

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 19, 2012

v

ANTHONY ANTWONE NICKLEBERRY,  
  
Defendant-Appellant.

No. 303475  
Saginaw Circuit Court  
LC No. 09-032793-FC

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Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felon in possession of a firearm, MCL 750.244f; carrying a firearm with unlawful intent, MCL 750.226; assault with intent to rob while armed, MCL 750.89; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to two years to 90 months' imprisonment for the felon in possession of a firearm conviction, two years to 90 months' imprisonment for carrying a firearm with unlawful intent, 18 to 20 years' imprisonment for the assault with intent to rob while armed conviction, and two years' imprisonment for each of the three felony-firearm convictions. The felony-firearm sentences are to be served concurrently to each other. The felon in possession of a firearm, carrying a firearm with unlawful intent, and assault with intent to rob while armed sentences are to be served concurrently to each other and consecutively to the felony-firearm sentences. We affirm.

Defendant's conviction arises from an attempted armed robbery in which, as the victim was leaving a store, he was approached by an armed assailant. The assailant pointed a gun at the victim and repeatedly demanded money. When the victim attempted to run back into the store, the assailant shot him in the leg and then fled the scene. The victim was shown a picture of defendant on MySpace the following day, recognized defendant as his assailant, and subsequently contacted police and provided them with defendant's name. The police conducted a photographic lineup four days later, in which the victim again identified defendant as his assailant. At trial, the victim identified defendant as his assailant, and evidence of both pretrial identifications was presented. The parties stipulated that defendant had a prior conviction for a specified felony and remained ineligible to possess a firearm.

Defendant contends that the evidence at trial was insufficient to identify him as the perpetrator of the charged crimes. This Court reviews claims of insufficient evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The evidence is viewed in the light most favorable to the prosecution to determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Identity is an essential element of every offense. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). As with all elements, “[i]dentity may be shown by either direct testimony or circumstantial evidence.” *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

At trial, the victim in this case positively identified defendant as the person who shot him. In addition, evidence of the victim’s pretrial identifications of defendant was presented to the jury, including admission of the MySpace photograph and the photographic lineup from which the victim identified defendant. “[P]ositive identification by witnesses may be sufficient to support a conviction of a crime.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000) (citation omitted). Circumstantial evidence was also introduced implicating defendant as the perpetrator. Evidence was admitted that defendant’s girlfriend, with whom defendant was staying at the time of the crime, lived only 1-1/2 to 2 blocks from the scene of the crime. While defendant’s girlfriend testified that she and defendant were at a hospital at the time of the crime, we view the evidence in a light most favorable to the prosecution. *Hunter*, 466 Mich at 6. Evidence was also presented that the gun used in the shooting was a .38-caliber revolver, and photographs were admitted into evidence showing defendant holding a .38-caliber revolver. A rational jury could find, based on the victim’s eyewitness identification and the additional circumstantial evidence, that defendant was the perpetrator of the alleged crimes. The evidence, when viewed in the light most favorable to the prosecution, was sufficient to support defendant’s convictions.

In reaching our conclusion, we also address defendant’s argument that the victim’s initial identification of defendant was impermissibly suggestive, formed the basis of the victim’s subsequent identifications, and caused defendant to be misidentified. Where an identification procedure is so impermissibly suggestive that it creates a substantial likelihood of misidentification, evidence of that identification is inadmissible at trial, and in-court identification by the same witness is precluded unless the prosecution establishes an independent basis for the in-court identification. *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993) (citations omitted). Although defendant argues that the identification “was unduly suggestive and would easily lead to misidentification,” defendant does not assert that the evidence was improperly admitted. Instead, defendant appears to argue that, even if admissible, the identification, because it resulted from an impermissibly suggestive procedure, cannot provide sufficient evidence to support defendant’s convictions. We disagree. Defense counsel questioned both the victim and the investigating police officer about the identification, thereby presenting the jury with evidence of the allegedly suggestive procedure. The weight and credibility of the identification in light of the allegedly suggestive procedure are questions of fact for the jury that this Court will not disturb on appeal. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Davis*, 241 Mich App at 700.

To the extent that defendant challenges the admissibility of the identification evidence itself, defendant failed to properly present this argument on appeal by raising it in the question

presented in his appellate brief. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); MCR 7.212(C)(5). Moreover, defendant failed to preserve this argument by objecting to the identification testimony at trial or requesting an evidentiary hearing on the matter. MRE 103(a)(1); *People v Lee*, 391 Mich 618, 626-627; 218 NW2d 655 (1974). Where an issue is unpreserved, the defendant bears the burden of establishing plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). Defendant has not done so.

In some circumstances, a photographic identification procedure may be so impermissibly suggestive that it violates a defendant's due process rights. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). A defendant who challenges the admissibility of identification evidence based on an assertion that an identification procedure violated his due process rights "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." *Kurylczyk*, 443 Mich at 302. Defendant's contention that the pretrial photographic identification in this case was impermissibly suggestive and conducive to misidentification is unsupported by the record. The victim observed his assailant's face, which was illuminated by a bright light, for 2-1/2 to 3 minutes from a distance of three to five feet. The identification took place the day after the crime, when the memory of assailant's face was still fresh in the victim's mind, and the victim recognized defendant as the assailant immediately and was certain of his identification. And, the evidence does not support that the victim was coerced or pressured into identifying defendant. See *Manson v Brathwaite*, 432 US 98, 116; 97 S Ct 2243; 53 L Ed 2d 140 (1977) (finding no substantial likelihood of misidentification where "there was no coercive pressure [on the witness] to make an identification" and "[t]he identification was made in circumstances allowing care and reflection"). The victim herein testified that the friends who showed him the photograph simply showed it to him and asked him if that was the person who shot him. Under the totality of the circumstances, the victim's identification of defendant was not so impermissibly suggestive that it created a substantial likelihood of misidentification, and the admission of the identification evidence was not plain error.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Henry William Saad