

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELROY LUCKY JONES,

Defendant-Appellant.

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UNPUBLISHED

March 30, 2010

No. 287734

Wayne Circuit Court

LC No. 06-007202-FC

Before: Hoekstra, P.J., and Stephens and M.J. Kelly, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of felony-murder, MCL 750.316(1)(b), first-degree premeditated murder, 750.316(1)(a), assault with intent to commit murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced to life without parole for his first-degree murder conviction,<sup>1</sup> 23 to 46 years' imprisonment for his assault with intent to murder conviction, 5 to 20 years' imprisonment for his first-degree home invasion conviction, three to five years' imprisonment for his felon in possession of a firearm conviction and five years for his felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel because trial counsel failed to present an expert witness to testify regarding the problems associated with eyewitness identification. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). We review the trial court's factual findings for clear error and review its constitutional determinations de novo. *Id.* As defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of

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<sup>1</sup> According to the Judgment of Sentence, defendant's convictions for felony murder and first-degree premeditated murder "are merged."

proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel must investigate, prepare, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 33; 608 NW2d 132 (1999). This Court, however, will not substitute its judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's decision whether to call or question witnesses is presumed to be a question of strategy. *Id.*

Based on the existing record, defendant is unable to demonstrate ineffective assistance of counsel. First, defendant is unable to demonstrate that trial counsel's performance was deficient. At trial, defense counsel vigorously cross-examined all witnesses. Defense counsel attempted to impeach the credibility of Matenis Carter, the brother of the victim, on numerous occasions and challenged his eyewitness identification of defendant. Defense counsel pointed out that Carter initially told the police that he had never seen the man who shot his brother before the day in question. Defense counsel also questioned Carter about whether the police influenced his identification of defendant by asking him questions about when he remembered defendant's full name. Defense counsel further attempted to impeach Carter by asking him about his prior convictions for armed robbery and carrying a concealed weapon. Moreover, trial counsel vigorously questioned Carter about the timing of the events on June 7, 2006. Finally, trial counsel pointed out the inconsistencies between Carter's testimony at trial and his prior testimony with regard to defendant's facial hair.

During the cross-examination of witness Michael Calhoun, the manager at McDougal and Carter's apartment building, defense counsel's questions resulted in Calhoun admitting that he had previously lied under oath regarding the identification of defendant. During the cross-examination of Cornel Bouru, Bouru indicated that he had told the police that the perpetrator's height was between five foot seven and five foot ten when defendant is about six feet tall. During his cross-examination of Sergeant William Anderson, defense counsel asked questions about the lack of physical evidence to tie defendant to the crime scene. Defense counsel's cross-examination of witnesses allowed the jury to question the identification of defendant. In addition, it seems unlikely that an expert on eyewitness testimony would have benefited defendant given that Carter was not identifying a stranger. Trial counsel's decision to not retain an expert, as well the recommendation to defendant regarding whether he should testify or call alibi witnesses, are matters of trial strategy. Based on the evidence in the record, defense counsel's performance was not deficient.

Even if defense counsel's performance was deficient, there is no evidence that the deficient performance resulted in prejudice to defendant. Without knowing what the expert would have said about witness identification, it is impossible to know whether the outcome

would have been different. Therefore, because defendant has not demonstrated that counsel's performance was deficient and that it affected the outcome of the trial, he has not overcome the presumption that counsel provided effective assistance.

Defendant's next argument is that he was unduly prejudiced by the admission of a Law Enforcement Information Network (LEIN) photograph of him and by testimony from Anderson regarding that photograph. We disagree. Generally, review of evidentiary decisions is for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998). Defense counsel waived the issue with regard to the photograph by affirmatively indicating that he had no objections to its admission. We will, therefore, not consider that issue on appeal. Defendant forfeited the issue with regard to the testimony by failing to object. For the issue not preserved below, we review for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Id.* at 734. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 736-737.

Relevant evidence must 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; *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

Where a defendant has not taken the stand, an unedited mug shot could impermissibly place the defendant's prior conviction, if any, before the trier of fact and result in reversible prejudice. *People v Heller*, 47 Mich App 408, 411; 209 NW2d 439 (1973). However, where defense counsel has made an issue of the witness's ability to recognize the defendant from the picture the police showed him, it was not improper for the trial court to admit the photos. *Heller*, 47 Mich App 411, citing *People v Travier*, 39 Mich App 398, 402; 197 NW2d 890 (1972).

The issue regarding the admission of the photograph was waived, as noted above, but the admission of the related testimony was not improper. Defense counsel put Carter's identification of defendant from the photograph at issue during the trial. During his cross-examination, defense counsel asked Carter whether he identified defendant by name prior to seeing defendant's photograph. Therefore, the testimony related to the photograph was at issue with regard to Carter's identification of defendant and had probative value for the jury, which outweighed its prejudice. Additionally, the prosecution and the defense stipulated that defendant was a felon and, therefore, had no right to carry or possess a firearm. Thus, any issues of a criminal record would have become known even without the mug shot or Lien evidence. The decision to stipulate rather than adjudicate an irrefutable fact is clearly not a demonstration of ineffectiveness of counsel.

Moreover, even if the admission of the testimony regarding the photograph was improper, defendant did not suffer any prejudice as a result. The prosecution presented enough other evidence that defendant committed the crime for the jury to convict defendant with or

without the photograph.

Defendant also argued that trial counsel was ineffective for failing to timely and specifically object to the admission of the LEIN photograph and testimony. We disagree. Even if trial counsel was deficient in failing to object, as noted above, defendant did not suffer any prejudice as a result.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Kelly