

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

v

RICHARD CHARLES GENTRY,
Defendant-Appellant.

No. 305644
Washtenaw Circuit Court
LC No. 10-001781-FC

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Richard Charles Gentry appeals as of right his jury trial conviction of two counts of assault with intent to murder,¹ conspiracy to commit first-degree murder,² and two counts of possession of a firearm during the commission of a felony (“felony-firearm”), second offense.³ Gentry was sentenced as an habitual offender, fourth offense,⁴ to 30 to 50 years’ imprisonment for each count of assault with intent to murder, life imprisonment for conspiracy to commit first-degree murder, and five years’ imprisonment for each count of felony-firearm. We affirm.

Gentry argues that there was insufficient evidence of his identity as the assailant. We disagree. We review a challenge to the sufficiency of the evidence de novo.⁵

[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the

¹ MCL 750.83.

² MCL 750.316(1)(a); MCL 750.157a.

³ MCL 750.227b.

⁴ MCL 769.12.

⁵ *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.⁶

The element of identity is always an essential element in a criminal prosecution.⁷ Here, one of the victims, Kevin McMillan, identified Gentry as the assailant at trial. On appeal, Gentry raises a series of factual claims to challenge the credibility of McMillan's identification. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew."⁸ Further, "positive identification by witnesses may be sufficient to support a conviction of a crime."⁹ Accordingly, the evidence, viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find that the essential element of identity was proved beyond a reasonable doubt.¹⁰

Gentry also raises issues in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None warrant reversal.

Gentry contends that the trial court erred in admitting McMillan's identification of him as the assailant because McMillan's opportunity to view Gentry at an adjourned November 24, 2010, preliminary examination was impermissibly suggestive. We disagree. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous."¹¹ "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made."¹²

Gentry has abandoned this issue because he failed to provide any authority in support of his claim.¹³ That notwithstanding, "[a]n identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process."¹⁴ "In order to challenge an identification on the basis of lack of due process, 'a defendant 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.'"¹⁵ "[B]ecause an identification

⁶ *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992) (quotations omitted).

⁷ *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

⁸ *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

⁹ *Id.*

¹⁰ *Nowack*, 462 Mich at 399-400.

¹¹ *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

¹² *Id.*

¹³ *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

¹⁴ *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

¹⁵ *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

procedure is suggestive does not mean it is necessarily constitutionally defective.”¹⁶ If a witness is exposed to an impermissibly suggestive pretrial identification, his in-court identification of the defendant will be admitted if the prosecution shows by clear and convincing evidence that the witness had an independent basis to identify the defendant in court.¹⁷

The factors that a court should weigh to determine if an independent basis exists for McMillan’s in-court identification include:

(1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant’s actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim’s age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant.¹⁸

Here, McMillan testified at the December 8, 2010, preliminary examination that he only looked directly at Gentry for approximately a tenth of a second on the day of the incident and admitted to being intoxicated at the time. The extent of McMillan’s description of the assailant at that time was that he was African American and wearing a baseball hat. Moreover, nearly six months elapsed between the crime and McMillan’s confrontation of Gentry before trial. Accordingly, we agree that there is some evidence that the identification procedure was suggestive.¹⁹

Based on the totality of the circumstances, however, we find that “there was a sufficient independent basis for the admission of [McMillan’s] in-court identification”²⁰ which was proven by clear and convincing evidence.²¹ At the time of the adjourned preliminary examination, McMillan identified Gentry to police and advised another witness that Gentry did not look the same in court as he did on the night of the incident. Therefore, McMillan was able to discern a change in Gentry’s appearance, who he viewed from ten to 15 feet away at the time he was shot, and explain the change. Additionally, McMillan met Gentry the day before the incident and spent numerous hours in close proximity to him. Moreover, there is no evidence that McMillan identified anyone other than Gentry as his assailant. Finally, the evidence fails to demonstrate that the police or the prosecution told McMillan that Gentry was his assailant before McMillan

¹⁶ *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

¹⁷ *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

¹⁸ *Davis*, 241 Mich App at 702-703.

¹⁹ *Id.*

²⁰ *Id.* at 703.

²¹ *Gray*, 457 Mich at 115.

identified Gentry before trial. Accordingly, the identification procedure did not violate Gentry's due process rights,²² and there was no clear error by the trial court.²³

Gentry also asserts that there were no grounds to support the issuance of his arrest warrant. We disagree. Gentry's claim is unpreserved so this Court reviews the issue for plain error affecting Gentry's substantial rights.²⁴ Gentry is unable to establish plain error because his factual claims are not supported by the record.²⁵ Assuming *arguendo* there was plain error in issuing the arrest warrant, the sole remedy for an illegal arrest is the suppression of evidence obtained as a result of the arrest.²⁶ The record does not support and Gentry does not allege that any evidence was obtained as a result of his arrest, and thus Gentry has failed to demonstrate prejudice.²⁷ Therefore, relief is not warranted.

Finally, Gentry alleges that his trial counsel was ineffective. We disagree. Because Gentry did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record.²⁸ To establish ineffective assistance of counsel, Gentry "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial."²⁹ To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of

²² *Williams*, 244 Mich App at 542.

²³ *Harris*, 261 Mich App at 51.

Gentry reiterates his trial counsel's claim that McMillan's pre-trial identification was impermissibly suggestive because Gentry was unrepresented at the adjourned November 24, 2010, preliminary examination, an argument which was rejected by the trial court. Because Gentry provided no evidence that he was unrepresented at that time, we find that there was no clear error by the trial court. *Id.*

Gentry raises the unpreserved issue that there was a transcriber's error in the preliminary examination transcript, but provides no evidence in support. Accordingly, he has failed to demonstrate the requisite plain error to warrant relief. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

²⁴ *Carines*, 460 Mich at 774.

²⁵ *Id.* at 763.

²⁶ *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991).

²⁷ *Carines*, 460 Mich at 763.

²⁸ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

²⁹ *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

the proceeding would have been different[.]”³⁰ “[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]”³¹

Gentry raises nine claims of ineffective assistance, but fails to meet the burden of establishing the factual predicate regarding five of his claims.³² We have, however, reviewed those claims and find them to be without merit.³³ Gentry has also abandoned his claim that trial counsel was ineffective for failing to “challenge the mail evidence” by failing to brief the merits of his claim.³⁴

Gentry also claims that while he insisted on an interlocutory appeal of the trial court’s decision not to suppress McMillan’s identification, defense counsel did not file the appeal and failed to adequately move to stay the proceedings until the appeal could be filed. An interlocutory appeal, however, would have been futile because McMillan’s identification was properly admitted, and “counsel is not required to advocate a meritless position.”³⁵ The record further shows that defense counsel adequately argued the motion to stay the proceedings. Thus, defense counsel’s representation did not fall below an objective standard of reasonableness.³⁶

Gentry further claims that defense counsel was ineffective for failing to subpoena the alibi defense witnesses or other unnamed witnesses. There is no record evidence regarding what testimony the witnesses purportedly would have provided. Thus, Gentry is unable to demonstrate that but for counsel’s error, “the result of the proceeding would have been different.”³⁷ Additionally, Gentry has failed to “overcome the presumption that the challenged action might be considered sound trial strategy.”³⁸ Therefore, Gentry’s argument must fail.

Moreover, Gentry claims that defense counsel failed to file a proper and timely notice of Gentry’s intent to present an alibi defense. Although defense counsel’s assistance was

³⁰ *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997) (quotations omitted).

³¹ *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

³² *Id.*

³³ *Toma*, 462 Mich at 302-303.

³⁴ *McPherson*, 263 Mich App at 136.

³⁵ *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

³⁶ *Toma*, 462 Mich at 302.

³⁷ *Id.* at 302-303, quoting *Mitchell*, 454 Mich at 167.

³⁸ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

ineffective when she failed to timely file the notice,³⁹ reversal is not warranted because Gentry cannot show prejudice as the trial court admitted his offered alibi testimony.⁴⁰

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

³⁹ MCL 768.20.

⁴⁰ *Toma*, 462 Mich at 302.