictions as impeachment evidence. The two convictions were for receiving and concealing stolen property, which is a theft offense punishable by more than one year's imprisonment and were both fewer than ten years old. They were therefore not barred by age or by subject matter, and their admissibility depends on "the degree of probativeness and prejudice inherent in the admission." MRE 609; *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988). As offenses involving concealing the truth, they are highly indicative of veracity. Their similarity to defendant's charged offense of carjacking is low, limiting their prejudicial effect. Because the probativeness outweighed the prejudice, the evidence of these convictions was admissible. *Allen, supra*. Counsel was not ineffective for failing to advocate a futile position, and given the strength of the other evidence against defendant, the outcome of the trial was not likely affected in any event.

Defendant next argues that the trial court abused its discretion by allowing the prosecution to present rebuttal testimony that the kind of car involved in this case was impossible to steal with only a screwdriver because of the anti-theft systems installed. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Defendant argues that this testimony was collateral and therefore inadmissible. The propriety of rebuttal evidence depends on the proofs presented by the other party. *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). Defendant testified that he could use a screwdriver and a snatch bar to steal virtually any car, including a car of the type taken in this case, in support of his defense theory that he had no need to commit a carjacking. The rebuttal testimony was therefore properly admitted to contradict and disprove defendant's testimony. *Pesquera, supra*.

Finally, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that the trial court violated his constitutional right to due process when it enhanced his sentence based on facts to which he had not pleaded guilty and which were not found by a jury beyond a reasonable doubt. Our Supreme Court has explicitly stated that *Blakely* does not apply to Michigan's indeterminate statutory sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). See also *People v Morson*, 471 Mich 1201, 1201; 683 NW2d 678 (2004).<sup>1</sup> Accordingly, defendant's argument is without merit.

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<sup>1</sup> We are aware that our Supreme Court has recently granted leave in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), to consider the issue of whether *Blakely* applies to Michigan's sentencing scheme. However, until and unless *Claypool* is overruled, it remains applicable and binding.

Affirmed.

/s/ Helene N. White  
/s/ William C. Whitbeck  
/s/ Alton T. Davis