STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286212 Wayne Circuit Court
JASON ROQUE, Defendant-Appellant.	LC No. 08-003360-FC

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to rob while armed, MCL 750.89; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Because defendant has not shown that he was prejudiced during the photographic or corporeal lineups, and because he has not shown that trial counsel was ineffective, we affirm, but remand for resentencing in accordance with this opinion.

Defendant first argues that his trial counsel rendered ineffective assistance of counsel because he failed to move to suppress the identification evidence of the second photographic lineup and the corporeal lineup showed to the victim. Our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).[1] To prevail, defendant must show that defense counsel's performance was deficient according to an objective standard of reasonableness considering the prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Defendant must also establish that the deficient performance prejudiced him by depriving him of a fair trial, i.e., there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted him. *Pickens*, *supra* at 314. Defense counsel's performance is presumed to be effective, and a defendant bears the heavy burden of demonstrating otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[1] Although defendant moved this Court to remand his case for an evidentiary hearing based on his ineffective assistance claim, this Court denied his motion. *People v Roque*, unpublished order of the Michigan Court of Appeals, entered March 19, 2009 (Docket No. 286212).

To effectively challenge a pretrial identification lineup, defendant must show that the lineup

> was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993) (internal citations omitted).]

Mere physical differences between the lineup participants do not render the procedure defective; they relate to the weight of the identification and they are "significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002) (citations omitted).

The record does not support defendant's assertion that the photographic lineup was so impermissibly suggestive that it led to a substantial probability of misidentification. *Kurylczyk*, *supra* at 302-303. Defendant's assertion that the other individuals in the photographic array were white police officers is erroneous and not supported by the record. The record reflects that the other participants were not police officers, but were generated by the police's "mugging machine," and the individuals "were once criminal suspects or arrested for a criminal violation" in the past. In fact, our review of the photographic lineup reveals that the complexions of the participants do not appear to differ drastically from defendant's complexion. *Hornsby*, *supra* at 466. Participants number two and five bear striking resemblance to defendant: they are bald, have similar facial features, and their complexions appear to be similar to defendant's complexion. And all the individuals in the photographic array appear to be of similar ages and physical stature to defendant. Thus, defense counsel cannot be deemed ineffective for failing to present a futile argument, because this evidence was properly admissible. *Snider*, *supra* at 425.

With respect to the corporeal lineup, it did not contain the "same police officers" wearing the "same clothing" as in the photographic lineup, because the second photographic lineup contained no officers, but four of the six individuals in the corporeal lineup were actually police officers. The officer who arranged the lineup indicated that the participants were selected because they matched defendant's physical description. They were dressed in plain clothes and the victim viewing the lineup was not informed that they were officers. The record reflects that two of the participants were of the same or similar height as defendant, and the others were only a few inches taller and slightly heavier than defendant. Although the officers were white and defendant emphasizes that he has a substantially darker skin tone than white, his claim of darker skin is not supported by the photographic lineup, and no record evidence supports his claim. There is no evidence of any procedural irregularities. Further, the record reflects that defendant had an attorney present during the corporeal lineup. The attorney never objected, and never otherwise indicated that there was a problem with the lineup or the procedure. On the record, defendant has failed to establish that defense counsel's performance was deficient in failing to move to suppress the corporeal lineup because he has not established that the lineup evidence was inadmissible. Defendant bore the burden of establishing the factual predicate of his claim.

People v Hoag, 460 Mich 1, 6; 594 NW2d 57 (1999). Again, defense counsel cannot be deemed to have rendered defective assistance in failing to make a futile motion. *Snider*, *supra* at 425.

Moreover, even assuming arguendo that defense counsel should have moved to suppress the lineup evidence, defendant has not established that he suffered prejudice, given the substantial evidence against him. *Pickens*, *supra* at 314. The victim's description of defendant was accurate. The victim also identified defendant by the Windstar van defendant was driving during the assault. The victim substantially recalled the van's license plate number, and he observed this van a second time shortly after the incident, recognized it, and called police again. The victim observed defendant wearing a red coat at the time of the crime. Defendant was arrested in the van, wearing a red coat, and he admitted to driving that van on the night of the incident and being involved in the incident. The victim's version of the events to the police was consistent with police observations, including the bullet hole through the windshield and the scratches on his face from flying glass. Moreover, although defendant claimed at trial that he was not involved in the incident with the victim, but he was involved in a different incident that occurred earlier that evening on different streets in that area, this contradicted the statement he signed and gave to police, and his trial testimony.

