

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE J. KYLES,

Defendant-Appellant.

UNPUBLISHED

February 18, 2003

No. 238180

Wayne Circuit Court

LC No. 01-003053

Before: Neff, P.J. and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to rob while armed, MCL 750.89, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to two concurrent terms of seven to fifteen years' imprisonment for the assault and carjacking convictions and two consecutive years' imprisonment for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that he was deprived of his right to the effective assistance of counsel based on defense counsel's failure to (1) object to and move to suppress the victim's in-court identification, (2) "thoroughly" cross-examine the victim, and (3) call two witnesses. We disagree.

I. Standard of Review

This Court reviews de novo claims of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). Our review is limited to the existing record because defendant failed to move for a new trial or a *Ginther*¹ hearing on the basis of ineffective assistance of counsel. *Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Pursuant to *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *People v Pickens*, 446 Mich 298, 309-327; 521 NW2d 797 (1994), a defendant must satisfy a two-pronged test to establish ineffective assistance of counsel:

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Strickland, supra* at 687.]

Effective assistance is presumed, and the defendant bears a heavy burden of proving that his counsel was ineffective. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

II. In-Court Identification

Defendant first argues that defense counsel was ineffective for failing to move to suppress the in-court identification. We disagree.²

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 168-169; 205 NW2d 461 (1973); *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To establish that an identification procedure denied him due process, a defendant must show that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *Williams, supra* at 542. If the procedure was impermissibly suggestive, the identification evidence is inadmissible unless an independent untainted basis for the in-court identification can be established. *Id.* at 542-543.

Defendant has failed to demonstrate that the identification procedure was impermissibly suggestive. Defendant does not cite any facts suggesting that the police indicated to the victim that they apprehended the right person or singled defendant out at the lineup. The first identification occurred the day after the incident as a result of the police calling the victim's wife indicating that a lineup would be conducted because an arrest had been made. At the lineup, the victim first chose another man and then identified defendant. The victim was able to provide a reasonable explanation for the mistake:

Q. Did you, when you saw that lineup, did you pick him right away, or was there somebody else that you picked out?

² In order to preserve a claim that an in-court identification was improper, a defendant must either object at trial or request a *Wade* hearing. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001); *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *People v Anderson*, 389 Mich 155, 167-172; 205 NW2d 461 (1973). Because defendant failed to object or request a *Wade* hearing, this issue, if raised, would be reviewed for plain error affecting his substantial rights. *McCray, supra* at 638, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). However, defendant's argument that the in-court identification was improper is in the context of an ineffective assistance of counsel claim. Therefore, defendant must show that defense counsel erred and, but for the error, there is a reasonable probability that the result would have been different. *Pickens, supra* at 302-303.

A. No. I had a couple of things that stuck out in my mind, specifically. I remembered that he had a beard and a scar by his eye. And the very first guy that I looked at had a beard and a scar by an eye. But as I – as I looked at him, I knew – he had a full beard, the other guy did. And he – they had them sittin' [sic] down. And he looked like he was much shorter. So, then, as I moved down the row, I recognized him by the scar. And he had a scrappy beard on. He didn't have his hat on, or his fatigue jacket, or anything, but –

Q. So, when you saw Mr. Kyles, the day before, he had a hat on?

A. Yes.

Q. And he had somewhat different clothing?

A. Yes.

The inconsistency, if any, in the victim's identification of defendant at the lineup merely goes to the weight of the testimony rather than its admissibility. *People v Gray*, 457 Mich 107, 124; 577 NW2d 92 (1998). These facts do not indicate that the identification procedure was impermissibly suggestive.

Even if defendant had succeeded in demonstrating that the identification procedure was impermissibly suggestive, there was an independent basis on which the victim could identify defendant in court. *Gray, supra* at 115. Factors to be considered in this analysis include: (1) the witness' opportunity to observe the criminal during the crime; (2) the length of time between the crime and the disputed identification; (3) the witness' level of certainty at the prior identification; (4) discrepancies between the pretrial identification description and the defendant's appearance; (5) any prior proper identification of the defendant or failure to identify the defendant; (6) any prior identification of another as the culprit; and (7) any special features of the defendant. *Id.* at 115-116.

Here, the victim had ample opportunity to view the defendant during the course of the robbery. The robbery occurred at approximately 5:00 p.m. in December at which time there was probably little sunlight. However, the victim was at a payphone at a gas station which probably provided some artificial light. At any rate, the victim did not testify that he had any trouble viewing defendant's face. Defendant approached the victim and asked for his wallet to which the victim responded that he was on the phone and turned away. Defendant demanded the wallet again and was close enough to the victim to take the phone from his hands and slam it down. The victim stated that his wallet was in his truck. Defendant then instructed the victim to get the wallet. As the victim opened the door of his truck, defendant stepped between him and the truck. The victim pushed defendant into the truck whereupon defendant pulled out a sawed-off shotgun. Based on this testimony, it does not appear that the victim was so panicked that he would not recall the details of the incident. Furthermore, the victim was close enough to defendant and had ample time to view him before the weapon was drawn. The victim immediately called the police who arrived at the scene and took a report. The victim was able to identify defendant because of a characteristic scar above the eye and a beard.

Based on this record, a motion to suppress the identification would have been meritless. Defense counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 424-425; 608 NW2d 502 (2000). Therefore, we find that defendant was not denied the effective assistance of counsel on this basis.

III. Cross-Examination

Next, defendant argues that defense counsel failed to “thoroughly” cross-examine the victim about his identification of defendant. This argument is without merit. Our review of the record reveals that trial counsel cross-examined the victim on his prior statements as to defendant’s description and the circumstances surrounding the lineup procedure. Furthermore, trial counsel utilized this testimony in his closing argument that the identification was not credible. Defendant was not deprived of the effective assistance of counsel on this basis.

IV. Failure to Call Defense Witnesses

Finally, defendant argues that he was deprived of the effective assistance of counsel based on defense counsel’s failure to call two witnesses in his defense. We disagree. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *Rockey, supra* at 76.

Defense counsel was clearly aware of the two witnesses and their importance to the defense. However, neither party was able to locate the witnesses. The trial court, aware of this situation, provided additional time to locate the witnesses. The trial court also granted an adjournment on the third day of trial for the same purpose. However, defense counsel declined the adjournment conceding that the witnesses could not be found. Under oath, defendant agreed with defense counsel’s decision to decline the adjournment and agreed to proceed with trial. Therefore, defendant affirmatively waived the presence of the witnesses. We find no error.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly