STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2009
v	No. 286954 Wayne Circuit Court
DEONTA DENZEL SMITH, Defendant-Appellant.	LC No. 08-000782-FC

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted 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. Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to concurrent sentences of 81 months to 20 years' imprisonment for the armed robbery conviction, and one to five years' imprisonment for the felon in possession of a firearm conviction, all of which are consecutive to two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

First, defendant contends the trial court improperly denied both defendant's motion to adjourn to allow for the procurement of DNA test results from the sweatshirt and bandana purportedly worn during the armed robbery and his post-conviction motion to complete the DNA testing. Specifically, defendant argues that the DNA test could have revealed exculpatory evidence. Because the record indicates that defendant never moved for an adjournment or a continuance, the issue is unpreserved and is reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). After his conviction, defendant moved to obtain the DNA test results and the trial court denied that motion. The issue related to denial of that motion is preserved and is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

"An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2). However, "[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process. Nor does due process require that the prosecution seek and find exculpatory evidence. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003) (citations omitted).

In *Coy*, the defendant argued that the trial court abused its discretion when it denied defendant's motion to allow for the DNA testing of another possible suspect's blood in order to compare it to DNA samples taken at the scene. *Id.* at 20. This other possible suspect had a corroborated alibi, but the defendant argued that this other possible suspect actually committed the crime. *Id*. The trial court denied the motion because it did not believe there was a "sufficient likelihood of the discovery of relevant – of evidence relevant to the Defense by the further or continued analysis of either the DNA . . ." *Id*. On appeal, this Court recognized that the prosecutor and police are not required to seek exculpatory evidence or "exhaust all scientific means at its disposal." *Id*. at 21. This Court also noted that defendant's exculpatory theory was highly speculative because the other possible suspect had a corroborated alibi and "[n]othing in the record suggests that DNA testing would have assisted defendant's case." *Id.* at 22.

In the present case, defendant's theory was highly speculative that DNA evidence that purportedly existed on the clothing recovered by the victim would be exculpatory. To make the possible DNA testing even more speculative than that in *Coy*, the chain of custody for the clothing in this case was tainted because the victim recovered it from a third party who was not investigated by police. Because there was no indication in the record to support defendant's theory that the DNA evidence existed to be tested and would have produced exculpatory evidence, no plain error occurred in the failure to grant an adjournment. *Carines*, *supra*. At best, defendant has shown a failure to develop evidence, not a failure to disclose it. See *Coy*, *supra* at 21-22, citing *People v Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd on other grounds 447 Mich 217 (1994).

As for defendant's post-conviction motion for DNA testing, such motions are governed by MCL 770.16. Pursuant to MCL 770.16(1):

> A defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the trial court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:
>
> (a) That DNA testing was done in the case or under this act.
>
> (b) That the results of the testing were inconclusive.
>
> (c) That testing with current DNA technology is likely to result in conclusive results.

Here, defendant has failed to meet the first requirement. Defendant conceded at the post-trial motion hearing that DNA testing was never done and requested "an order that this DNA be done, and be produced." Having failed to meet the statutory requirements, defendant was not entitled to post-conviction DNA testing. Accordingly, the trial court properly denied the motion. There is no abuse of discretion.[1] *Unger*, *supra*.

[1] Although we decide this issue on a ground separate from that utilized by the trial court, we may (continued…)

Second, defendant alleges that the photographic lineup was unduly suggestive because the physical appearances of the other men in the lineup were inconsistent with the victim's description of the perpetrator of the armed robbery. We disagree. "A photographic identification procedure violates a defendant's right to 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). A review of the photographic lineup reveals that all of the men had similar basic qualities matching the victim's description of the perpetrator of this crime, were African-American, and were approximately the same size and same age. There is no indication that defendant was singled out in any manner when the array is viewed. Thus, the photographic lineup was not unduly suggestive. *Id.*

Defendant also argues his due process rights were violated when no attorney was present at the photographic lineup. We disagree. Generally, there is no right to counsel at a precustodial investigatory photographic lineup "unless the circumstances underlying the investigation and lineup are 'unusual.'" *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). This Court defined "unusual" as either 1) "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant," or 2) the circumstances presented in *People v Cotton*, 38 Mich App 763; 197 NW2d 90 (1972). *McKenzie*, *supra.* In *Cotton*, *supra* at 770, the defendant had previously been in police custody, had previously been arrested and released, and had counsel present for previous lineups. At the time of the photographic lineup, defendant herein was not in custody, the victim had not previously made a positive identification of defendant and defendant's case does not present such unusual facts, as in *Cotton,* to warrant counsel's presence at the photographic lineup. Consequently, defendant was not entitled to counsel's presence at the photographic lineup. *McKenzie*, *supra.*

Third, defendant contends he did not receive effective assistance of counsel because defense counsel's advice that defendant should testify on his own behalf did not constitute sound trial strategy. To prevail on a claim of ineffective assistance of counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Carbin, supra*. The record is entirely silent as to whether defense counsel ever advised defendant to testify on his own behalf; thus, defendant has failed to establish a factual predicate for this aspect of his claim. In addition, even if defense counsel so advised defendant, after review of the record we would not conclude that such advice fell below an objective standard of reasonableness under prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Finally, defendant alleges there was insufficient evidence to convict him of armed robbery because there was no physical evidence to connect him to the crime and because he was convicted based on the victim's identification. We disagree. We review a claim of insufficient

(…continued)

still affirm where the trial court reached the right result. *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (1999).

evidence de novo, viewing the evidence in a light most favorable to the prosecution, to determine whether the evidence would justify a rational trier of fact finding that the defendant was guilty beyond a reasonable doubt. *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008).

To establish armed robbery, the prosecution must prove: "(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon." *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). Additionally, identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). In this appeal, defendant challenges the sufficiency of the identity evidence. The testimony of a victim alone, however, is sufficient evidence to establish defendant's guilt beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

In the present case, the victim positively identified defendant as the man who approached him with a handgun, ordered him to the ground and then stole his wallet, cellular telephone and money. This evidence alone was sufficient to establish defendant's guilt beyond a reasonable doubt of armed robbery. *Id.* The victim indicated that the area was well-lit; that when defendant was within three feet of him, the bandana covering defendant's face slipped down so he could see defendant's nose and chin; he saw defendant's face again while he was on the ground; and he immediately recognized defendant's photograph in the photo array he viewed the day after the incident, but examined all of the photographs to make certain. Evidence regarding the limits of the victim's view of the perpetrator was fully brought out on cross-examination. It was for the fact-finder to weigh the reliability of the identification and the victim's credibility. *Id.* Viewing the evidence and reasonable inferences in a light most favorable to the prosecution, the evidence justified a rational trier of fact to find defendant was guilty beyond a reasonable doubt of armed robbery. *Kanaan, supra*.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro