

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD RICKS,

Defendant-Appellant.

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UNPUBLISHED

April 26, 2012

No. 301479

Wayne Circuit Court

LC No. 07-013326-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a; armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; felonious assault, MCL 750.82; possession of a firearm during the commission of a felony, MCL 750.227b; receiving or concealing a stolen motor vehicle, MCL 750.535(7); and receiving or concealing stolen property valued at \$1,000 or more but less than \$20,000, MCL 750.535(3)(a). Defendant appeals as of right. We affirm defendant's convictions but remand for the limited purpose of amending the judgment of sentence to reflect defendant's entitlement to credit for time spent in prison.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

On July 26, 2007, Frederick Wingfield worked as a delivery-truck driver for General Wine and Liquor Company, which is now called Great Lakes Wine and Spirits. During a 1:00 p.m. delivery at Dean's Liquor in Detroit, Wingfield encountered a man holding a gun in the back alley of the store. It was sunny outside, and Wingfield was able to see the man's face. The man approached within a few feet of Wingfield and pointed his gun at Wingfield's chest. The man demanded money and the keys to the delivery truck. He then talked to Wingfield about how to operate the truck and the value of its contents. The man asked whether there was a tracking device in the truck, and Wingfield confirmed that there was. Wingfield observed that the man was approximately 35 or 40 years old, five feet, eleven inches in height, and 195 pounds. He was dark skinned with a bald head and a thin mustache. He wore a "du-rag," a baseball hat or skull cap, blue jean shorts, and a light-colored t-shirt.

Immediately after the incident, Wingfield called the police and then his employer to report the carjacking. He spoke with his employer's loss-prevention director, Peter Bullach, who was a former detective sergeant and 25-year veteran of the Detroit Police Department. Wingfield described the carjacker's appearance and the direction of the truck as it fled the scene.

Based on Wingfield's description and information that Bullach had gathered from investigating prior similar incidents, Bullach and fellow employee Kenneth Anderson<sup>1</sup> drove toward Yacama Street near the I-75 expressway to track down the truck. With the help of the company dispatcher, who obtained GPS tracking information from the truck's telephone system, Bullach and Anderson successfully located the truck. They first spotted it heading the wrong way on Yacama, a one-way street. Bullach gave chase and followed the truck to Lance Street, where it came to a stop. As Bullach and Anderson approached, the driver's door of the truck was open, and the back-up lights were blinking because the vehicle was still in gear. The man standing next to the open door, who fit Wingfield's description of the carjacker, started walking in Bullach's direction. Bullach was able to look the man "dead on" and got within 30 to 35 feet of him. As Bullach began to exit his vehicle, the man lifted up his shirt, pulled out a gun, pointed it in the direction of Bullach and his vehicle, and then ran away. Bullach got back into his vehicle and pursued the man. As the man ran down the sidewalk, Bullach pulled close to the curb alongside him. The man then began to run across lawns. Bullach slammed on his brakes and started to get out of his vehicle to chase the man on foot. The man again pointed his gun toward Bullach. Bullach pulled out his own weapon and fired a shot at the man, who then fled the scene.

Two days after the incident, Wingfield went to the police station to view a photographic line-up. Wingfield positively identified defendant among a selection of six photographs. Wingfield was "very certain" of his identification.

At the preliminary examination on August 21, 2007, Wingfield was asked whether he saw the person who robbed him sitting among the individuals seated in the courtroom pews. The pews were "completely filled" with people. Wingfield identified a person other than defendant. He testified at trial that he was scared at the preliminary examination, defendant's appearance was similar to the person he identified, and he had chosen between defendant and the other person, as they looked alike.

At the jury trial on October 2010, Wingfield did not believe defendant was the person who committed the carjacking. He testified, however, that defendant's appearance at trial, where he was clean shaven and wearing glasses, was vastly different than his appearance in the photograph shown to him by the police at the photographic line-up two days after the incident. Wingfield remained certain that the person he identified in the photographic line-up (defendant) was indeed the person who robbed him. The court allowed the jury to submit questions, and Wingfield answered a series of questions regarding the quality of his memory and vision.

Bullach also viewed a photographic line-up at the behest of the police two days after the crime. He viewed six photos and initially identified photo number six as the culprit of these crimes. When asked whether he was sure, Bullach said no because he was debating between photo number one and photo number six. Bullach studied the photos for another minute or two and chose photo number one, defendant, as the culprit. When asked again whether he was sure,

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<sup>1</sup> Anderson was not called to testify at trial. The parties stipulated that if he were called as a witness, he could not identify defendant.

Bullach said yes. When asked to identify the culprit among the pews of the very-crowded courtroom at the preliminary examination, Bullach positively identified defendant. At trial, Bullach was 100 percent certain that defendant was the man he pursued near the delivery truck on the day of the carjacking.

Defendant was previously tried and convicted of the crimes charged; however, we reversed and remanded for a new trial because defendant was denied his constitutional right of confrontation when a police officer was permitted to testify regarding the substance of a telephone call she received from an anonymous source, which eventually led to defendant's arrest. *People v Ricks*, unpublished opinion per curiam of the Court of Appeals, issued June 9, 2009 (Docket No. 283053). On retrial, defendant was again convicted, resulting in the current appeal.

## II. ANALYSIS

### A. EFFECTIVENESS OF COUNSEL

Defendant contends on appeal that he was denied the effective assistance of counsel because his trial counsel failed to employ the services of an expert on eyewitness identification despite the fact that defendant's previous counsel had successfully moved the trial court to appoint such an expert at public expense. We disagree.

A claim of ineffective assistance of counsel must be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Defendant moved in propria persona for a new trial on the basis of ineffective assistance of counsel. The trial court held a *Ginther* hearing and denied defendant's motion. We review for an abuse of discretion a trial court's decision to deny a defendant's motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo and a trial court's findings of fact for clear error. *Id.*

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance prejudiced him. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

Counsel is presumed to be effective and engaged in trial strategy, and a defendant has the heavy burden to prove otherwise. *LeBlanc*, 465 Mich at 578; *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). This Court refuses to substitute its judgment for that of counsel regarding trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "[T]he 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). A substantial defense is a defense that might affect the trial's outcome. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Here, as defendant points out, his previous defense counsel successfully moved the trial court to appoint an expert in eyewitness identification to assist the defense. Defendant's trial counsel did not, however, call such an expert. At the *Ginther* hearing, defendant's counsel testified that he recalled a discussion about an eyewitness expert being asked to testify but that the expert could not withstand a *Daubert*<sup>2</sup> hearing.<sup>3</sup> Defense counsel testified that he conducted his own investigation but could not find anyone who "fit the bill" and would pass a *Daubert* test, which the trial court required as a condition precedent to qualifying an expert. He further testified that he did not believe he needed an eyewitness-identification expert because of the obvious problems with the witnesses' identification of defendant.

At trial, defense counsel cross-examined Wingfield and Bullach; he highlighted Wingfield's erroneous identification at the preliminary examination, Wingfield's inability to identify defendant at trial, and Bullach's initial identification of a different person at the photographic line-up. Defense counsel pursued a theory of misidentification, and the trial court provided the jury with Standard Criminal Jury Instruction No. 7.8, which advised the jury on deciding the dependability of identification testimony. Under the circumstances, we hold that defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness and prejudiced defendant. Therefore, defendant's ineffective assistance of counsel claim lacks merit.

## B. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was no credible or reliable identification evidence presented to the jury that supported a finding beyond a reasonable doubt that he committed any of the crimes of which he was convicted. We disagree.

In reviewing the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Defendant only challenges the sufficiency of the evidence regarding the identity element of his convictions. The positive identification of a defendant by a witness may be sufficient to

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<sup>2</sup> *Daubert v Merrill Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

<sup>3</sup> At the *Ginther* hearing, Dr. Steven Raymond Miller testified that he is a licensed psychologist who had consulted with defendant's prior counsel about the case. Miller told defendant's prior counsel that, if the prosecutor was going to insist on a *Daubert* hearing, he should "get somebody else." Miller explained that he had told a different judge in an unrelated prior hearing that he did not feel the important issue of whether eyewitness identification stood up to *Daubert* could or should be defended by him.

support a defendant's conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Where there are other indications of reliability, a witness's initial inability to identify the defendant will not invalidate the witness's later identification of the defendant. *People v Kurylczyk*, 443 Mich 289, 309; 505 NW2d 528 (1993). Moreover, the credibility of witnesses' identification testimony is a question for the trier of fact that this Court does not resolve anew. *Davis*, 241 Mich App at 700. "Circumstantial evidence and reasonable inferences drawn [from it] may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, despite an initial selection of a different person at the photographic line-up, Bullach positively identified defendant as the carjacker, and he remained consistent in his certainty at both the preliminary examination and trial. Furthermore, while Wingfield identified a different person at the preliminary examination and was unable to identify defendant as the carjacker at trial three years after the incident, he testified that he was very certain that the carjacker was the person that he identified in the photographic line-up: defendant. We hold that while Wingfield's and Bullach's identifications of defendant may have been less than compelling, the credibility of their identification testimony was a question for the trier of fact that this Court does not resolve anew. See *Davis*, 241 Mich App at 700. The record reflects that, in addition to hearing testimony from the witnesses as elicited by the attorneys, the trial court permitted jurors to submit their own questions to be asked of the witnesses so that they could fully assess the credibility and reliability of the testimony. Viewing this evidence in a light most favorable to the prosecution, we hold that the evidence was sufficient to find defendant guilty of these crimes because, at some point, both Wingfield and Bullach identified defendant as the perpetrator of the crimes, including when Bullach identified defendant as the culprit in court.

### C. SENTENCE

Defendant argues that the sentences he received for his carjacking and armed robbery convictions after his second trial, which were more severe than the sentences he received after his first trial, are not proportionate and constitute an abuse of the trial court's discretion. Additionally, defendant argues that these sentences constitute cruel and unusual punishment. We disagree.

MCL 769.34(10) provides that sentences within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information; however, this limitation on review does not apply to claims of constitutional error. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). This Court reviews a defendant's unpreserved claim of error regarding a constitutional right in a criminal case for plain error affecting the defendant's substantial rights. *People v Williams*, 245 Mich App 427, 430-431; 628 NW2d 80 (2001).

Sentences within the guidelines range are presumptively proportionate, and sentences that are proportionate are not cruel or unusual punishment. *Powell*, 278 Mich App at 323. When a defendant is resentenced to a longer sentence by a different judge following a conviction at a second trial, there is no presumption of vindictiveness. *People v Colon*, 250 Mich App 59, 66-67; 644 NW2d 790 (2002).

Defendant was sentenced for carjacking, MCL 750.529a, according to the Class A Offenses Sentencing Grid, MCL 777.62, as a fourth habitual offender, MCL 777.21(3)(c), to a minimum sentence of 30 years' (360 months) imprisonment. Defendant was sentenced for armed robbery, MCL 750.529, according to the Class A Offenses Sentencing Grid, MCL 777.62, as a fourth habitual offender, MCL 777.21(3)(c), to a minimum sentence of 25 years' (300 months) imprisonment. Defendant acknowledges that he received minimum sentences within the guidelines, which is 10-1/2 years to 35 years (126 to 420 months). MCL 777.62. Furthermore, the trial court did not follow the prosecutor's request to take defendant's prison misconduct into consideration when it sentenced defendant. Therefore, we hold that defendant has not overcome the presumption of proportionality, and because a proportionate sentence is not cruel or unusual, defendant has not established a constitutional violation.

Furthermore, Judge Gregory D. Bill presided over defendant's first trial and sentenced defendant to 17-1/2 to 35 years' imprisonment for the carjacking and armed robbery convictions. We hold that defendant has failed to show that the longer sentences imposed by Judge James A. Callahan, which were within the guidelines range, were the result of vindictiveness, an abuse of discretion, disproportionate, or cruel or unusual punishment. See *Powell*, 278 Mich App at 323; *Colon*, 250 Mich App at 66-67.

As defendant points out and plaintiff agrees, the trial court did commit error when sentencing defendant by failing to give him credit for the time he served in prison from the date he was first sentenced on December 12, 2007, until the time he was resentenced on November 5, 2010, as was requested in the presentence investigation report (PSIR). As such, we remand this case to the trial court for the sole purpose of amending the judgment of sentence to give defendant 1,059 days of prison credit for the time he served between his sentencing dates.

#### D. STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant contends that he was deprived of his rights to due process and a fair trial when the trial court erroneously denied his motion to suppress identification testimony by Wingfield and Bullach. We disagree.

Before trial, defendant moved to suppress the identification testimony of Wingfield and Bullach, claiming that the photo array was inappropriate or unduly suggestive and that the witnesses' testimony was unreliable. The trial court denied defendant's motion because it found that defendant failed to provide a factual basis for his claims. This Court reviews a trial court's findings of fact on a motion to suppress for clear error and its ultimate decision on the motion de novo. *People v Hrlac*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007).

"The fairness of the identification procedure must be evaluated in the light of the totality of the circumstances. The test is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness for identification." *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). An identification procedure violates a defendant's right of due process of law "when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Improper suggestion often arises when a witness is asked if he can identify the culprit of a crime

and is shown only one person or a group of people in which one person is singled out in some way. *Id.*

Here, there is no evidence to support defendant's assertion that the photographic line-up conducted by the police was unduly suggestive or improper. Wingfield's photographic line-up was conducted separately from Bullach's. The police showed them each six photographs of individuals and did not indicate that the culprit was among the persons depicted in the photographs. Although both witnesses had inconsistencies in their identification of defendant as the perpetrator throughout the course of the case, there is no evidence that the identification procedures were impermissibly suggestive or gave rise to a substantial likelihood of misidentification. Therefore, we hold that the trial court did not err in denying defendant's motion to suppress the identification testimony of Wingfield and Bullach.

Affirmed as to defendant's convictions but remanded for the sole purpose of amending the judgment of sentence to reflect defendant's entitlement to 1,059 days of prison credit for the time he served between his sentencing dates. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ William C. Whitbeck

/s/ Jane M. Beckering