

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREMAYNE TALISON,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 231225

Wayne Circuit Court

LC No. 00-003247

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit armed robbery, MCL 750.89, and was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 240 to 480 months. Defendant appeals as of right. We affirm.

I. Ineffective Assistance of Counsel

Defendant first argues that he was deprived of his state and federal constitutional right to effective assistance of counsel because his trial counsel failed to present evidence of defendant's limp and stutter, failed to challenge a suggestive in-court identification, and failed to call an expert witness to aid the jury in understanding the evidence at trial. We disagree.

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303 (1994).

Although defendant claims that his trial counsel's failure to present evidence of his limp and stutter amounted to ineffective assistance, defendant has failed to overcome the presumption that this was reasonable trial strategy. Decisions as to what evidence to present are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and we will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465

(1995), mod on other grds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* Here, trial counsel's failure to present this evidence did not deprive defendant of a substantial defense.

At trial, defendant's counsel adequately presented the defense of misidentification. During the cross-examination of the victim, Klaus-Peter Zauner, defense counsel sought to undermine Zauner's identification of defendant as the perpetrator by impeaching Zauner's trial testimony that he saw his perpetrator's face for a period of time "considerably longer" than twenty seconds. In particular, defense counsel highlighted Zauner's preliminary examination testimony that he only saw the assailant's face for twenty to thirty seconds.

Defense counsel also explored the lack of daylight during the assault, and then turned to the clothing and physical description of Zauner's assailant. Defense counsel asked Zauner about his perpetrator's clothing, face shape, skin color, and height. Defense counsel then presented Zauner's preliminary examination testimony where Zauner testified that he had told the police he did not believe he could identify his assailant if he saw him again. Defense counsel also elicited testimony that Zauner could not remember which of the six photos used in a photo lineup depicted the man whom Zauner had identified as his perpetrator. Likewise, during cross-examination of eyewitness Noelle Paschalidis, defense counsel revisited Paschalidis' earlier testimony that she had picked out the wrong person in the photo-lineup just three days after the assault. Thus, defense counsel elicited testimony to support defendant's position that he was not the man who tried to rob Zauner.

In light of trial counsel's thorough cross-examination of the two eyewitnesses in this case, his failure to introduce evidence concerning defendant's stutter and limp would have had little, if any, additional impact on the presentation of this defense. Given the fact that the perpetrator spoke only eight words during the commission of this offense, it is not clear how the existence of a stutter would have aided defendant's theory that the two eyewitnesses misidentified him.

Similarly, any trial testimony concerning the perpetrator's gait would not have benefited defendant's defense that he was falsely accused of the convicted crime. Neither eyewitness testified concerning the presence or absence of a limp in the perpetrator's gait. Although Amanda Smith testified at trial that she could see the assault from her fourth floor apartment window across the street, and that the perpetrator walked away "normally" after committing the assault, Smith was describing the pace of the perpetrator's walk, not whether he walked with a limp. Thus, there was no trial testimony on the issue of whether the perpetrator who robbed Zauner walked with or without a limp. As plaintiff points out, defense counsel had sound strategic reasons to not introduce evidence that defendant had a limp and to not explore whether the robber had one. If the jury knew that defendant walked with a limp, any questioning of the witnesses regarding whether the robber had a limp would not have been useful to the defense because a negative answer was not inconsistent with the testimony that the robber walked away slowly. Meanwhile, a positive answer would have been very persuasive evidence of defendant's identity as the robber. Because trial counsel's failure did not deprive defendant of a substantial defense, that representation was not ineffective.

Next, defendant argues that his trial counsel was ineffective for not challenging Paschalidis' in-court identification of defendant. If a witness is exposed to impermissibly

suggestive pretrial identification procedures, no in-court identification is permitted absent a showing by clear and convincing evidence that the in-court identification is based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). However, the defendant must show that, under the totality of the circumstances, the pretrial identification procedure employed was “so impermissibly suggestive as to have led to a substantial likelihood of misidentification.” *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

Defendant has failed to identify any unduly suggestive pretrial identification procedure that led to a substantial likelihood of misidentification. Therefore, the prosecution was not required to present clear and convincing evidence that Paschalidis’ in-court identification was based on a sufficiently independent basis other than an illegal pretrial identification. Furthermore, because trial counsel is not ineffective for failing to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), we find no merit to defendant’s argument that his trial counsel’s failure to object to this in-court identification constitutes ineffective assistance.

Defendant also argues that his trial counsel’s representation was ineffective because he failed to request an expert witness who could help the jury understand the evidence. In particular, defendant contends that expert testimony was needed to inform the jury that “erroneous eyewitness identifications are the result of pliable memories and innocent errors.” Furthermore, defendant argues that an expert witness could have informed the jury that the photo lineup conducted in this case was contrary to the recommended procedure of certain law enforcement guidelines. Because defendant has not overcome the presumption that his trial counsel’s failure to call an expert witness was reasonable trial strategy, his argument lacks merit.

Defendant has not established that trial counsel’s failure to call an expert witness deprived him of a substantial defense. Thus, trial counsel’s failure to call the witness does not constitute ineffective assistance. *Hyland, supra* at 710. Furthermore, defendant has failed to create a record concerning what a proposed expert witness would have testified to if called. Therefore, it is not apparent from the existing record that trial counsel’s failure to introduce expert testimony affected the outcome of trial. Because defendant has not overcome the presumption that his trial counsel’s failure to call an expert witness constituted reasonable trial strategy and because defendant fails to establish that his trial counsel’s failure affected the outcome of trial, we are not persuaded that defendant was deprived of his constitutional right to effective assistance of counsel.

Defendant also argues that the cumulative effect of all these alleged errors warrants the conclusion that his trial counsel provided ineffective assistance. However, because none of these failures rose to the level of ineffective assistance, their cumulative effect did not deny defendant a fair trial.

II. Prosecutorial Misconduct

Defendant next contends that the prosecutor’s misconduct deprived him of a fair trial. Defendant failed to object at trial to the remarks he now contends were improper. Therefore, we review this issue for plain error that affected defendant’s substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Here, defendant argues that the prosecutor engaged in impermissible misconduct when he made the following remark during rebuttal, concerning defendant's position that reasonable doubt existed:

We had witnesses who told you, ladies and gentlemen, exactly what they saw. To come in this courtroom and start saying this is doubt is outrageous. Doubt because we only ID'ed [sic] him only a couple of times, or three or four times out of five? That's not doubt.

Defendant offers no explanation as to why the prosecutor's "outrageous" comment amounted to misconduct. Regardless, a prosecutor is not prohibited from making the remark that defendant's theory of defense is "outrageous" because a prosecutor is free to argue that the evidence is uncontradicted and may contest evidence that the defendant presents. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Further, the prosecutor need not state inferences in the blindest possible terms, but has wide latitude and may argue the evidence and all reasonable inferences from it. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant also argues that the prosecutor committed misconduct by vouching for police identification procedures. The prosecutor, commenting on the validity of the photo lineup during rebuttal, stated:

This is, ladies and gentlemen, the normal progression of investigation. Trust me. If his [sic] procedure was not something you could use, you would have never seen these pictures. We would never talk about them. Lineup is something normal used in an investigation. Each police department, each police individual who investigated this case followed the steps. Narrow it down. Narrow it down, until this gentleman said this is him. And he came to court and he said to you – I remember his words. I wrote them big so I don't forget to repeat them. He said there's absolutely no doubt in my mind about this is him. Why would he do that? Just because he wants a victim? I mean, he wants a defendant?

Defendant argues that the prosecutor improperly vouched for the credibility of the police identification procedure despite the fact that no evidence was introduced concerning the "propriety or reliability" of the identification procedures.

Defendant is correct that there was no evidence introduced at trial concerning the propriety or reliability of the photo lineup conducted in this case. A prosecutor may not make a statement of fact to the jury that is not supported by the evidence. *Schutte, supra* at 721. Because the prosecutor discussed the reliability or propriety of the photo lineup in the absence of any evidence supporting his statement, the prosecutor did engage in misconduct. Moreover, the error was plain because it was apparent that the prosecutor did not present any evidence on the intrinsic reliability or the propriety of photo lineups. Nevertheless, defendant has failed to establish how this misconduct deprived him of a fair trial or affected his substantial rights.

Here, the six-picture photo lineup was entered into evidence at trial. Moreover, both eyewitnesses who participated in the identification procedure testified at trial and were subject to cross-examination. Regardless of whether the photo lineup identification procedure conducted in this case could be considered "the normal progression of investigation," the jury had the

opportunity to consider the evidence of the photo identification and to determine from that evidence, as well as the in-court identification, whether defendant had been misidentified. Thus, defendant has failed to show how the impropriety of the prosecutor's statement that the identification procedure was "normal procedure" affected his substantial rights. Furthermore, the prejudicial effect of the improper statement was cured by the trial court's instruction to the jury that the prosecutor's arguments and statements are not to be considered evidence at trial. Thus, we do not believe that defendant was deprived of a fair trial.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter