

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST HALL,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 260771

Wayne Circuit Court

LC No. 04-011411-01

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carjacking, MCL 750.529a, armed robbery, MCL 750.529, and receiving a stolen motor vehicle, MCL 750.535(7). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 25 to 40 years for the carjacking and armed robbery convictions, and two to five years for the receiving stolen property conviction. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

I

Defendant's convictions arise from a crime spree that occurred in Detroit on October 24, 2004. At about 9:00 p.m., William Tucker was waiting outside a store in a black Suburban Yukon vehicle while his cousin, Corey Tucker, went inside the store. Two men approached William. One of the men, later identified as defendant, brandished a gun and told William to get out, which he did. The two men then got into the Yukon and drove away, with defendant driving. At about 9:30 p.m., Johnny Worthy was walking in a nearby neighborhood when a black Yukon pulled up to the curb. The passenger approached Worthy, held a gun to his head, and demanded Worthy's money and possessions. After the men left, Worthy flagged down a police car and reported the incident. Worthy acknowledged that he did not see the driver of the car.

Detroit Police Officers Michael McGinnis and Jason McCartney heard a radio report of the carjacking and saw a black Yukon, which they began to follow. The officers watched as the Yukon pulled up to a curb and the passenger gestured to a person on the street. The person dove to the ground, as if he had been threatened with a gun, and the officers suspected that a robbery was taking place. McGinnis attempted to initiate a traffic stop, but the Yukon quickly drove off.

After a short distance, the driver and passenger parked the vehicle and ran away on foot. McGinnis and McCartney pursued the suspects, but lost them and returned to their patrol car.

Officer Shelby Remy encountered defendant near the area where McGinnis lost sight of the driver. Defendant was not wearing a coat, although it was a cold night. He was sweating, out of breath, and his heartbeat was accelerated, as if he had been running. McGinnis identified defendant as the driver who fled from the Yukon, and Remy arrested him. The passenger was never apprehended. The officers confirmed that the abandoned Yukon was Corey Tucker's stolen vehicle. The officers found a chrome-colored plastic BB gun and Worthy's coat inside the Yukon. William Tucker and Worthy both identified the BB gun as the weapon used in their respective robberies.

II

Defendant first argues that the trial court improperly sentenced him to 25 to 40 years' imprisonment for the carjacking and armed robbery convictions after it initially announced that it was imposing sentences of 10 to 20 years for each of those convictions. Defendant argues that the trial court lacked the authority to increase his sentences after first issuing a valid sentence. A trial court "may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." MCR 6.429(A); *People v Wybrecht*, 222 Mich App 160, 166; 564 NW2d 903 (1997). However, a sentence is not effectively imposed until the defendant is remanded to jail to await execution of the sentence, or the trial court's sentencing order is actually issued. *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984).

In this case, the trial court stated that it intended to sentence defendant within the sentencing guidelines range, which was 126 to 420 months. The court then verbally announced that it was imposing sentences of 10 to 20 years for the carjacking and robbery convictions. Minutes later, however, before signing a written order, the court stated that it "had misspoken" and instead was sentencing defendant to prison terms of 25 to 40 years each for the carjacking and robbery convictions. Because a sentencing order had not been issued and defendant had not been remanded to jail to await execution of his sentences, the trial court did not lose its jurisdiction to correct its misstatement and impose the sentences it intended. There was no sentencing error.

III

Defendant next argues that his constitutional right against self-incrimination was violated when Officer Berryman testified that defendant covered his face with his shirt when Berryman tried to photograph him. Because defendant did not object to this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

The United States and Michigan Constitutions guarantee a defendant's right against self-incrimination. US Const Am V; Const 1963, art 1, § 17. In accordance with this guarantee, a defendant's decision to exercise his right to silence may not be used as evidence against him. *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006); *People v Taylor*, 245 Mich

App 293, 304; 628 NW2d 55 (2001). But as this Court explained in *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988):

The constitutional privilege against self-incrimination protects a defendant from being compelled to testify against himself or from being compelled to provide the state with evidence of a *testimonial* or *communicative* nature

* * *

Compulsion which makes a defendant a source of real or physical evidence does not violate the Fifth Amendment's privilege against self-incrimination. Compelling a defendant to perform actions which demonstrate identifying physical characteristics, such as handwriting or voice exemplars, does not compel a defendant to give testimonial or communicative evidence and so does not violate the privilege against self-incrimination. [Citations omitted; emphasis added.]

Because the photographs of defendant involved only physical or visual evidence, rather than evidence of a testimonial or communicative nature, defendant's privilege against self-incrimination was not implicated and defendant has failed to establish a plain error.

IV

Defendant next argues that trial counsel was ineffective for failing to move for disjoinder of the various charges. To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

MCR 6.120(B) provides that the trial court "may . . . 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." MCR 6.120(B)(1) provides that joinder is appropriate if the offenses are related, meaning that they are based on (a) the same conduct or transaction, (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan. The trial court must grant a defendant's motion for severance if the offenses are not related as defined in subrule (B)(1). MCL 6.120(C). But the trial court is not obligated to sever counts if the charges are related. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Whether charges are related is a question of law subject to de novo review. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005).

Here, the charges against defendant were related because they arose out of a series of connected acts. MCR 6.120(B)(1)(b). The evidence showed that defendant and an accomplice committed an armed carjacking to steal a vehicle, and, less than an hour later, used the stolen vehicle to commit another armed robbery against a pedestrian. There was a substantial

commonality of the evidence used to prove both offenses; for example, Worthy testified that the armed robber was the passenger in the same kind of vehicle that was stolen from the Tuckers, Worthy's coat and the plastic gun that was identified as the weapon used in both offenses were found in the Yukon, defendant was apprehended while on foot in the vicinity of the abandoned Yukon, and the abandoned vehicle was identified as Corey Tucker's stolen Yukon. Because the offenses were sufficiently related, a motion for severance would have been futile. See *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Therefore, defense counsel was not ineffective for failing to make a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

V

Defendant raises several issues concerning the identification procedures used in this case. Because defendant failed to object to the identification evidence at trial, or request a *Wade*¹ hearing, we review these issues for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001).

First, defendant argues that the police improperly conducted a photographic lineup while he was in custody. Generally, when an accused is in custody, the police should not conduct a photographic lineup unless there is a legitimate reason for not holding a corporeal lineup. *People v Kurylczyk*, 443 Mich 289, 298 (Griffin, J); 505 NW2d 528 (1993); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Circumstances that justify use of a photographic lineup include: (1) when it is not possible to arrange a proper lineup; (2) there is an insufficient number of persons available with the accused's physical characteristics; (3) the case requires immediate identification; (4) the witnesses are distant from the location of the accused; and (5) the accused refuses to participate in a lineup and by his actions seeks to destroy the value of the identification. *People v Anderson*, 389 Mich 155, 186-187 n 23; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

At trial, Officers Newson and Walker testified that they arranged for a photographic lineup instead of a corporeal lineup because defendant refused to cooperate, and because they could not find five other persons of similar appearance at the four neighboring precincts. Because the record discloses proper reasons for conducting a photographic procedure instead of a corporeal lineup, plain error has not been shown. Further, defense counsel was not ineffective for failing to challenge the identification procedure on this basis. *Snider*, *supra*.

Second, defendant argues that William Tucker's in-court identification of defendant was tainted by an impermissibly suggestive pretrial identification procedure. An identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial probability of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness will not be permitted to subsequently identify the defendant in court unless the prosecutor shows

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

by clear and convincing evidence that there is an independent basis for the in-court identification sufficient to purge the taint of the illegal identification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

Defendant argues that William Tucker's identification was tainted because a police officer told William that he did a "good job" after selecting defendant's photograph. It is not clear that the officer's remark was intended as a statement that William had selected the "correct" suspect. This vague statement is insufficient to establish a plain error. Furthermore, exclusion of William's in-court identification would have been warranted only if there was no independent basis for the identification. A prior correct identification is a factor supporting a finding of an independent basis for identification apart from a suggestive remark. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-96; 752 NW2d 807 (1977). Here, the officer's statement was not made until *after* William had identified defendant. This circumstance provides additional support for our conclusion that William's in-court identification was not plain error.

Third, defendant argues that the photographic lineup was unduly suggestive because the men depicted in the filler photographs had much darker complexions than he did. A copy of the photographic lineup has not been submitted with the record on appeal, and defendant has not responded to this Court's inquiry regarding this record. Accordingly, this issue may be considered waived. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). In any event, apart from the fact that defendant never argued below that the photographic lineup was unduly suggestive, the record discloses that two of the three witnesses who viewed the lineup were unable to identify a lineup participant as a perpetrator of the charged offenses. Thus, there is no basis for concluding that the photographic lineup was so impermissibly suggestive that it led to a substantial probability of misidentification.

Fourth, defendant argues that his due process rights were violated under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), because the prosecution failed to disclose Worthy's participation in the photographic lineup, and also failed to disclose that although Worthy was unable to identify defendant as a participant in the charged offenses, he recognized defendant as a person he had previously seen in the neighborhood. In *Brady*, the Supreme Court held that it is a violation of due process for the prosecution to withhold exculpatory evidence. *Id.* at 87; *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002). The prosecution must disclose exculpatory evidence, regardless of whether the defendant requested it, if it contains information that could affect the outcome of the trial. *People v Elston*, 462 Mich 751, 771; 614 NW2d 595 (2000).

Here, the record does not support defendant's claim that the prosecution withheld exculpatory evidence. On the contrary, the evidence in question was fully disclosed at trial. Further, defendant was aware since the preliminary examination that Worthy was unable to identify him as a perpetrator. Additionally, evidence that Worthy recognized defendant as someone he previously saw in the neighborhood was not exculpatory and, therefore, was not subject to mandatory disclosure under *Brady*. For these reasons, we find no merit to this issue.

Fifth, defendant argues that the absence of an attorney at Worthy's lineup participation violated his Sixth Amendment right to counsel. In *Hickman, supra* at 609, our Supreme Court held that "the right to counsel attaches only to corporeal identifications conducted at or after the

initiation of adversarial judicial criminal proceedings.” Thus, the absence of counsel was not plain error.

Finally, because we have rejected defendant’s claims that the identification evidence was tainted by an improper identification procedure, we likewise reject defendant’s claim that defense counsel was ineffective for failing to object to this evidence. *Snider, supra*.

VI

Defendant argues that he was prejudiced by the introduction of photographs depicting him in his jail cell with his shirt pulled over his face. Defendant did not object to this evidence at trial, so we review this issue for plain error. *Carines, supra* at 763; *Coy, supra* at 12. Defendant acknowledges that the photographs were relevant to show the clothes he was wearing at the time of his arrest, but contends that the probative value of the evidence was substantially outweighed by its prejudicial effect. Defendant specifically argues that the photographs were prejudicial because they were analogous to forcing him to appear before a jury in handcuffs or shackles.

Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); MRE 403.

A defendant’s appearance at trial in handcuffs or shackles is generally disfavored because it “negatively affects the defendant’s constitutionally guaranteed presumption of innocence.” *Banks, supra* at 256. Shackling could interfere with the defendant’s right to be judged solely on the evidence introduced at trial, “and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). Here, the jury was aware that defendant had been arrested, and the photographs were offered for the limited purpose of depicting defendant’s appearance at the time of his arrest. This circumstance does not present the concerns inherent in observing a shackled defendant at trial. Therefore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, MRE 403, and defense counsel was not ineffective for failing to object on this basis. *Snider, supra*.

VII

Defendant raises several additional claims of ineffective assistance of counsel relating to defense counsel’s trial preparation and performance at trial. Although defendant raised the issue of ineffective assistance of counsel in a motion for a new trial, he did not advance these specific claims. Therefore, our review is limited to errors apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Defendant argues that trial counsel was ineffective because she failed to timely request discovery materials and, therefore, was unable to prepare an effective defense. The record does not support this claim. Contrary to what defendant argues, the record discloses that defense counsel utilized a video recording from a camera mounted on McGinnis’s patrol car to impeach McGinnis’s testimony at trial, and to elicit his admission that he did not identify defendant by his

face. Counsel also used the witnesses' police statements to attempt to discredit their trial testimony and highlight inconsistencies in their testimony.

Defendant argues that defense counsel could have used the videotape to prove that he was arrested without probable cause, because it shows that McGinnis was unable to observe the face of the driver who fled from the abandoned Yukon. This argument misapprehends both the evidence and the applicable law. Probable cause to arrest a suspect exists when circumstances permit a reasonably cautious person to believe that the arrested person is guilty of the offense charged. *Walsh v Taylor*, 263 Mich App 618, 628; 689 NW2d 506 (2004). Here, defendant was found in the vicinity of McGinnis's unsuccessful foot chase and appeared to have been running, and McGinnis identified him from his clothing as the person he had been chasing. This provided probable cause to believe that defendant was the driver who fled from the stolen Yukon. Furthermore, the sole remedy for an illegal arrest is the suppression of evidence obtained as a result of the arrest. An illegal arrest does not negate a trial court's jurisdiction over the defendant. *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991). Defendant does not argue that evidence was unlawfully obtained as a result of his arrest, but rather mistakenly assumes that an illegal arrest alone would preclude prosecution and conviction.

Defendant also argues that the police videotape could have been used to highlight weaknesses in the prosecution's timeline. However, the record discloses that defense counsel cross-examined the witnesses about the timeline and elicited facts concerning the very weaknesses that defendant discusses. Nor is there merit to defendant's argument that trial counsel was unprepared to effectively cross-examine and impeach prosecution witnesses. On the contrary, trial counsel extensively cross-examined William Tucker regarding the reliability of his identification of defendant as the carjacker, eliciting that he had a limited opportunity to observe the carjacker, and that his description of the carjacker did not match defendant's appearance.

Defense counsel also challenged Officer McGinnis's ability to identify defendant as the driver of the stolen Yukon. On cross-examination, McGinnis admitted that he only saw the driver's face for a "brief second" when he fled from the Yukon, and that he identified defendant from his clothing, not his face. Trial counsel also cross-examined Officers McCartney and Adam Byrd regarding the witnesses' original descriptions of the suspects. Both admitted that the initial reports described the driver as a light-complected man with an Afro hairstyle, which did not accurately describe defendant, who is bald. Although defendant identifies additional discrepancies and inconsistencies that counsel did not raise, this does not establish ineffective assistance of counsel. The record discloses that trial counsel extensively cross-examined and impeached the various witnesses to elicit discrepancies between their descriptions of defendant and defendant's appearance. Against this backdrop, the record does not support defendant's claim that counsel was deficient in his cross-examination, even if some additional discrepancies or inconsistencies could have been elicited. The standard for effective assistance does not require perfect representation. *Pickens, supra* at 359.

Defendant also argues that trial counsel was deficient for failing to interview prosecution witnesses. The record does not disclose what interviews counsel did or did not conduct. Further, it is not apparent that additional interviews were necessary in light of information counsel may have already possessed from other sources, e.g., preliminary examination testimony, police reports. Moreover, defendant has not made any showing that additional interviews would have

led to the discovery of additional information favorable to the defense. For these reasons, defendant has not shown that counsel was ineffective in this regard.

Defendant also argues that defense counsel should have requested an “adverse inference” instruction in relation to the gloves that were allegedly found on defendant’s person and in the Yukon, but which were not introduced into evidence. The prosecutor must produce at trial all evidence bearing on the defendant’s guilt or innocence that is within the prosecutor’s control. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Where evidence is not produced, the relevant considerations are whether the prosecutor deliberately suppressed it, whether the defendant requested the evidence, and whether, “in retrospect, the defense could have significantly used the evidence.” *Id.* If the prosecutor acted in bad faith in failing to produce the evidence, it is appropriate for the trial court to instruct the jurors that they may infer that the evidence would have been favorable to the defendant. *Id.* at 514-515. Here, there is no basis in the record for assuming that the officers did anything improper with regard to the gloves, or that they might have been used to defendant’s advantage. Accordingly, there was no reason for defense counsel to request an adverse inference instruction. *Snider, supra.*

In sum, defendant has failed to show either that trial counsel’s performance was objectively unreasonable, or that he was prejudiced by any alleged deficiency.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey