

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 19, 2012

v

FREDERICK MARTEZ MARTIN,  
Defendant-Appellant.

No. 302405  
Wayne Circuit Court  
LC No. 09-023095-FC

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Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions 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 (felony-firearm), MCL 750.227b. Defendant was sentenced to 20 to 40 years' imprisonment for his armed robbery conviction, 3 to 10 years' imprisonment for his felon in possession conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first argues that the trial court clearly erred by failing to suppress all identification evidence stemming from the initially suggestive police station identification of defendant. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

"An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Harris*, 261 Mich App at 51, citing *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009) (quotations and citation omitted). "[A]n improper suggestion often arises when the witness[,] when called by the police or prosecution[,] either is told or believes that the police have apprehended the right person" or "when the witness is shown only one person[,] or a group in which one person is singled out in some way," such that the witness "is tempted to presume that he is the person." *Gray*, 457 Mich at 111 (quotations and citation omitted).

The trial court did not clearly err in finding that the initial identification of defendant, although suggestive, was not unduly suggestive. The evidence adduced from the *Wade*<sup>1</sup> hearing gave sufficient evidence for the trial court to find that there was not a substantial likelihood of misidentification. Officer Robson, with the Detroit Police Department, only indicated that they had arrested a man “from the area” where William Freeman was robbed, and asked if Freeman could identify his robber. Robson then had defendant stand approximately 40 feet from Freeman, in a room with 3 other individuals, to make an identification. See *Gray*, 457 Mich at 111 (holding that the combination of an officer’s statement to the victim that they had arrested the assailant and the officer’s showing of a single photograph of the assailant to the victim was highly suggestive). Although defendant was singled out, he was not singled out in such a way that Freeman would presume defendant to be the robber.

Moreover, Freeman’s additional bases for identification, the limp and facial recognition, also indicated that the identification was not based on suggestion, despite the fact that defendant was wearing the same clothes as he wore when arrested. *People v Johnson*, 202 Mich App 281, 286; 508 NW2d 509 (1993). Freeman was also positive of his identification at the outset. See *Gray*, 457 Mich at 112. As a result, the trial court did not clearly err in holding that the initial identification was not unduly suggestive so as to give rise to a substantial likelihood of misidentification.

The trial court also did not clearly err in holding that the prosecution sufficiently proved an independent basis for the photographic line-up identification, the identification at the preliminary examination, and an in-court identification, irrespective of whether the initial identification was suggestive. Even if a pretrial procedure was impermissibly suggestive, other identification evidence by the same witness still may be allowed if an independent basis for the identification can be established showing that the identification is untainted by the suggestive pretrial procedure. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). The prosecutor must show a basis independent of the prior identification procedure by clear and convincing evidence. *Gray*, 457 Mich at 115. The inquiry is factual, and the validity of the in-court identification must be determined in light of the totality of the circumstances. *Id.* In determining whether there is an independent basis for an in-court identification which cleanses it of a prior tainted identification, a court should consider: (1) the witness’ prior relationship with or knowledge of the defendant; (2) the witness’ opportunity to observe the offense, including such factors as the length of time of the observation, lighting, noise and other circumstances affecting sensory perception and proximity to the crime; (3) the length of time between the offense and the disputed identification; (4) the accuracy or discrepancies in the pre-lineup or showup description and the defendant’s actual description; (5) any previous proper identification or failure to identify the defendant; (6) any identification prior to lineup or showup of another person as the defendant; (7) the nature of the offense and the physical and psychological state of the victim; and (8) any idiosyncratic or special features of the defendant. *Id.* at 115-116.

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<sup>1</sup> *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Freeman testified at the *Wade* hearing that he was robbed outside of Harding Market, at approximately 10:00 a.m. The robber's face was approximately 18 inches from Freeman's face during the robbery. Freeman stated that the robber was wearing a short-sleeved black t-shirt, black pants, and black gym shoes. Following the robbery, Freeman returned to Harding Market and viewed the store's surveillance tapes. Freeman identified the individual standing behind him in line and riding away on his bicycle in the surveillance video as the robber. Freeman then went to the police station to make a report. While making his statement, an officer told Freeman that police arrested a man from the area of his robbery.

The officer then walked to the "lock-up area," which was about 40 feet away from Freeman, and had a man stand and walk a few feet toward Freeman. Three other individuals were also sitting in the area on the same bench. Freeman identified defendant, explaining that the man who robbed him also had a limp and was also wearing a black t-shirt and black pants. Freeman was positive that defendant was the one who robbed him. Freeman also identified defendant in the surveillance video. Freeman returned at a later date and identified defendant once more in a photographic line-up.

The trial court held that although Freeman was not "the most articulate witness," Freeman's testimony showed that he identified defendant based on his face-to-face interaction with defendant and by defendant's limp. Freeman's clothing description was also consistent, and Freeman identified defendant prior to the initial identification at the police station in the store's video surveillance tapes. The trial court thus did not clearly err in holding that the prosecution sufficiently provided an independent basis for Freeman's identification of defendant absent the suggestive initial identification. Furthermore, the trial court articulated its ruling sufficiently when it discussed each factor in its ruling, even though it did not explicitly examine the factors with reference to *Gray*.

Defendant next argues that the trial court erred in denying defendant's motion to consolidate cases 09-023093-FC and the present case, 09-023095-FC, made biased remarks at a November 6, 2009, pretrial hearing, as well as shifted the burden of proof in jury instructions regarding defendant's alibi defense.

Whether joinder is permissible presents a mixed question of fact and law that is subject to clear error and de novo review. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). In the absence of an objection at trial, an appellate court reviews an unpreserved claim of judicial bias for plain error affecting defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Unpreserved claims of instructional error are also reviewed for plain error affecting substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). To avoid forfeiture under the plain error rule, defendant must show that an error occurred, the error was plain, and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *Williams*, 483 Mich at 231. MCR 6.120(B), the rule on permissive joinder and severance, provides, in the relevant part:

On its own initiative, the motion of a party, or the stipulation of all parties, . . . the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

"Joinder is appropriate if the offenses are related." *People v Breidenbach*, 489 Mich 1, 14; 798 NW2d 738 (2011), quoting MCR 6.120(B)(1) (quotations and emphasis in the original omitted). Offenses are related if they are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. *Id.*, quoting MCR 6.120(B)(1) (quotations omitted).

Defendant was charged in case number 09-023093-FC with two counts of possession with intent to deliver less than 50 grams of cocaine, felon in possession of a firearm, and felony-firearm based on the circumstances of defendant's arrest. In case number 09-023095-FC, the present case, defendant was charged with armed robbery, felon in possession of a firearm, and felony-firearm, based on the circumstances at Harding Market. Defendant could show no connecting event that would indicate that the two crimes were related, aside from the fact that the robbery and defendant's arrest took place on the same day. The trial court thus did not err in finding that the two cases were not similar enough to consolidate.

The trial court also did not evince bias in denying defendant's motion to consolidate or by making inappropriate remarks at the pretrial conference on November 6, 2009. A criminal defendant is entitled to a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (quotations and citation omitted). A defendant claiming judicial bias must overcome "a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id.* Comments that are critical or hostile to counsel or the parties are generally not sufficient to evince bias. *Id.*

The trial court's decision on defendant's motion to consolidate cannot form the basis for a recusal. *Wells*, 238 Mich App at 391. The record also does not contain a reference to "fault" and adjournments in the pretrial conference on November 6, 2009, as defendant contends. The trial court did not show bias at the pretrial conference or in any of its rulings.

Defendant also argues that the trial court improperly shifted the burden of proof in jury instructions regarding his alibi defense, specifically using the word "proven" in regard to defendant's alibi. A trial court must instruct a jury concerning the law applicable to the case and "fully and fairly present the case to the jury in an understandable manner." *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). The trial court instructed the jury on the burden of proof, including that the prosecution must prove every element beyond a reasonable doubt. The trial court did not reference that defendant must prove he had an alibi; in fact, the trial court explicitly stated that defendant need not prove his alibi. In fact, the only use of the word "prove"

was used in reference to the prosecution. The trial court did not plainly err in giving jury instructions in regard to an alibi defense.

Defendant next argues that he was denied the effective assistance of counsel when his counsel failed to investigate, locate or call necessary witnesses, including an expert witness, and had a substitute counsel appear at defendant's preliminary examination. Because defendant failed to preserve his ineffective assistance of counsel claims, we review for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). The determination whether a defendant was deprived of his constitutional right to counsel through ineffective assistance is reviewed de novo on appeal. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

A defendant asserting that he was deprived of the effective assistance of counsel bears the burden of demonstrating both deficient performance and prejudice, and he bears the burden of establishing the factual predicate for his claim. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). The defendant must show that "counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment[.]" and "that the deficient performance prejudiced the defense." *Id.* (quotations and citations omitted). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* (quotations and citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotations and citations omitted).

Defendant fails to establish that his counsel's failure to investigate constituted deficient performance. The "[f]ailure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, the record shows that defense counsel requested and was granted an investigator, and that his trial counsel also successfully pursued a motion to show cause, requesting defendant's medical records. Consequently, defendant has failed to establish that defense counsel failed to investigate his claim or file motions such that his performance fell below the standard of professional norms.

Likewise, defendant fails to show how defense counsel was deficient in failing to locate or call alibi witnesses or an expert witness on human memory. A defendant bears a "heavy burden of overcoming the presumption that his trial counsel employed effective trial strategy." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "[W]hether to call a witness is presumed to be a strategic . . . [decision] for which this Court will not substitute its judgment." *Id.* The failure to call a witness constitutes ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotations and citation omitted).

Defendant's counsel called two witnesses, Officer Racz and an employee from Preferred Rehabilitation Center, in addition to defendant, to establish defendant's alibi. Defense counsel also introduced two exhibits, the sign-in sheets from Preferred Rehabilitation and the parole office. Defense counsel therefore presented defendant's alibi defense to the jury. Defendant

fails to provide additional witnesses on the record that would have impacted the outcome of the trial. Similarly, defendant fails to establish the factual predicate necessary regarding an expert witness because he offers no proof that an expert witness would have testified in support of his defense. Defendant therefore fails to show how, in failing to call witnesses, he was deprived of a substantial defense.

Finally, defendant fails to show how the substitution of counsel at a preliminary hearing prejudiced his defense. Defendant's argument regarding substitute counsel pertains to an attorney whom he asked to withdraw, and who did withdraw. Defendant fails to establish how the previous substitution, which pertained to an attorney that did not represent him at trial, prejudiced his defense.

Affirmed.

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello