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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **Michigan Supreme Court No. 162373**

DAMETRIUS POSEY,
Defendant-Appellant.

Court of Appeals No. 345491
Circuit Court No. 18-0074-01-FC

PLAINTIFF-APPELLEE'S ANSWER OPPOSING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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PLAINTIFF-APPELLEE'S ANSWER OPPOSING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

The People of the State of Michigan—through Kym L. Worthy, Prosecuting Attorney, County of Wayne; Jon P. Wojtala, Chief of Research, Training, and Appeals; Gabrielle O'Connor, Assistant Prosecuting Attorney—ask this Court to deny defendant's application for leave to appeal.

1. Defendant's application relies on the same arguments made in the Court of Appeals.
2. The People's brief on appeal in the Court of Appeals adequately addresses these issues and is incorporated in this answer. See Appendix 1.
3. The Court of Appeals did not clearly err in rejecting defendant's arguments and affirming his convictions. MCR 7.305(B)(5).
4. Defendant's application does not demonstrate any of the other grounds for granting leave to appeal. MCR 7.305(B)(1)-(3).

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5. Defendant also raises issues not presented to the Court of Appeals, but review of those issues is foreclosed in this Court. When a defendant does not afford the Court of Appeals the opportunity to pass on an issue, the Court of Appeals cannot have rendered a "decision" on it, and thus this Court has no jurisdiction to review it. Michigan Court Rule 7.303 sets out this Court's jurisdiction. The only relevant subsection—(2)—provides for jurisdiction of a case "after *decision* by the Court of Appeals." Subsection (B) also references MCR 7.303, which clarifies the meaning of "decision" and unquestionably requires that the Court of Appeals actually pass on an issue—otherwise the "clearly erroneous" language is rendered superfluous. This Court specifically stated in *People v Holloway,* 387 Mich 772 (1972), that "an appellant may not raise in this Court an issue not presented to the Court of Appeals."

6. In sum, defendant's application raises no issues worthy of this Court's review, and it should be denied.

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RELIEF

THEREFORE, the People request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief of Research, Training,
and Appeals

/s/ *Gabrielle O'Connor*

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Dated: January 12, 2021

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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
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DAMETRIUS POSEY,
Defendant-Appellant.

Court of Appeals No. 345491
Circuit Court No. 18-0074-01-FC

Appendix 1
People's Brief on Appeal to the Court of Appeals

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V **No. 345491**

DAMETRUIS POSEY,
Defendant-Appellant.

Third Circuit Court No. 18-0074-01 FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

Filed under AO 2019-6

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COUNTERSTATEMENT OF JURISDICTION

The People concur with defendant's statement of appellate jurisdiction.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

An in-court identification of a defendant by the victim is not inadmissible unless influenced by a prior suggestive identification procedure. Here, the victim was previously shown a proper photography array and failed to identify defendant, but the victim was able to identify defendant at trial. Was the in-court identification rendered inadmissible by the prior proper identification procedure? Further, was trial counsel ineffective for failure to suppress the witness's testimony?

The trial court did not answer this question.

The People answer, "No."

Defendant would answer, "Yes."

II

The appellate court must affirm a properly scored guideline sentence when the trial court does not depart from the recommended minimum sentencing range. Here, the defendant's sentence was within the properly scored guidelines range. Is the defendant entitled to resentencing?

The trial court did not answer this question.

The People answer, "No."

Defendant would answer, "Yes."

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COUNTERSTATEMENT OF FACTS

On October 8, 2017, cousins Dwayne Scott and Terrence Byrd went to the Super X Market in Detroit after a Lions tailgate. 7/25, 45. [1] Scott drank some tequila at the tailgate. 7/25, 47. Byrd remained sober because he does not drink. 7/24, 47. Scott and Byrd went inside the market to play the lottery and then stood outside by Byrd's car conversing and observing passersby. 7/25, 47.

Two men walked up the street towards the market. 7/25, 94. One man was a light-skinned Black man, about 5'7 and the other was a dark-skinned Black man, about 6'3." 7/25, 94. The men walked by Byrd and Scott and went into the market. 7/25, 48. The men were dressed in sweatshirts with the hoods pulled up. 7/25, 94. At trial, Byrd noted that this was unusual because it was sunny and in the mid-seventies. 7/25, 94. The men went into the market and stayed there for a few minutes. 7/25, 49; 96.

The men came back outside and began to walk past Byrd and Scott. 7/25, 96. The taller, dark-skinned man turned towards Scott and pulled out a gun from his pocket. 7/25 49: 96-97. He said something to Scott, but at trial Scott could not recall what he said. 7/25, 67. Scott raised his hands and backed up. 7/25, 53.

The shorter light-skinned man pulled out what Byrd thought was a 9 mm pistol and pointed it at Byrd's face. 7/25, 98. Byrd, a CPL carrier, reached for his weapon under his clothes. 7/25, 98. Byrd pushed the

[1] References to the trial court transcript will be the date of hearing followed by the page number.

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light-skinned man away and fired his gun. 7/25, 99. Byrd and the two men exchanged gunfire. The dark-skinned man was next to Byrd's Trailblazer and was trying to get across the street. 7/25,100. The light-skinned man was shot, fell to the ground, and went to the side of the store. 7/25, 100. Byrd also fired down the street in the direction of the dark-skinned man. 7/25, 102. Byrd emptied his gun during the shoot-out. 7/25, 100. He knew at the time he had hit both men. 7/25, 103.

During the shooting, Scott attempted to flee towards the side of the store. 7/25, 53. Scott heard between 15 to 20 shots before he was hit. 7/25, 54. Scott was hit in the left arm and left hip. 7/25, 54. Byrd took Scott to Receiving Hospital in Detroit. 7/25, 57. Scott had surgery because the bullet shattered his left arm bone and caused nerve damage. 7/25, 59-60. Scott remained at the hospital for three or four days and had three months of physical therapy as a result of his wounds. 7/25, 60-61.

While at the hospital, Byrd was waiting downstairs with a security guard and nurse.7/25, 107. He saw the shooters pull up behind his car and one of them exit their vehicle. 7/25, 107. Byrd told the security guard about the shooters and attempted to retrieve his weapon. 7/25, 107. The security guard explained to Byrd that he could not have his gun at the hospital and confiscated it. 7/25, 107. The men did not enter the emergency room and drove away. 7/25, 108.

Later that evening, Officers Antwon Herron and Thomas Baker went to Receiving Hospital and interviewed Byrd. 7/30, 68. Baker and Officer Michael Collins recovered Byrd's Glock pistol used during the shooting. 7/30, 69.

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On October 9, Byrd was asked to identify the shooters. 7/25, 110. He described one as light-skinned with reddish or sandy brown facial hair. 7/25, 102. Officer Person showed him two photo lineups. 7/25, 103. He picked the sixth person in the first lineup because he believed that he resembled the person he thought was a shooter. 7/25, 105. He also selected the second person in the second lineup because he believed that that person resembled the other shooter. 7/25, 106. Byrd did not pick either of the defendants out of the lineups. 7/26, 14; 27.

On October 10, Detective Person of the Detroit Police Department showed Scott two photo lineups of the potential shooters. 7/25, 57. Scott picked out the second person in the first lineup because he believed that whom he selected looked like one of the shooters. 7/25, 58. He could not select anyone from the second lineup. 7/25, 59. Scott also described the people shooting at him. 7/25, 74. He told police that one shooter was about 5'9" but clarified at trial that it was between 5'9 and 6'0. 7/25, 74. He also said that the other was a short, light-skinned Black man. 7/25, 75.

A few days after the shooting incident, Byrd saw a video of the men shooting at him on the news and realized that he picked the wrong two people from the photo lineups. 7/26, 32. At trial, Byrd testified that he learned the defendant's name, Dametrius Posey, after documents were sent to his home through a subpoena. 7/25, 117. He identified the other shooter, Sanchez Quinn, at the preliminary exam. 7/26, 32. A police officer later told Byrd that the people in custody were different from the people he picked from the lineup. 7/26, 37. Byrd also saw photos

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of Sanchez Quinn on Facebook and during news broadcasts. 7/26, 48. He did not see any other photos of the defendant. 7/26, 49.

On October 8, around 8:30 PM, Officers Robert Beach and Nicholas Barrett were dispatched to Oakwood Hospital in Dearborn for a shooting report. 7/30, 73. Officer Beach spoke with the defendant, who gave him the name Devone Posey. 7/30, 73-74. The defendant told officers that he was shot by two men in Detroit's Sixth Precinct. 7/30, 74. Officer Beach contacted his supervisor, who sent a unit to the place where the defendant said he was shot to investigate. 7/30, 78-80.

The officers took the defendant's clothing and items. 7/30, 75. Officer Barrett ran the defendant's name in LEIN. 7/30, 93. The results in LEIN produced a driver's license photo that did not match the man at the hospital. 7/30, 93. Officer Barrett then checked the last name Posey in the Michigan Department of Corrections Offender Tracking Information System and saw a profile of a person who strongly resembled the man in the hospital. 7/30, 94.

When the officers went through the defendant's property, they found a social security card with the defendant's actual name. 7/30, 74. The defendant explained that he did not want to give his real name because he was on parole and did not want to get into trouble. 7/30, 78. The defendant also explained that he was shot around 7:45 PM. 7/30, 80. Beach also spoke with the hospital staff who told him that the defendant arrived at the hospital at 7:12 PM. 7/30, 81. The defendant was not taken into custody at that time.

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On October 8, around 7 PM, Evidence Technician Nathan Johnson and Forensic Technician Terri Light examined the crime scene in front of the market. 7/30, 16. The technicians collected shell casings located in the street. They found .40 caliber shell casings in the street, on the south side of the market, and the sidewalk on the south side of the market. 7/30, 17. The investigators recovered twelve Federal brand .40 caliber casings from the scene and placed them into evidence. 7/30, 29. The technicians also recovered seven additional .40 caliber casings west of the scene. 7/30, 40.

Technician Johnson also recovered a loaded firearm in the street. 7/30, 33. The recovered handgun was a KEL-TEC P-40 and contained a spent shell casing on the inside. 7/30, 33. Technician Johnson cleared the handgun and collected nine additional miscellaneous .40 caliber casings. 7/30, 37. He also picked up a right-footed, Nike low top shoe on the sidewalk. 7/30, 34-35. Finally, the technicians collected samples of what appeared to be blood at the entrance of the doorway of the store and by the curb. 7/30, 45. The blood was placed into a sealed evidence envelope, but it is unclear if it was sent to a lab for DNA analysis. 7/30, 45.

The shell casings, the KEL-TEC, and Byrd's Glock were sent to the Michigan State Police for further analysis. Sergeant Jefferey Bedell of MSP determined that the 28 shell casings sent to the lab were all .40 caliber and of Smith and Wesson make. 7/30, 53. Sergeant Bedell also found that seventeen casings were fired from the Glock as they matched the tool marks. 7/30, 55; 58. The remaining twelve casings came from the KEL-TEC pistol. 7/30, 57; 61.

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The defendant was charged in the information with two counts of assault with intent to murder,[2] two counts of assault with intent to do great bodily harm less than murder,[3] carrying a concealed weapon,[4] carrying a dangerous weapon with unlawful intent,[5] felon in possession of a firearm,[6] and seven counts of felony firearm, second offense.[7]

On July 23, 2018, the defendant was tried by a jury with the Honorable Ulysses Boykin presiding. On August 2, 2018, the defendant was convicted on all counts and sentenced to 22 to 40 years imprisonment for the assault with intent to murder convictions, 9 to 20 years imprisonment for the assault with intent to do great bodily harm less than murder convictions, 4 to 10 years imprisonment for the carrying a concealed weapon conviction, 4 to 10 years imprisonment for the carrying a weapon with unlawful intent conviction, and 4 to 10 years imprisonment for the felon in possession of a firearm conviction. These terms would run concurrently to each other and consecutive to the seven concurrent terms of five-year imprisonment for the felony-firearm second convictions. The defendant received no jail credit as he was subject to parole at the time of the offense.

The defendant filed a timely request for appellate counsel. Appellate defense counsel and the prosecutor filed a joint motion for remand for resentencing, citing several scoring errors. This Court

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[2] MCL 750.83
[3] MCL 750.84
[4] MCL 750.227
[5] MCL 750.226
[6] MCL 750.224F
[7] MCL 750.227B-A

granted that motion and remanded the case for resentencing. The defendant was resentenced on November 17, 2019. The defendant's assault with intent to do great bodily harm convictions, the corresponding felony firearm convictions, and the felony firearm conviction linked to carrying a concealed weapon were vacated. The trial court imposed the same sentences on the remaining convictions.

The defendant now files this appeal. Further facts shall be presented as necessary *infra*.

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ARGUMENT

I.

An in-court identification of a defendant by the victim is not inadmissible unless influenced by a prior suggestive identification procedure. Here, the victim was previously shown a proper photography array and failed to identify defendant, but the victim was able to identify defendant at trial. Because there is no state created bad influence on the witness, the witness's testimony should be admitted and evaluated based on credibility. Further, failure to object to the witness's testimony does not render counsel ineffective.

Standard of Review and Issue Preservation

Generally, a trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made.[8] Erroneously admitted identification testimony warrants reversal only when the error is not harmless beyond a reasonable doubt.[9] However, as the defendant here did not object to the in-court identification or move to suppress the witness's identification, the issue is not preserved and must instead be reviewed for plain error.[10]

To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were

[8] *People v. McDade,* 301 Mich App 343, 356 (2013).
[9] *People v. Hampton,* 138 Mich App. 235, 239 (1984).
[10] See *People v Carines*, 460 Mich 750 (1999).

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fundamentally unfair or unreliable.[11] The performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.[12] Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise.[13]

Discussion

The defendant was not deprived of due process by Terrence Byrd's in-court identification of the defendant. Due process is violated is an identification is the product of an improper or suggestive state-initiated identification process. The defendant makes no claim that the photography array was improper or suggestive and that the victim's in-court statement was state initiated. Because there was no improper state conduct, the court was not required to review the evidence for reliability before presentation to the jury.

Further trial counsel for the defendant was not ineffective. Because there was no improper state action in Terrence Byrd's in-court identification of the defendant, defense counsel's objection to the testimony or the suppression of that testimony would have been denied. Moreover, defense counsel's decision to not call an expert witness on memory or eyewitness testimony was a matter of trial strategy and did not fall below an objective standard of reasonableness.

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[11] *People v Odom,* 276 Mich App 407, 415, (2007).
[12] *Strickland v Washington*, 466 US 668, 698 (1984).
[13] *Id.* at 578 (2002).

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A. The defendant was not denied due process by Terrence Byrd's in-court identification of the defendant.

The defendant was not denied due process by an in-court identification. 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.[14] The fairness of an identification procedure is evaluated in light of the totality of the circumstances.[15]

The United States Supreme Court has emphasized that due process concerns regarding identification only arise when law enforcement officers use an identification procedure that is both suggestive and unnecessary.[16] Further, "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."[17]

Here, there was no improper suggestion by the state. Terrence Byrd was shown two photo packs after the incident and selected whom he believed to be the shooters. He was not told who to select, pressured to select anyone, or limited in time for consideration. The defendant does not allege any impermissible conduct on behalf of the police; therefore, the inquiry shifts to Byrd's credibility during trial rather than whether the trial court should have suppressed the identification.

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[14] *People v Gray*, 457 Mich 107, 111 (1998).
[15] *People v. Lee,* 391 Mich 618, 626 (1974).
[16] *Perry v New Hampshire*, 565 US 228, 238–39 (2012).
[17] *Id.* at 245.

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As the Supreme Court noted in *Perry v New Hampshire*, the jury traditionally determines the reliability of evidence and there are "safeguards built into our adversary system that caution juries against placing undue weight on the eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness."[18]

The defendant was availed of his constitutional safeguards in this case. The defendant, through his counsel, confronted and vigorously cross-examined Byrd during the trial regarding his identification. The court also instructed the jurors in the final instructions about the fallibility of eyewitness testimony.[19]

Because the defendant was afforded these safeguards, the issue becomes a question of credibility. This Court may not disturb the fact finder's finding of credibility. The finder of fact, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.[20] Exceptions are carved out only where the testimony is patently incredible or defies physical realities, where a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror, or where the witness's testimony has been seriously impeached and the case marked by uncertainties and discrepancies.[21]

There is no indication in the trial record that Byrd's testimony was incredible or defied reality. Byrd's description of the defendant was

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[18] *Id.*
[19] 8/1/18, 146-148.
[20] *People v Palmer*, 391 Mich 370, 375-376 (1974).
[21] *People v Lemmon*, 456 Mich 625, 642-644 (1998).

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about 6'3" tall, dark-skinned, Black male, wearing a hoodie.[22] The defendant is a 6'2" tall, dark-skinned Black male. This description was also corroborated by Dwayne Scott.

Further, when asked why he did not identify the defendant at an earlier proceeding, Byrd explained that he was not asked to identify the defendant at that time.[23] Because there is nothing patently incredible about Byrd's testimony, this Court may not disturb the jury's finding that Byrd was a credible witness. Therefore, the defendant is not entitled to relief.

B. The defendant's trial counsel was not ineffective for failing to suppress Terrence Byrd's testimony or for failing to call a memory expert.

A defendant is guaranteed the right to effective assistance of counsel at trial.[24] In claiming that his right to counsel was violated, defendant bears the burden of establishing: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable.[25] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."[26] Further, a defendant "bears the burden of establishing the

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[22] 7/25/18, 94.
[23] 7/26/18, 34.
[24] US Const, Ams VI, XIV; Const 1963, art 1, § 20.
[25] *Strickland v. Washington, supra* at 690 (1984); *People v. Pickens*, 446 Mich 298, 318 (1994); *People v. Rodgers*, 248 Mich App 702, 714 (2001).
[26] *People v. Eisen,* 296 Mich App 326, 329 (2012).

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factual predicate for his claim."[27] A strong presumption exists that counsel's assistance was sound trial strategy.[28]

"Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible reasons' that counsel may have had for proceeding as he or she did."[29] In general, the trial counsel's strategic choices will not be second-guessed.[30] That counsel's trial strategy failed does not make counsel's assistance ineffective.[31] The objective standard of reasonableness does not require counsel to be perfect.[32] "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."[33] Further, an error by counsel does not warrant setting aside the judgment of a criminal proceeding if the error did not affect the judgment.[34]

i. Trial counsel was not ineffective for failing to move to suppress or object to Terrence Byrd's identification testimony.

As noted in the previous section, trial counsel would not have been successful in his motion to suppress or object to Terrence Byrd's

---

[27] *People v. Putman,* 309 Mich App 240, 248 (2015).
[28] *People v Stanaway*, 446 Mich 643, 687 (1994).
[29] *People v Gioglio (On Remand)*, 296 Mich App 12, 22 (2012) (quoting *Cullen v Pinholster*, 563 US 170 (2011)).
[30] *People v Rockey*, 237 Mich App 74, 77 (1999).
[31] *People v Kevorkian*, 248 Mich App 373, 414 (2001).
[32] *Mason v Mitchell*, 320 F 3d 604, 617 (CA 6, 2003).
[33] *Kimmelman v Morrison,* 477 US 365, 374(1986).
[34] *Strickland,* supra at 691.

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identification testimony based on a due process violation. Because there was no improper state procedure, the trial court did not need to make a preliminary determination on the reliability of Byrd's testimony; therefore, the motion to suppress would have been denied. Because the motion would have failed, trial counsel did not fall below an objective standard of reasonableness by not raising the issue.

ii. Trial counsel was not ineffective for failing to call an expert witness.

The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense.[35] A defense is substantial if it is one that might have made a difference in the outcome of the trial.[36] Defense counsel is afforded wide latitude on matters of trial strategy, and the appellate court will not substitute its judgment for that of defense counsel on matters of trial strategy.[37] There are countless ways to provide effective assistance in any given case, and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way."[38] This Court has held that "[a]n attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy,"[39] and the "fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel."[40]

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[35] *People v Dixon*, 263 Mich App 393, 398 (2004).
[36] See *People v Chapo*, 283 Mich App 360, 371 (2009).
[37] See *People v Unger*, 278 Mich App 210, 242-243 (2008).
[38] *People v. Fackelman*, 489 Mich 515, 598 (2011), quoting *Strickland*, 466 U.S. at 689.
[39] *People v Payne*, 285 Mich App 181, 190 (2009).
[40] *People v Williams*, 240 Mich App 316, 332 (2000).

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The defendant has not shown that calling an expert on eyewitness testimony or memory would have materially impacted his case. While the defendant outlines several general issues about memory or eyewitness testimony, the defendant does not state with specificity or offer proof on how an expert would have testified in this case. The defendant solely postulates what the defendant believes an expert could testify to.

Moreover, in furtherance of the defendant's strategy of misidentification, defense counsel vigorously cross-examined both witnesses about their certainty of the defendant's identity and pointed out several discrepancies, including Mr. Byrd's initial incorrect identification. This strategy of calling Byrd's testimony into question was reasonable, even if it did not prevail.[41] Therefore, the defendant is not entitled to relief on these grounds.

[41] *People v Blevins*, 314 Mich App 339, 351 (2016).

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II.

The appellate court must affirm a properly scored guideline sentence when the trial court does not depart from the recommended minimum sentencing range. Here, the defendant's sentence was within the properly scored guidelines range. The defendant is not entitled to resentencing.

Standard of Review

When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information.[42] This Court is required to review for reasonableness only those sentences that depart from the guidelines.[43]

Discussion

This Court must affirm the defendant's sentence since the minimum sentence was within the defendant's properly scored guidelines, and there was no error in the information presented to the court. The defendant's guidelines were scored between 171 months to 427 months imprisonment. The defendant received sentences of 264 months (22 years) to 480 months (40 years) imprisonment. Accordingly, the defendant's sentence was within the guidelines.

The defendant does not dispute that his guidelines were correctly scored or that he received a guideline sentence but argues that the sentence is disproportionate because it is long. This Court, however, has

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[42] MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196 (2016).
[43] *People v Anderson*, 322 Mich App 622, 636 (2018).

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held that a sentence is presumptively proportionate if it is within the sentencing guidelines.[44]

Further, even if this Court were to review for reasonableness, the defendant does not present any information that overcomes the reasonableness of his sentence. The defendant argues that the trial court did not account for the defendant's rehabilitative potential and other mitigating factors, such as his strong family connection, faith, and his acceptance of responsibility for his crimes.[45] The trial court, however, directly addressed this information on the record during the defendant's resentencing. When issuing its sentence, the Court stated:

> While Mr. Posey may have had some improvement while he was in prison in his attitude and outlook on life, it doesn't change the fact that these offenses were committed while he was on parole after he previously served time for a similar offense, and the Court is not convinced that his sentence should be any different than what was imposed before.[46]

While the defendant disagrees with the trial court's conclusion, this does not make the conclusion unreasonable. Because the trial court considered the mitigating and aggravating factors of the defendant's behavior when imposing resentence, the sentence was reasonable, and the court did not abuse its discretion. Accordingly, the defendant is not entitled to relief.

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[44] *People v Odom*, 327 Mich App 297, 315 (2019).
[45] Defendant's brief on appeal page 27-28.
[46] 11/17/19, 31.

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RELIEF

THEREFORE, the People request that this Honorable Court affirm defendant's convictions and sentences.

Respectfully submitted,

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Dated: April 22, 2020

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 4046 countable words.

/s/ *Gabrielle O'Connor*

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