Defendant further argues that his due process rights were violated because police took no photographs of the individuals in the corporeal lineup. Because he did not raise this argument in the trial court, we review it for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). There is a distinction between failing to disclose evidence and failing to develop evidence. The police are not required to develop evidence absent a showing of suppression, intentional misconduct, or bad faith. *People v Coy*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003). There is no evidence of intentional suppression, misconduct, or bad faith in this case. *Id*. No photographs were taken because a camera was not available at the time. Further, the descriptions of the individuals in the lineup were recorded and the attorney present at the live lineup voiced no objection to the composition. Defendant even concedes that the photographs would have been merely "speculatively useful evidence." Defendant has failed to establish the existence of a plain error that affected his substantial rights, or that defense counsel's performance was defective in failing to raise his due process concerns in the trial court. *Carines*, *supra* at 763-764; *Snider*, *supra* at 425.

Defendant also argues that trial counsel's performance was objectively unreasonable because he did not: have the owner of the cab company that employed the victim testify, present the receipt for the repair of the windshield, and subpoena company records. Defendant represents company records would have shown that the victim was not working on the night in question and that the victim did not file an incident report. Defendant's exhibits attached to his brief on appeal, such as the receipt, trial counsel's notes, and appellate counsel's affidavit, were not contained in the lower court file, and "will not be considered by this panel to resolve this issue because it was not part of the lower court record. MCR 7.210(A)(1); *Long v Chelsea Community Hosp*, 219 Mich App 578, 588; 557 NW2d 157 (1996)." *People v Shively*, 230 Mich App 626, 629 n 1; 584 NW2d 740 (1998).

Nonetheless, were we to consider the evidence, defendant's claim has no merit. The record reflects that trial counsel investigated defendant's case, hired a private investigator, and subpoenaed the cab company owner, who brought the receipt for the repairs to the cab to trial. Trial counsel ultimately made a strategic decision that the owner should not testify or present the

repair receipt as evidence because he felt that the evidence would do more damage to defendant's case than good. Indeed, it would have corroborated the victim's version of events. The fact that the passenger window was not also listed on the windshield receipt does not mean that it was not fixed or broken. We decline to second-guess trial counsel's strategic decision regarding whether to call a witness or present certain evidence in hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A mere difference of opinion with respect to trial strategy does not constitute ineffective assistance of counsel. *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987).

Additionally, regardless of whether the victim made an official incident report or was recorded as working at that time, he obviously submitted the damage claim to the owner of the cab company because the owner had the windshield fixed the day after the crimes at issue occurred. The owner even produced the receipt for the repairs to trial counsel. The victim also called the police after the incident and reported it to them, and the police observed the damage to both the windshield and the passenger window. Further, the victim testified that any time he was in his cab, he was on duty. Whether the victim was actually on duty with the cab company would not negate the fact that he was robbed at the time and place he indicated. The record does not support that trial counsel did not conduct an adequate and reasonable investigation regarding an incident report and work records. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). The lack of an incident report or work records would not have provided defendant with a substantial defense under the circumstances. *People v Rockey*, 237 Mich App 74, 76-78; 601 NW2d 887 (1999) (Failure to call a witness or present evidence constitutes ineffective assistance when it deprives the defendant of a substantial defense.) In sum, defendant has ultimately not established that absent any errors by trial counsel, the outcome would have been different, given the substantial amount of evidence indicating his guilt, including his statement in which he confessed to being involved in the incident. *Pickens*, *supra* at 312-314.

Defendant next argues that the trial court improperly scored prior record variable (PRV) 6, MCL 777.56, and as a result he is entitled to resentencing. The prosecutor agrees. Defendant preserved this claim because he raised the scoring issue in his motion to remand this case. *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004); MCL 769.34(10).

A defendant is scored ten points where he is on probation for committing a felony at the time he committed the instant offense, and five points where he is on probation for committing a misdemeanor. MCL 777.56(1)(c) and (d). The trial court erroneously scored defendant ten points for PRV 6. Defendant's presentence investigation report reflects that he was on probation for a misdemeanor domestic violence offense. Under the corrected scoring, defendant's total PRV score would be 45. The applicable sentencing guideline's range would be 81 to 168 months' imprisonment with the habitual offender enhancement rather than the guideline's range used of 108 to 225 months' imprisonment. MCL 777.62; MCL 777.21(3)(a). Because defendant's sentence was based on inaccurate information and scoring that led to sentencing under an improper guidelines range, he is entitled to be resentenced. MCL 769.34(10); *Kimble*, *supra* at 309-311; *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

Defendant argues that trial counsel was ineffective for failing to raise this scoring objection at trial. However, "since defendant is getting his desired remedy, remand for resentencing, we do not find it necessary to reach this claim." *People v Lowe*, 172 Mich App 347, 353; 431 NW2d 257 (1988).

Finally, defendant requests a remand for an evidentiary hearing to further develop his ineffective assistance of counsel claims. Defendant's request for a remand in his brief on appeal presents the same factual predicate and arguments as previously raised in his motion to remand in this Court, which we denied. *People v Roque*, unpublished order of the Michigan Court of Appeals, entered March 19, 2009 (Docket No. 286212). We again decline to remand defendant's case.

We affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens