

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN TYRELL MASON,

Defendant-Appellant.

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UNPUBLISHED  
November 1, 2005

No. 254637  
Wayne Circuit Court  
LC No. 03-009634-01

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of seventeen to thirty years each for the armed robbery convictions, and a consecutive two-year term for the felony-firearm convictions. He appeals as of right. We affirm.

**I. FACTS**

Defendant's convictions arise from the armed robbery of the Nice Beauty Supply store in Detroit on October 8, 2002. Testimony at trial indicated that Darnell Suttles drove defendant and codefendant Terrance Greene to the store and waited outside in his car while defendant and Greene entered the store, posing as customers. Defendant jumped over the counter, pointed a pistol at the cashier, Gum Sin Lee, and demanded money and the store's surveillance tape. Lee gave him both. Defendant shot and wounded Errol Frank, the store's manager, before leaving the store. Suttles drove defendant and Greene away.

Over defendant's objection, evidence was presented that defendant participated in two other robberies on October 11, 2002. Earlier that day, Suttles drove defendant, Greene, and Gregory Anderson to the C & J Beauty Supply store. Suttles waited outside in his car while defendant, Greene, and Anderson entered the store and pretended to be customers. Defendant then approached the cashier and demanded money and the surveillance tape at gunpoint. The cashier gave them the money, but told them that the store's surveillance system was not working that day. Suttles drove the getaway car for the C & J robbery, but was arrested later that day.

Later on October 11, 2002, defendant, Greene, and Anderson robbed a McDonald's restaurant in Southfield. They approached the counter as if they were customers, and defendant

produced a gun. They demanded money from the cash registers, and then ordered the employees to the back of the store where they demanded money from the safe and the surveillance tape. The clerk was unable to remove the tape from the recording machine, so they took the entire machine. A short distance from the McDonald's, the police began to pursue the getaway car. Defendant and his co-felons threw a gun and the video recorder from the car before they crashed into a utility pole. Defendant, Greene, and Anderson were all arrested.

The police recovered the video recorder and gun that were thrown from the car after the McDonald's robbery. Although the gun was damaged and could no longer fire, a firearms examiner manually pushed bullets through the barrel to compare the markings on the bullet used to shoot Frank. She concluded that the markings on the pushed bullets matched the markings on the bullet that shot Frank.

Defendant confessed to the C & J robbery and pleaded guilty to armed robbery for that offense. Greene and Anderson also pleaded guilty to their participation in the C & J robbery. Suttles pleaded guilty to a reduced charge of unarmed robbery in the C & J case pursuant to a plea agreement in which he agreed to cooperate in the prosecution of defendant and Greene in the Nice Beauty Supply robbery. Defendant and Greene were tried jointly before the same jury and each was convicted of two counts of armed robbery, and one count of felony-firearm.

## II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel did not object to Frank's identification. Defendant's preliminary examination was originally scheduled for August 19, 2003. Defendant requested that the police conduct a lineup for Frank and Lee before the preliminary examination. The district court adjourned the preliminary hearing until August 21, and ordered the police to hold the lineup. Detroit Police Sgt. Carolyn Nichols conducted a photographic lineup for Frank and Lee at the Nice store on August 20, 2003. Nichols testified at trial that Frank looked at the sheet, and said, "No. 6 [defendant] looked [sic] like the one that shot me." Nichols admitted that she subsequently told Frank that he had picked out a suspect. Frank positively identified defendant at the preliminary examination and at trial.

Nichols testified that defendant was already in custody when the photographic lineup was held. She explained that she did not conduct a corporeal lineup because there was a "time factor" in bringing defendant to the Wayne County Jail for a lineup, but she did not remember all the facts. She also recalled that it is difficult to schedule lineups at the Wayne County Jail on short notice.

Defendant argues that Frank's photographic identification of defendant, and his subsequent courtroom identification, were inadmissible, and that counsel erred by failing to object to the admission of this evidence.

### A. Standard of Review

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, 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). Where, as here, a defendant claiming ineffective assistance of counsel fails to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

## B. Analysis

Defendant argues that a photographic lineup should not have been conducted because he was already in custody, and that Nichols' suggestive remark to Frank influenced the courtroom identification. 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), 318 (Boyle, J); 505 NW2d 528 (1993); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Circumstances that might 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; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). Here, Nichols testified that she was obligated to comply with a court order to conduct a lineup the day before the preliminary examination, and that it was not possible to schedule a corporeal lineup at the Wayne County Jail within the time constraints. Defendant argues that the two-day adjournment of the preliminary examination gave Nichols enough time to schedule a corporeal lineup at the jail, but there is no record evidence to support this assertion. Nichols' inability to schedule a corporeal lineup in time to comply with the court order is a circumstance that justified use of a photographic lineup.

Defendant also argues that Frank's courtroom identification should have been excluded because Nichols informed him after the photographic lineup that he had selected a suspect. Defendant contends that Nichols' statement was unduly suggestive because Frank "positively" identified defendant in court, after only "tentatively" identifying his photograph.

A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Our Supreme Court stated in *Anderson, supra* at 178, that an improper suggestion often arises when "the witness is told or believes that the police have apprehended the right person."

In *People v Gray*, 457 Mich 107, 109-114; 577 NW2d 92 (1998), our Supreme Court found that an identification procedure was unduly suggestive when an officer showed the complainant a photograph of the defendant after the complainant made only a tentative identification in a corporeal lineup. However, the Court concluded that an in-court identification was still permissible because the complainant had an independent basis for identifying the defendant. *Id.* at 114-116, citing *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Here, we disagree with defendant's contention that Frank's statement that the person depicted in the sixth photograph "looked like" the robber reflects that Frank was uncertain about his identification of defendant as the perpetrator. There is no indication in the record that Frank expressed any doubt or uncertainty about his identification. Consequently, we do not view Nichols' subsequent statement confirming that Frank had identified a suspect as being unduly suggestive. Thus, the record does not support defendant's claim that defense counsel was ineffective for failing to object to Frank's in-court identification. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Furthermore, defendant cannot satisfy the prejudice prong of the ineffective assistance of counsel test, because it is not apparent that Frank's identification was outcome-determinative. Apart from Frank's identification, Suttles testified at trial that defendant participated in the Nice Beauty Supply robbery and that he admitted shooting Frank. Additionally, physical evidence showed that the gun defendant used in the McDonald's robbery was the same gun used to shoot Frank. In light of this evidence, there is no reasonable probability that the outcome would have been different if Frank's identification testimony had not been admitted.

### III. 404b EVIDENCE

Defendant also argues that the trial court erred in admitting evidence that he and his co-felons were involved in the robberies of the C & J Beauty Supply store and a McDonald's restaurant. We disagree.

#### A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

#### B. Analysis

MRE 404(b) prohibits evidence of prior bad acts to prove a person's character, but permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered for a purpose other than a character or propensity theory, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

Here, the trial court admitted the evidence of the C & J and McDonald's robberies because they showed a common plan. The evidence indicated that defendant committed each of the robberies with the assistance of two codefendants. Additionally, common to each case was that defendant entered the store posing as a customer, that it was defendant who subsequently produced a gun and threatened the cashier at gunpoint, and that defendant demanded the store surveillance tape.

Defendant argues that the three robberies do not evince any pattern or scheme, because they were committed in the same manner as most store robberies. He refers to Nichols' testimony that robbers typically pose as customers when they enter a store, and that they often demand surveillance tapes. Nichols also stated that beauty supply stores are a common robbery

target in Detroit, because Asian owners are often uncomfortable with pursuing charges. See *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000) (holding that uncharged acts must be sufficiently similar so as to support an inference that they are manifestations of a common plan, scheme, or system). But the evidence of the C & J and McDonald's robberies was also admissible for other proper, noncharacter purposes under MRE 404(b). The McDonald's robbery also explained how defendant was apprehended and how the gun that was linked to the Nice Beauty Supply robbery was found and could be linked to defendant. Additionally, the C & J robbery was relevant to corroborate Suttles' testimony about defendant's involvement in the Nice Beauty Supply robbery. Defendant challenged Suttles' credibility by emphasizing that he was testifying in exchange for a favorable plea agreement for his own involvement in the C & J robbery. Evidence that Suttles' testimony about the C & J robbery was consistent with defendant's confession and guilty plea in that case was relevant to his credibility. For these reasons, the trial court did not abuse its discretion in admitting the evidence under MRE 404(b).

#### IV. JURY INSTRUCTION

Defendant argues that the trial court's instruction on aiding and abetting was erroneous. Again, we disagree.

##### A. Standard of Review

Defendant failed to object to the instruction at trial, so this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. MCL 768.29; *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Reversal is not warranted if the trial court's instructions, as a whole, fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.*

##### B. Analysis

The substance of defendant's argument is not entirely clear. He appears to argue that the trial court's instructions were unclear regarding the requisite intent necessary to be convicted as an aider and abettor of an armed robbery.

The requisite intent for conviction as an aider and abettor "is that necessary to be convicted of the crime as a principal." *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The trial court stated that in order to convict defendant as an aider and abettor, he "must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance." It also stated that in order to convict a defendant of armed robbery, the prosecutor must prove "that at the time they took the money the Defendants intended to take it away from Errol Frank permanently." It repeated this instruction with respect to Gum Sin Lee. Read as a whole, the trial court's instructions adequately advised the jury that it could convict defendant as an aider and abettor only if he possessed the same intent that would be required to convict him as a principal, i.e., that he specifically intended to permanently deprive the owner of property. The trial court's instructions were not erroneous, let alone plain error. Accordingly, there is also no

merit to defendant's additional argument that defense counsel was ineffective for failing to object to the trial court's instructions. *Snider, supra*.

## V. PROSECUTORIAL CONDUCT

Defendant argues that the prosecutor improperly vouched for Suttles' credibility by stating in his rebuttal argument that "we made him be truthful in his statement. Totally truthful in the statement." We disagree.

### A. Standard of Review

Defendant did not object to this statement at trial; thus, we review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

### B. Analysis

A prosecutor may not vouch for a witness' credibility or suggest that the government has some special knowledge that a witness' testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Generally, reference to a plea agreement containing a promise of truthfulness is not grounds for reversal. *People v Bahoda*, 44 Mich 261, 276; 531 NW2d 659 (1995). Furthermore, the propriety of the prosecutor's remarks depends on the facts of the case, and their relationship to defense arguments and the evidence admitted at trial. *Rodriguez, supra* at 30. Defense counsel had earlier suggested that Suttles was falsely incriminating defendant because he was willing to say anything in exchange for leniency from the prosecutor. The prosecutor argued in response that Suttles' plea agreement required him to testify truthfully. Viewed in context, the prosecutor's argument was properly intended to respond to defendant's argument and did not constitute prosecutorial misconduct. Therefore, defense counsel's failure to object also did not constitute ineffective assistance of counsel. *Snider, supra*.

Affirmed.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Bill Schuette