

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER BRET SENIOR,

Defendant-Appellant.

UNPUBLISHED

February 1, 2007

No. 264118

Tuscola Circuit Court

LC No. 04-009225-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of unlawfully driving away an automobile, MCL 750.413, and was sentenced as a fourth habitual offender, MCL 769.12, to four to fifteen years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At trial, Frederick Herline testified that, as he left his house at approximately 5:10 a.m. on September 23, 2004, he noticed a Chevrolet Lumina parked at the end of his driveway. Herline saw a man, whom he later identified as defendant, attempting to get into two vehicles parked in driveways across the street. Herline asked defendant what he was doing. Defendant walked up to Herline's truck, and Herline rolled the window down to speak to him. Defendant said that the people living across the street were his friends. When Herline challenged that statement, defendant got into the Lumina and drove away. Herline obtained a partial license plate and reported defendant's behavior to the police. Herline pursued defendant in his truck and phoned a 911 operator. However, defendant was eventually able to elude Herline. Later, Herline met with the police and gave a statement. He described defendant and reported the partial license plate number.

Tuscola County Sheriff's Deputy Michael Mattlin testified that a license plate check led him to the residence of Thomas and Jackie Diedrich. A green Chevrolet Lumina was parked in the driveway of the Diedrich residence. Its license plate number matched the one reported by Herline. Additionally, the vehicle's doors were unlocked, the keys were on the floor, and the hood and tailpipe were warm to the touch. When it was determined that the Diedrichs had not recently driven the vehicle, Mattlin concluded that someone else had done so. Mattlin asked the Diedrichs to identify any potential suspects, and they directed him to the nearby Reif/Senior residence, which was located across the road and about one-eighth of a mile to the north. Mattlin went to the residence and spoke to its occupants, including defendant and his brother, Jason Reif.

Later that day, Mattlin presented a photographic lineup to Herline. The array consisted of two sheets of black and white photographs. Each sheet contained six photographs. Herline indicated his concern about making a proper identification. He chose two photographs, one from each sheet, and indicated that both men had similar physical characteristics to the person that he saw. One of those men was defendant. Mattlin did not consider the other man a valid suspect because, among other reasons, he lived about 35 miles away. Defendant was charged with and convicted of UDAA and sentenced as described above.

On appeal, defendant challenges the trial court's decision to allow Thomas Diedrich to testify about an incident between Diedrich and Jason Reif that was witnessed by defendant and that had occurred two days before the Lumina was stolen. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003); *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Preliminary questions of law regarding the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

At trial, over defendant's objection, Diedrich testified he went to defendant's residence to speak to Jason Reif after learning that Reif may have swerved his truck at Diedrich's dog. The trial court ordered this testimony stricken from the record as inadmissible hearsay. Diedrich later testified over objection that he spoke to Reif and asked that he not swerve at the dog. He indicated that defendant was present during the conversation but did not speak. Instead, defendant stared at him with an unhappy look on his face.

Defendant argues that the above testimony constituted improperly admitted character evidence. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is: (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant under MRE 402 to a fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993). However, we find that MRE 404(b) is not implicated because the challenged testimony did not describe a crime, wrong or act committed by defendant.

Defendant additionally argues that the challenged testimony was inadmissible hearsay. However, the trial court ordered nearly all of the challenged hearsay evidence stricken from the record, and the jury was instructed not to consider it during its deliberation. We note first that simply striking testimony from the record and instructing the jury that it may not consider that testimony cannot realistically undo all the damage done by allowing the testimony in the first place. However, given all of the facts of this case, we cannot say that the challenged testimony was sufficiently prejudicial to defendant to merit reversal. Moreover, defendant fails to identify the statements he is challenging and fails to cite any authority for his argument. Under these circumstances, we conclude that defendant has abandoned this argument. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Defendant also challenges the relevancy of the evidence. Relevant evidence is evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). We agree with the trial court's assessment that the testimony at issue was of "[p]retty limited"

relevancy to the present case. However, the cumulative effect of the proximity of the involved parties' homes and the time between the interaction and the Lumina being taken, and the defendant's perceived unhappiness with Diedrich, supports a conclusion that it was more probable that defendant had a motive to cause harm to Thomas by taking his vehicle, and that he was the person that actually committed the act charged. MRE 401.

Even if relevant, however, 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. MRE 403. At trial, Reif corroborated Diedrich's testimony that he was the only participant in the incident involving the Diedrichs' dog, and that Thomas and Reif were the only participants in the subsequent conversation. We do not find a danger of unfair prejudice that would preclude the challenged testimony. Furthermore, on this record, there is no reason to suspect that the jury used the evidence for an unduly prejudicial purpose. On appeal, defendant claims that the trial court did not instruct the jury that it should not consider the stricken testimony. However, the record clearly demonstrates that the trial court did instruct the jury to that effect, and jurors are presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We find no abuse of discretion.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to challenge the photographic lineup, and failed to move the trial court for a corporeal lineup. The denial of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Our review is limited to mistakes apparent on the record because no *Ginther*¹ hearing was held. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. To establish ineffective assistance, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must also overcome the strong presumption that his counsel's performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Decisions regarding what evidence to present are matters of trial strategy, which this Court will not review with the benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

If an accused is in custody or can be compelled to appear, identification by photographic showup should not be made unless a legitimate reason for doing so exists. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). 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

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

of the identification. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

In *Hickman supra* at 611, our Supreme Court held that the right to counsel attaches only to identifications conducted at or after the initiation of adversarial judicial criminal proceedings, such as by formal charge, a preliminary hearing, an indictment, an information, or an arraignment. The Court stated, “To the extent that *People v Anderson* ... goes beyond the constitutional text and extends the right to counsel to a time before the initiation of adversarial criminal proceedings, it is overruled.” *Id.* at 603-604.

The lower court record indicates that defendant was arrested on September 23, 2004, but does not state the time of arrest. On the record before this Court, we are unable to determine whether defendant was in custody at the time of the photographic lineup. However, even if defendant was in custody at the time of the photographic lineup, it appears that the lineup occurred before the initiation of adversarial proceedings against him. *Hickman, supra* at 611. Additionally, in light of the fact that Herline chose two potential suspects out of the photographic lineup, it appears that under the totality of the circumstances, the photographic lineup was not unduly suggestive. *Kurylcyk, supra* at 302, 311-312. Furthermore, we note that the defense introduced the evidence of the photographic lineup at trial during cross-examination. Thus, error warranting reversal did not occur because a party cannot obtain relief on appeal for an alleged error at trial to which the complaining party “contributed by plan or negligence.” *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Defendant cannot introduce evidence at trial and claim on appeal that error occurred in its admission. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Defendant is unable to demonstrate that defense counsel’s failure to raise that challenge denied him the effective assistance of counsel because defense counsel need not “make a meritless motion or a futile objection.” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Moreover, we find that the decision by defense counsel to forego a challenge to the photographic lineup and to forego a request for a corporeal lineup were strategic choices that were made to defend her client. The record demonstrates that the defense hired a private investigator to conduct an independent photographic lineup. However, Herline allegedly refused to participate. Thus, defense counsel was left with two options: to file a motion for a corporeal lineup or to cease pursuit of a second identification procedure and attack the photographic lineup at trial. A corporeal lineup could have resulted in the identification of defendant as the only suspect in the present case. This choice clearly risked harm to the defense. On the other hand, the circumstances of the photographic lineup provided a significant means for defense counsel to undermine Herline’s credibility and his identification of defendant.

On direct examination, Herline identified defendant as the person that he saw attempting to break into two vehicles located across the street from his house. However, defense counsel attacked Herline’s credibility and his identification of defendant during the photographic lineup. By eliciting the testimony that defendant and another person looked like the person that Herline observed and pursued in the early morning hours of September 23, 2004, defense counsel was able to highlight the fact that Herline was indecisive during the only identification procedure conducted during the course of the investigation. That Herline identified two potential suspects from the photographic array certainly cast doubt on the credibility or accuracy of his recollection and identification of defendant. Additionally, in her closing argument, defense counsel raised

the identity issue in an attempt to cast a reasonable doubt in the jurors' minds, and highlighted the fact that the second individual was never interviewed or investigated by police. Accordingly, we conclude that trial counsel employed reasonable trial strategy and was not deficient in her representation of defendant. Defendant is unable to demonstrate that his counsel's performance fell below an objective standard of reasonableness, *Pickens, supra* at 302-303, and is unable to overcome the strong presumption that counsel's performance was sound trial strategy. *Carbin, supra* at 599-600.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper