

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 23, 2012

v

DJUAN JAMAR COUSINS,
Defendant-Appellant.

No. 300715
Wayne Circuit Court
LC No. 10-005622-FC

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as an habitual offender, second offense, MCL 769.10, to 20 to 30 years' imprisonment for armed robbery, 1 to 7-1/2 years' imprisonment for felon in possession of a firearm, and two years' imprisonment for felony-firearm. We affirm.

Defendant first argues that the trial court abused its discretion in scoring Prior Record Variable (PRV) 1, MCL 777.51 (prior high severity felony convictions), at 25 points, and in scoring PRV 7, MCL 777.57 (subsequent or concurrent felony convictions), at 20 points.¹ Alternatively, defendant claims that defense counsel provided ineffective assistance in failing to object to the trial court's scoring of PRV 1 and PRV 7. On April 28, 2011, defendant filed a motion with this Court to remand for resentencing. On June 1, 2011, we granted that motion, while retaining jurisdiction of the appeal. At resentencing, the trial court rescored PRV 1 at zero points and PRV 7 at ten points. The trial court has already resentenced defendant and thus, the present issue is moot. See *People v Bonilla-Machado*, 489 Mich 412, 416; 803 NW2d 217 (2011). Also, defendant's claim of ineffective assistance of counsel is moot because the trial court's resentencing renders it impossible to grant any further relief. See *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987).

¹ Defendant contends that the correct PRV 1 score was zero and that the correct PRV 7 score was ten.

Defendant next argues that his trial counsel was ineffective because he failed to review the arrest photograph of defendant, questioned a witness on the basis of that photograph, and elicited testimony harmful to defendant. Our review of this issue is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

To establish ineffective assistance of counsel, a defendant “must show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The failure to reasonably investigate the case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). When claiming ineffective assistance due to defense counsel’s unpreparedness, a defendant is required to show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Prejudice exists where there is a reasonable probability that a different outcome would have resulted had the errors not occurred. *People v Pickens*, 446 Mich 298, 314-327; 521 NW2d 797 (1994).

Defense counsel did not review the arrest photograph before trial, and counsel admitted that if he had reviewed it, he would not have called Sergeant Scott Spencer as a defense witness. Spencer’s testimony in some ways undermined defendant’s theme at trial that the victims’ identifications of defendant were unreliable.² Although the reasons for counsel’s failure to review the arrest photograph are unclear, we will assume, arguendo, that the failure to review it fell below an objective standard of reasonableness.

If an attorney’s lack of preparation deprives a defendant of his only theory of defense, the defendant may be deemed prejudiced. See *People v Grant*, 470 Mich 477, 491-493; 684 NW2d 686 (2004). In this case, however, defense counsel used Spencer’s testimony and the arrest photograph to support his closing argument, during which he argued extensively that defendant was misidentified. For example, counsel emphasized that in the photograph, the perpetrator had a full beard, whereas two witnesses did not mention a beard in their descriptions of the perpetrator.³ Defense counsel’s actions or inactions did not deprive defendant of his theory of defense that the victims’ identifications of defendant were unreliable.

² Spencer used the arrest photograph to aid his testimony that there were slight differences between defendant’s appearance at the time of the investigation and the trial. The prosecution argued in closing arguments that those differences explained why defendant’s appearance at trial did not entirely match the descriptions the victims gave to the police.

³ In addition, counsel mentioned that witness Dewone Hudson (even though Hudson later claimed that the statement was inaccurate) had signed a statement indicating that the perpetrator had a very dark complexion. Spencer indicated that in the photograph, the perpetrator was “medium-complected.”

Defendant cites *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988), for its holding that defense counsel may be ineffective for calling a witness for the defense who provides the only substantive evidence of a defendant's guilt. However, Spencer did not provide the only substantive evidence of defendant's guilt. Kevin Boyd was 100 percent sure of his in-court identification of defendant and Dewone Hudson was 65 to 75 percent sure of his in-court identification, and Boyd and Hudson each identified the same handgun as the gun defendant used during the criminal incidents. Moreover, defendant was wearing Hudson's hat and he possessed Hudson's cellular telephone during a police chase, and he demonstrated consciousness of guilt by running from the police and by disposing of a gun and Hudson's items during the chase.⁴ Under all the circumstances, defendant has not shown a reasonable probability that a different outcome would have resulted if defense counsel had reviewed the arrest photograph before trial, and thus defendant's ineffective assistance claim fails. *Caballero*, 184 Mich App at 640; *Rodgers*, 248 Mich App 714.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

⁴ Defendant was ultimately convicted based on his robbery of Hudson but was acquitted on charges of assaulting Boyd and a police officer. Boyd had testified that defendant lifted up his shirt and showed Boyd a handgun while defendant's companion asked, "[w]hat you got, what you got?" Boyd escaped from the men without giving them anything. The police officer had testified that defendant pointed the gun at him during the police chase.