

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD YOUNG, a/k/a REGINALD
MAURICE YOUNG, a/k/a REGINALD
MARECE YOUNG,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 251262
Wayne Circuit Court
LC No. 03-007172-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of nine to twenty years for each robbery conviction, two to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. In this appeal as of right, defendant raises four claims of ineffective assistance of counsel. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

I. Suppression of the Victims' In-Court Identifications

Defendant argues that defense counsel was ineffective for failing to move to suppress the victims' in-court identifications because they were tainted by an impermissibly suggestive pretrial identification procedure, namely, an improper on-the-scene identification. Although identification procedures that are unnecessarily suggestive and conducive to irreparable

misidentification deny a defendant due process, *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), the record contains no indication that any impermissible or unduly suggestive identification procedures occurred here. Contrary to defendant's claim, there was no on-the-scene identification. Rather, the record indicates that the victims independently identified defendant as the robber and informed the police of defendant's whereabouts before the police took any action to question or detain defendant. Because there was no on-the-scene identification procedure that could be considered unnecessarily suggestive, any objection would have been futile. Counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

II. Prosecutorial Misconduct

Defendant contends that defense counsel was ineffective for failing to object when the prosecutor asked him about an unspecified 1996 Virginia conviction. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). But even if the prosecutor's question was improper, we are not persuaded that it affected this bench trial verdict. "A judge, unlike a juror, possesses an understanding of the law which allows [her] to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). A review of the record shows that the trial court found defendant guilty on the basis of properly admitted evidence. Because the trial court's decision was not affected by the challenged testimony, it follows that counsel's failure to object did not deprive defendant of the effective assistance of counsel. *Effinger, supra*.

III. Failure to Call an Identification Expert

Defendant also avers that defense counsel should have called an identification expert to attack the victims' identifications. A trial counsel's decisions concerning what witnesses to call and what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant has failed to overcome the presumption that defense counsel's inaction was trial strategy. The victims indicated that they were certain that defendant was the person who robbed them. Both victims had a good opportunity to view defendant in a well-lit area and were able to provide a description of defendant to the police. In light of these facts, defense counsel could have reasonably surmised that calling an identification expert would have been futile, or that an expert may have actually been harmful to the defense. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 76-77. Further, defendant was tried by a judge rather than a jury, and the trial court presumably was aware of the proper considerations in evaluating the victims' identification testimony. *Jones, supra*. Accordingly, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*.

IV. Failure to Call an Alibi Witness

Lastly, defendant claims that counsel was ineffective for failing to call an alibi witness, “Angel,” to testify that he was at her home on the night of the offense. But defendant has not provided a witness affidavit, or identified any evidence of record establishing that the proposed witness’ testimony would have yielded valuable evidence that would have affected the outcome of trial. See MCR 7.210(A)(1). Rather, defendant simply avers in his brief and his own affidavit that the witness would have supported his alibi. Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel’s failure to produce the witness, the result of the proceedings would have been different. *Effinger, supra*.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen