STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 10, 2009
v	No. 288257 Oakland Circuit Court
JAMES ANTHONY MAYZE, Defendant-Appellant.	LC No. 2008-221204-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110(a)(2), and sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 78 months to 20 years. Defendant was observed riding a stolen bicycle within minutes after it was taken and he was apprehended with the bicycle in his possession. He did not dispute those facts at trial, but denied that he was the person who entered the home and took the bicycle. He now appeals as of right, asserting that trial counsel was ineffective for failing to move to suppress the complainant's in-court identification. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On June 1, 2008, at approximately 5:15 p.m., the 13-year-old complainant heard the door to the breezeway of his home open twice and then saw a man taking his bicycle, which was stored in the breezeway. The complainant testified that he saw a side view of the person, whom he described by race, with very short black hair, wearing a green varsity jacket and plain black pants. The person was medium to heavy build and "somewhat muscly."[sic] The complainant saw the man for approximately 30 seconds, from a distance of approximately 8 to 15 feet. The man went to the right as he left. The complainant woke his father, who then drove through the neighborhood in an effort to locate the thief.

According to the complainant's father, as he was driving, he saw a person riding a bicycle that appeared to be the one that was stolen. The person was wearing a green jacket with white sleeves resembling a varsity jacket. At that point, the complainant's father called the police. The complainant's father followed the man to a gas station, where the police arrived and questioned him. The father estimated that five minutes elapsed between the time he woke up and the time he saw the person on the bicycle and called the police. The man was approximately three quarters of a mile from the house when the father saw him. The father told the police that

his son would need to identify the bicycle and drove home to get him. The father told the complainant that the police had someone in custody.

According to the complainant, his father called and said that "they" found the man at a nearby gas station. As his father drove to the gas station, he said that he had followed the man on the bicycle. The complainant agreed with defense counsel that when the complainant arrived at the gas station, he knew that the man who stole his bicycle was in the back seat of the police car because his father had told him that.

Police Officer Richard Haefner testified that before the complainant viewed defendant at the gas station, he said that the person who stole his bicycle was wearing some sort of cloth on his head and was wearing a dark green jacket. He was large and heavyset. According to Haefner, when he saw defendant, he was wearing a dark green jacket and a black bandana.

The complainant testified that after he wrote out a statement, an officer escorted him to the police car and asked him to look in to see if he recognized the man.[1] According to Haefner, when the complainant saw defendant, he said, "That is the man." The complainant testified that the person in the car was the person he saw taking his bicycle. The complainant identified defendant as that same person. He was sure. He recovered his bicycle at the gas station.

Ellen Coccitti, who lived three houses away from the complainant, testified that after 4:00 p.m. on the day of the incident, she saw a man walking very slowly and looking at the homes. She described the man by race, with medium tone skin, about five feet, eleven inches tall, heavier than 190 pounds, and with short black hair. He was wearing a t-shirt, white or burgundy, and blue jeans. He had white papers in his pocket. She testified that defendant "looks like" the person she saw.

The defense stipulated that defendant left a treatment facility at 7:00 a.m. in a car, that he did not have a bicycle in his possession, and that he needed to be back at the facility by 7:00 p.m. and was supposed to return by car. Defendant also agreed that the bicycle that was in his possession at the gas station belonged to the complainant.

Defendant argues on appeal that defense counsel was constitutionally ineffective for failing to move to suppress the complainant's in-court identification of him on the basis that it resulted from an unfairly suggestive on-the-scene identification when he was handcuffed in the police car.

In the absence of an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective

[1] The testimony of the complainant and Officer Haefner conflicted regarding whether the complainant identified his bicycle before he identified defendant. Haefner testified that the complainant identified the bicycle first. The complainant testified that he identified defendant first.

standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id*.

Defendant argues that trial counsel should have moved to suppress the in-court identification because the on-the-scene identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968); *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). However, this Court has upheld prompt on-the-scene investigations in several cases.

In *People v Johnson*, 59 Mich App 187, 190; 229 NW2d 372 (1975), this Court explained:

> While we agree that there may be some element of suggestiveness where a suspect is viewed alone in an 'in-the-field' identification proceeding, we are nevertheless of the opinion that such an identification procedure is a reasonable police practice. The reasons are twofold. First, this type of identification allows confirmation or denial of an identification while the memory of a witness is still fresh. Second, identifications of this type expedite the release of innocent suspects.

In *People v Purofoy*, 116 Mich App 471; 323 NW2d 446 (1982), the defendants argued that an on-the-scene identification was unduly suggestive particularly because they were handcuffed in the back seat of the patrol car. *Id*., p 478. This Court rejected that argument, stating, "While we agree that the custodial identification may have been suggestive, we nonetheless believe that the procedure was reasonable. Inasmuch as the identification occurred within minutes of defendants' arrest, it enabled the complainant to confirm or deny the identification while his memory was fresh and accurate. Additionally, a police procedure such as was employed here results in innocent suspects being expeditiously released." *Id*., p 480.

In *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002), the defendant argued that an in-the-field identification was inherently suggestive and that it was not prompt as grounds for a new trial. The complainant was taken to two scenes where the police were detaining suspects in a carjacking. The identification occurred one hour and fifty-four minutes after the offense. *Id*., p 361. The Court determined that despite the lapse of time, the identification was not unreasonable. *Id*., p 363. The Court also noted that "there was nothing in the record to suggest that the police made any suggestive comments at the identification or that the police were acting for reasons other than to determine 'whether there [was] a reasonable likelihood that the suspect [was] connected with the crime and subject to arrest, or merely an unfortunate victim of circumstances.'" *Id*., p 363, quoting *People v Winters*, 225 Mich App 718,

728; 571 NW2d 764 (1997), lv den 459 Mich 877 (1998).[2] Accordingly, the Court held that the trial court did not abuse its discretion in denying the defendant's motion for a new trial.

As a leading treatise states, "Showups are commonly permitted when they occur within several hours of the crime; the two justifications given are the need for quick solution of the crime and the desirability of fresh, accurate identification by eyewitnesses." 2 LaFave, Israel, King & Kerr, Criminal Procedure (3d ed), § 7.4(f), p 959. See also *Russell v United States*, 408 F2d 1280, 1284-1285; 133 US App DC 77, 81-82 (1969), cert den 395 US 928; 89 S Ct 1786; 23 L Ed 2d 245 (1969), in which the court recognized the suggestiveness of showup confrontations, but because of the advantages of prompt identification, resolved that "absent special elements of unfairness, prompt on-the-scene confrontations do not entail due process violations."

In light of these authorities, trial counsel did not perform "below an objective standard of reasonableness" by failing to move to suppress the complainant's in-court identification as having been tainted by the on-the-scene identification. *Toma, supra,* p 302. Rather, these authorities indicate that such a motion would have been futile, and defense counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997), lv den 456 Mich 953 (1998).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

[2] The defendant in *Winters, supra,* p 729, also argued that the on-the-scene identification was unduly suggestive. Noting that the issue was not raised below and there was no record on which to review the issue, this Court declined to address it.