

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN NICHOLAS-WILLIAM KERSEN,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 276766

Monroe Circuit Court

LC No. 06-035432-FC

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of 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 769.11, to 14 to 40 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first claims that he was denied the effective assistance of counsel when his counsel failed to raise a defense of insanity or involuntary intoxication, and failed to move for the suppression of allegedly improper identification testimony. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

An individual is legally insane if, as a result of mental illness or mental retardation, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a; *People v Jackson*, 245 Mich App 17, 19; 627 NW2d 11 (2001). A person who is under the influence of voluntarily consumed alcohol or controlled substances at the time of the offense shall not be deemed legally insane. MCL 768.21a(2). Although MCL 768.21a(2) excludes voluntary drug or alcohol intoxication from the definition of legal insanity, if a “settled condition of insanity” exists from drug abuse, even if temporary, then legal insanity may nonetheless be the result. *People v Conrad*, 148 Mich App 433, 439-441; 385 NW2d 277 (1986). To successfully raise the defense of involuntary intoxication, a defendant must prove that he voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired. MCL 768.37.

Defendant’s presentence investigation report indicates that he used alcohol and drugs in the past and has prior convictions for possession and use of marijuana, but denied abusing alcohol or drugs. During sentencing, defendant admitted to having a drug problem. Apart from a 1998 diagnosis of attention deficit disorder, there is no evidence that defendant has ever suffered from a mental illness. There is absolutely no evidence in the record to suggest that defendant could successfully raise a defense of insanity or involuntary intoxication. His struggles with drugs or alcohol simply do not rise to the level of qualifying him for a defense of insanity or involuntary intoxication. Accordingly, counsel acted reasonably in choosing not to pursue such a defense.

Next, defendant claims that the identification procedures used in the instant case were improper. An identification procedure can be so unnecessarily 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). To sustain a due process challenge, 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. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993). When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of a prior description, the witness’s level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

Testimony from four employees of Zeiler’s Farm Market established that defendant entered the market with a gun, pointed the gun at the cashier and other employees and demanded money from the cash register and safe, then ran out with \$250 that was turned over by the cashier.

About a week and a half after the robbery, a detective showed the four employee-witnesses a photographic lineup consisting of one piece of paper depicting six color photographs of six different men. Defendant was in the position labeled # 4. The detective advised the witnesses that the offender was not necessarily in the lineup, and they were not obligated to pick someone out unless they recognized him as the robber. The detective showed the photographic lineup to each witness separately. All witnesses examined the lineup closely and identified defendant’s picture as that of the robber. Additionally, at trial, all four witnesses testified that

they got a good, unobstructed look at defendant when he was robbing the store, and they did not have any doubts that he was the robber. There was nothing about the lineup that drew attention to defendant's picture more so than any other picture, or otherwise made identification of defendant more likely than any other suspect in the lineup. There is no evidence to support a finding that the photographic identification was unnecessarily suggestive or conducive to misidentification. Accordingly, the trial court did not clearly err in admitting the identification evidence. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004) (“[A] trial court’s decision to admit identification evidence will not be reversed unless it is clearly erroneous”). Counsel was not ineffective for failing to object to the identification procedures. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (counsel is not required to make a frivolous objection, or advocate a meritless position).

Regarding defendant’s claim that an attorney should have been present during the presentment of the photographic lineup, a defendant is generally not entitled to counsel at a precustodial investigatory photographic lineup. *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). When the photographic lineup was shown to three of the four employee-witnesses, defendant was not yet in custody, and thus, he was not entitled to counsel. Regarding the fourth employee-witness, the photographic lineup was shown to him on the day that defendant was arrested. It is unclear whether the lineup was shown to him before or after defendant’s arrest. Even assuming that the lineup was shown to him after defendant was taken into custody, defendant cannot demonstrate error when the admission of this evidence was cumulative to the identification of the three other employees. The admission of cumulative evidence is not prejudicial. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Moreover, the evidence against defendant was substantial. The four employee-witnesses testified that they got a good, unobstructed look at the robber, and they were confident that the robber was defendant. Further corroborating the identification, two detectives reviewed the surveillance video capturing the robbery and testified that defendant was indeed the robber. In light of the weighty evidence against defendant, his ineffective assistance of counsel claim fails.

Next, defendant claims that the trial court erred in barring his alibi testimony. We disagree.

This Court review’s a defendant’s unpreserved claim of error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, (3) and the plain error affected the defendant’s substantial rights, i.e., it affected the outcome of the lower court proceedings. *Carines, supra* at 763-764.

MCL 768.20(1) governs the protocol for a defendant who seeks to offer an alibi defense and provides:

If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain, as particularly as is

known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

If the defendant fails to provide the proper notice, "the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi." MCL 768.21.

In the instant case, defendant concedes that he did not timely file the required alibi notice. Indeed, there is no evidence that defendant filed a notice at all. Consequently, the trial court did not err in excluding the alibi evidence because MCL 768.21 mandates such a result.

Defendant also claims that his counsel was ineffective for failing to timely file an alibi notice. Defendant has failed to demonstrate outcome determinative error. *Carines, supra*. As we determined above, there was significant evidence against defendant. Four witnesses who worked at the market testified that they got a good look at the robber and they were confident that the robber was defendant. When each was separately shown the photographic lineup, each unhesitatingly chose defendant's picture as that of the robber. Furthermore, two detectives reviewed the surveillance video and testified that defendant was the person depicted in the video. Accordingly, defendant's ineffective assistance claim fails.

Finally, defendant argues that the information relied upon by the trial court in determining his sentence, which was within the appropriate guidelines range, was inaccurate in that it failed to take into account important factors concerning his background and rehabilitation potential. Defendant raised this issue for the first time on appeal, and his sentence is within the appropriate guidelines range. Therefore, he cannot demonstrate that the trial court relied on inaccurate information to determine his sentence; defendant cannot raise this issue on appeal. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello