

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIS MARCELL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 17, 2005

No. 251317

Ingham Circuit Court

LC No. 03-000190-FC

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 469.11, to 120 to 240 months in prison for the armed robbery conviction, to be proceeded by a consecutive two years' imprisonment for the felony-firearm conviction. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant argues that he was denied the right to due process and a fair trial by the admission of identification evidence. More specifically, he argues that the circumstances of the preliminary examination were unduly suggestive and that there was no independent basis for the victim's subsequent in-court identification. We disagree. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. . . . Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). To sustain a due process challenge, a defendant must show that the pre-trial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Further, the fact that the pretrial confrontation occurred at a preliminary examination does not mean that it cannot be considered unduly suggestive. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). But this Court has repeatedly held that not all confrontations at preliminary examination are impermissibly suggestive. See, e.g., *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984). Moreover, just because

the identification procedure is suggestive does not mean that it is constitutionally defective. *Kurylczyk, supra* at 306.

Defendant claims that the preliminary examination identification was tainted because defendant was the only black person in the courtroom and the only person in the courtroom wearing a jail jumpsuit, leg chains, and handcuffs. While there is no question that the preliminary examination in this case was a suggestive atmosphere, *Colon, supra* at 305, the relevant test is whether the procedure was so impermissibly suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Kurylczyk, supra* at 302. The relevant factors for evaluating the totality of the circumstances include “the opportunity for the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of a prior description, the witness’ level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.” *Colon, supra* at 304-305.

In the instant case, the victim testified that he observed defendant for approximately five minutes inside the store and that he focused on defendant’s face when defendant was pointing a gun at him. Additionally, the victim’s description of defendant given to the police immediately after the robbery was consistent with defendant’s appearance. Finally, the victim testified that he had no doubt about his identification of defendant at the preliminary examination, which occurred approximately three months after the robbery, and that he had no contact with defendant between the robbery and the preliminary examination. Under the totality of the circumstances, defendant has failed to show that there was a substantial likelihood of misidentification. Therefore, we conclude that the identification of defendant at the preliminary examination was not unduly suggestive. Accordingly, we see no error in the subsequent admission of the victim’s identification of defendant at trial.

Defendant also argues that his trial counsel was ineffective for failing to object to or moving to suppress the victim’s identification of defendant at the preliminary examination. We again disagree. Because defendant failed to preserve this issue by not moving for a new trial or seeking an evidentiary hearing, our review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631, lv den 471 Mich 851 (2004).

To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel’s performance fell below an objective standard of reasonableness, and that trial counsel’s representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel’s error. *Id.* at 6. In addition, “defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843, lv den 461 Mich 941 (1999), which includes a trial counsel’s decision not to move for suppression of identification testimony, *People v Wilki*, 132 Mich App 140, 145; 347 NW2d 735 (1984).

We note that while defense counsel did not specifically move to suppress this evidence, the entire issue of the victim’s identification of defendant—including the circumstances of the

preliminary examination—were presented to the court prior to proofs. The court ruled that if the victim were to identify defendant at trial, the issue of pretrial identification would go to the weight of the in-court identification, not its admissibility. In any event, given that the preliminary examination was not impermissibly suggestive and that the subsequent in-court identification had a sufficient independent basis for admission, counsel cannot be faulted for his actions.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder