

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 19, 2011

v

JAMES ROY LITTLETON,  
  
Defendant-Appellant.

No. 296411  
Ottawa Circuit Court  
LC No. 09-033414-FC

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Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 180 to 360 months' imprisonment for each conviction. Defendant appeals as of right. We affirm.

**I. BASIC FACTS**

On December 10, 2008, Mark and Tami Kooman arrived home from a church supper and discovered their house was being robbed. The house and garage lights were on, a garage door was open, and an unexpected vehicle, an Oldsmobile Toronado, sat in the driveway. Mark parked the Explorer that he and Tami were in behind the Toronado. Tami wrote down the Toronado's license plate number, and went to a neighbor's house to call 911. Mark approached the Toronado, spoke to an African-American male who was sitting in the passenger seat, and removed the keys from the ignition. Mark then went into the garage "to verify what was going on." While in the garage, he heard a "horrendous noise" as a man went through a storm door without unlocking it. The man approached Mark in the garage and threatened to shoot Mark if Mark did not give him the keys to the Toronado. Mark handed over the keys, and the man began to maneuver the Toronado around the Explorer. Mark got into his Saturn, which was parked in the garage, but he was again approached by the man. The man threatened to shoot Mark if Mark attempted to follow him. Mark got out of the Saturn, closed the garage door, and let the man drive the Toronado from the driveway.

At trial, Mark identified defendant as the man who twice threatened to shoot him. Mark had previously identified defendant in a photographic lineup and a corporeal lineup. The photographic lineup was conducted on December 12, 2008, two days after the home invasion. Mark identified defendant without hesitation and said he was positive about the identification.

The corporeal lineup, conducted at defendant's request, took place on September 1, 2009. Mark identified defendant as the perpetrator of the home invasion. However, he admitted that, in making the identification, he had referred to two photographs of defendant that Tami had printed from the "Inmate Lookup" website.

## II. IN-COURT IDENTIFICATION

Defendant argues that the trial court denied him a fair trial and due process when it denied his motion to suppress an in-court identification of him by Mark Kooman. We disagree.

We review a trial court's decision on a motion to suppress an in-court identification for clear error. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Here, defendant claims that the corporeal lineup was unnecessarily suggestive because Mark looked at two photographs of him that Mark's wife had printed from the Internet before identifying him at the lineup. It is undisputed that the prosecutor was unaware that Mark possessed or looked at the two photographs at the lineup.<sup>1</sup> Thus, neither the prosecutor, nor anyone working on his behalf, created an identification procedure that was unnecessarily suggestive. Because the due process clauses of the United States and Michigan constitutions only protect against governmental action, *People v England*, 176 Mich App 334, 347; 438 NW2d 908 (1989), *aff'd* 436 Mich 305 (1990); *Dearborn v Freeman-Darling, Inc*, 119 Mich App 439, 442; 326 NW2d 831 (1982), action taken by Mark that was unknown to the prosecutor cannot lead to a violation of due process.

Nonetheless, even if Mark's conduct of looking at the two photographs of defendant at the corporeal lineup led to an unnecessarily suggestive identification procedure, we find no clear error in the trial court's finding that an independent basis existed for an in-court identification by Mark. If a pretrial identification procedure was impermissibly suggestive, an in-court identification is permitted if there is an independent basis for the in-court identification that is "untainted by the suggestive pretrial procedure." *Williams*, 244 Mich App at 542-543 (quotation omitted); see also *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). The validity of an in-court identification must be viewed in light of the totality of the circumstances. *Gray*, 457 Mich at 115. *Id.* The Supreme Court in *Gray* set forth eight factors a trial court should consider in determining whether an independent basis for an in-court identification exists:

- (1) Prior relationship with or knowledge of the defendant.

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<sup>1</sup> At the evidentiary hearing, defense counsel stated that the corporeal lineup was an unfair procedure, not because of anything done by the "state," but by what was done "unintentionally or innocently" by Mark.

(2) The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act.

(3) Length of time between the offense and the disputed identification.

(4) Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.

(5) Any previous proper identification or failure to identify the defendant.

(6) Any identification prior to lineup or showup of another person as defendant.

(7) The nature of the alleged offense and the physical and psychological state of the victim. . . .

(8) Any idiosyncratic or special features of defendant. [*Id.* at 116 (citations, quotations, alterations, and ellipses omitted).]

Because the independent basis inquiry is a factual one, all eight factors may not be relevant to a decision. *Id.* at 117 n 12.

At the conclusion of the evidentiary hearing, the trial court found, as supported by the evidence, that Mark had an "excellent opportunity" to view the perpetrator. Mark testified that the lights were on in the garage and that he twice spoke face-to-face with the man who ran out of his house. Each time, the man stood approximately two to three feet from him. Nothing interfered with Mark's ability to see the man's face. The trial court also found that Mark had made a "positive, unhesitating identification" of defendant two days after the home invasion. This finding was also supported by the evidence. Detective Jeremy Baum testified that Mark's identification of defendant was the "fastest identification" he had experienced at a photographic lineup. Mark testified that he had no doubt or any reservations that the man he identified at the photographic lineup was the man who robbed his home. In addition, we note that Mark never identified any other person as the man who approached him in the garage, and testified that the only emotion he felt occurred when the man drove down the road. Based on its findings, we find no clear error in the trial court's finding that there was an independent basis for an in-court identification by Mark. Accordingly, the trial court did not err in allowing Mark at trial to identify defendant as the man who ran out of his house and threatened to shoot him.

### III. MEDICAL RECORDS

Defendant argues that the trial court deprived him of his rights to due process and a fair trial when it denied his motion for an eye examination. We disagree.

Before trial, defendant moved the trial court to order an eye examination for him. However, at the motion hearing, defense counsel stated that after he filed the motion, he learned that defendant's medical records kept by the Department of Corrections could verify that defendant was legally blind in both eyes. Defense counsel stated that he would subpoena the

records, which he and the trial court agreed would resolve defendant's motion for an eye examination.<sup>2</sup> Defendant cannot now argue on appeal that the trial court erred by denying his motion for an eye examination when defense counsel agreed with the trial court that the motion for an eye examination was resolved by him subpoenaing defendant's medical records from the Department of Corrections. *Barclay*, 208 Mich App at 673. ("Defendant may not assign error on appeal to something that his own counsel deemed proper at trial."). Thus, defendant's argument that the trial court erred in denying his motion for an eye examination is waived. *People v Carter*, 462 Mich 206, 216-217; 612 NW2d 144 (2000).

However, defendant also argues that because the medical records were not received by the end of trial, the trial court erred in not adjourning trial until the records were received. We disagree. Because defendant did not request an adjournment, the issue is unpreserved. We review an unpreserved issue for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A trial court may grant an adjournment on the ground of unavailability of evidence if the evidence is material and diligent efforts have been made to produce the evidence. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003), quoting MCR 2.503(C). On the second day of trial, an employee of the prosecutor's office detailed her efforts to obtain defendant's medical records, and it was clear that the records would not be received by the end of trial. However, defense counsel informed the trial court that defendant, who was planning on testifying, would testify as to his eyesight and that he would recall Norma Wodarek, defendant's girlfriend, to testify about defendant's eyesight. Given that defendant had other means to present evidence that he was legally blind and needed glasses to see, the trial court did not plainly err in failing to grant an adjournment. In addition, because defendant testified that he was legally blind, cannot see without glasses, and wears glasses all the time, and his testimony was corroborated by Wodarek, the trial court's failure to grant an adjournment did not affect defendant's substantial rights.

#### IV. PROSECUTORIAL MISCONDUCT

Defendant claims that he was denied a fair trial when the prosecutor elicited irrelevant and prejudicial testimony about a traffic stop that occurred three days after the home invasion, the tread pattern on defendant's shoes, and a fingerprint match. We disagree. Because defendant did not object to the alleged misconduct below, we review his claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The prosecutor called Police Officer Brian Gard to testify about his traffic stop of the Toronado that occurred on December 13, 2008, three days after the home invasion. According to Gard, defendant was the driver of the Toronado and an African-American male sat in the

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<sup>2</sup> In a written order, the trial court did deny defendant's motion for an eye examination, but it also ordered the Department of Corrections to immediately turn over any medical records regarding defendant's vision.

passenger seat. Defendant argues that because the traffic stop occurred several days after the home invasion, it was irrelevant. All relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). “‘Relevant evidence’ means 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. Here, evidence that defendant was driving the Toronado three days after the home invasion and was with a man who fit the description of the co-perpetrator made the fact that defendant was the man who invaded the Kooman home and threatened to shoot Mark more probable. Accordingly, the evidence was relevant, and the prosecutor committed no misconduct in presenting it.

The prosecutor elicited testimony from Detective Jeremy Baum that the tread pattern on the shoes defendant was wearing when he was arrested matched footwear impressions that were photographed outside the Kooman house on December 10, 2008. According to defendant, the evidence was inadmissible because Baum was not an expert, he only conducted a “gross eye exam,” and there was no statistical analysis of the frequency of the tread. Although not qualified as an expert witness, Baum could provide a lay opinion regarding whether the tread pattern matched the footwear impressions. A lay witness may testify to an opinion that is “rationally based on the perception of the witness” and that is “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” MRE 701. Baum’s opinion was based on his perceptions and it was helpful to a determination whether defendant was the person who invaded the Kooman home. In addition, it was up to the jury to determine the weight and credibility of Baum’s testimony. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The jury could take into account that Baum only conducted a “gross eye exam” of the tread on defendant’s shoes and the footwear impressions at the Kooman house. Baum’s testimony was admissible, and the prosecutor committed no misconduct in eliciting it.

The prosecutor presented the testimony of Detective John Schuman, a latent fingerprint examiner, who testified that he compared a thumb print on a store receipt with defendant’s “ten-print card” “obtained from the Michigan State Police archive.” Defendant argues that Schuman’s testimony improperly informed the jury of his criminal past. A prosecutor has “a high degree of duty to insure that police officers do not venture into forbidden areas in their testimony.” *People v McCartney*, 46 Mich App 691, 694; 208 NW2d 547 (1973). “If an officer brings out the fact that a defendant has previously been convicted or charged with crime, even if the answer could be considered nonresponsive, reversible error will have occurred.” *People v McCarver*, 87 Mich App 12, 15; 273 NW2d 570 (1978). However, “an isolated or inadvertent reference to a defendant’s prior criminal activities will not result in reversible prejudice.” *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).

It was clearly improper for the prosecutor to elicit testimony from Schuman that could permit the jury to infer that defendant has a criminal past. However, the error does not require reversal because defendant fails to show that it affected his substantial rights. Neither the prosecutor nor Schuman explained why defendant was a known fingerprint candidate with a ten-print card in police archives. In addition, the testimony was isolated; the prosecutor did not refer to defendant’s ten-print cards in his closing argument. Further, there was significant evidence supporting defendant’s convictions, including eyewitness identification and a connection to the

Toronado. Schuman's testimony did not affect the outcome of defendant's trial. *Carines*, 460 Mich at 763.

## V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied effective assistance of counsel. We disagree. Because defendant did not move for a *Ginther*<sup>3</sup> hearing or a new trial below, our review of defendant's claims is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To prevail on a claim for ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Carbin*, 463 Mich at 600 (quotation omitted).

Defendant claims that defense counsel was ineffective because counsel did not call an expert witness to testify regarding the unreliability of eyewitness identification. However, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant was not denied a substantial defense because, even absent an expert witness, he presented the defense of misidentification. Moreover, the failure to call an expert witness on eyewitness identification may have been trial strategy. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999) ("Trial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate."). This Court will not second-guess counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant next argues that defense counsel was ineffective because counsel failed to request an adjournment to obtain defendant's medical records. Even assuming that counsel's performance in failing to request an adjournment was deficient, counsel's performance did not prejudice defendant. Defendant presented evidence—his testimony and the testimony of Wodarek—that he was legally blind and needed glasses to see.

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant also argues that defense counsel was ineffective for failing to object to the irrelevant and prejudicial testimony elicited by the prosecutor. The testimony that the prosecutor elicited from Officer Gard regarding the traffic stop and from Detective Baum regarding the tread pattern on defendant's shoes was relevant and admissible. See part IV, *supra*. Any objection to the testimony would have been futile, and counsel is not ineffective for failing to raise a meritless objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Defense counsel may have deemed it better not to object and bring the jury's attention to Schuman's testimony that defendant was a known fingerprint candidate and that he obtained defendant's ten-print card from the Michigan State Police. Nevertheless, even if counsel should have objected, counsel's failure did not prejudice defendant. In light of the strong evidence of defendant's guilt, defendant cannot show that but for counsel's failure to object to Schuman's testimony, the result of his trial would have been different.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray  
/s/ Michael J. Kelly