

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DEMETRIUS CARTER,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 250429
Wayne Circuit Court
LC No. 03-003744-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and carjacking, MCL 750.529a. Defendant was sentenced to concurrent terms of five to fifteen years in prison for the armed robbery conviction and five to fifteen years in prison for the carjacking conviction. We affirm.

On appeal, defendant first claims that he was denied his constitutional right of confrontation when the trial court committed reversible error by admitting into evidence Douglas Sampson's prior statement to police that implicated defendant in the instant crimes when Sampson did not testify at trial and was unavailable for cross-examination. We disagree.

A defendant waives his right to appeal an issue when he specifically assents to the action or decision by the trial court. *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). In *Lowery*, *supra* at 173, this Court held that the defendant waived his right to appeal two jury instructions when he informed the trial court that he had "no additional objections." Similarly, in this case, defense counsel stated, "We would not object to that," referring to the introduction of Sampson's statement into evidence. Accordingly, the trial court received the statement into evidence. Therefore, we conclude that defendant waived his right to appeal the allegedly erroneous evidentiary ruling. Since any objections to the trial court's ruling were waived, there are no errors for this Court to review. See *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

Next, defendant contends that he was denied the effective assistance of counsel when defense counsel failed to object to the admission of Sampson's statement into evidence. We disagree.

The determination of whether a defendant was denied the effective assistance of counsel is a combined question of fact and constitutional law. This Court reviews a trial court's findings of fact for clear error and constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Absent an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To prove the ineffective assistance of counsel, a defendant must meet a two-part test by proving that defense counsel's performance was so deficient that it fell below the standards guaranteed by the Sixth Amendment and that this deficiency resulted in prejudice so egregious as to alter the outcome of the trial. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant bears a heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578.

Even assuming that counsel's representation was ineffective, we conclude that defendant failed to demonstrate prejudice resulted to his case. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Upon review of the record, we conclude that the introduction of Sampson's statement was merely cumulative and did not alter the outcome of the trial. There was testimony from the victim, an accomplice, and corroborating police evidence to support the jury's guilty verdict. Because the trial court's admission of Sampson's statement to the police was not outcome determinative, we hold that defense counsel's failure to object to the introduction of Sampson's statement was likewise not outcome determinative. Accordingly, defendant was unable to establish that he was denied the effective assistance of counsel. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Defendant's second claim on appeal is that the trial court erred by admitting identification evidence from a photographic array when a corporeal lineup should have been required. We disagree. Defendant failed to challenge the pretrial identification procedure below. Therefore, we review this unpreserved evidentiary issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A photographic lineup is generally impermissible when the defendant is in custody or available to appear at a corporeal lineup. *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). However, a photographic lineup is permissible in place of a corporeal lineup if "[t]here [is an] insufficient number of persons available with defendant's physical characteristics." *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). In this case, Officer Davis made considerable efforts to organize and conduct a corporeal lineup, but he was unable to do so because of the lack of suitable participants. The photographic lineup was conducted due to the unavailability of participants who possessed similar characteristics to those of defendant and not to the lack of police endeavor to locate suitable participants. "There is no authority that requires the police to make endless efforts to attempt to arrange a lineup." *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Under these circumstances, we conclude that the use of a photographic lineup in lieu of a corporeal lineup was permissible.

Moreover, defendant's right to due process of law was not violated by the use of the photographic identification procedure because it was not unduly suggestive nor did it give rise to the likelihood of misidentification. A photographic identification procedure violates a defendant's right to due process of law when it is so suggestive, given the totality of the circumstances, as to lead to a substantial likelihood of misidentification. *Kurylczyk, supra* at 302. The factors to consider when evaluating the totality of the circumstances include: the opportunity for the witness to view the offender at the time of the offense, the witness' level of attention, the accuracy of a prior description of the offender, the witness' degree of certainty at the pretrial identification procedure, and the length of time between the offense and the confrontation. *Id.* at 306.

Here, there was evidence that the victim had ample time and lighting to view defendant during the incident, the photographic identification occurred shortly after the incident, and the victim expressed certainty that defendant's picture was the picture of the perpetrator. There was insufficient evidence that the victim's prior description of defendant was flawed. There was no evidence that the victim was coerced or unduly influenced by the police or other eyewitnesses at the time of the photographic lineup. Accordingly, we conclude that the photographic identification procedure was not impermissibly or unduly suggestive, and therefore, the trial court did not commit plain error by admitting the photographic identification evidence and related in-court identification evidence.

Moreover, trial counsel is not ineffective for failing to bring a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Because the trial court properly admitted the photographic identification, defendant was not denied the effective assistance of counsel when trial counsel failed to assert a futile motion to suppress.

Affirmed.

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Donald S. Owens