STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE FLOWERS,

Defendant-Appellant.

UNPUBLISHED
April 11, 1997

No. 182146
Recorder's Court
LC No. 94-003573

Before: Markman, P.J., and Smolenski and G.S. Buth*, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797; unlawfully driving away a motor vehicle (UDAA), MCL 750.413; MSA 28.645; and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a term of two years' imprisonment for the felony-firearm conviction, such sentence to be followed by concurrent terms of twenty to forty years' imprisonment for the armed robbery conviction and two to five years' imprisonment for the UDAA conviction. Defendant appeals as of right. We affirm.

Following is a summary of the testimony of the complainant in this case. On March 18, 1994, at 1:45 a.m. the complainant parked his wife's vehicle in front of a bank located in the area of Six Mile and Sorrento in Detroit and withdrew a $10 bill from the bank's automated teller machine (ATM). After getting back into his vehicle the complainant was accosted at gunpoint by a man who ordered the complainant out of the vehicle. The man then demanded money, and the complainant gave the man the $10 bill he had just withdrawn from the ATM machine. The man then yelled to a second man, who came from behind the bank, entered the vehicle and drove away. The first man went behind the bank. The complainant identified defendant as the man who robbed him at gunpoint.

Defendant presented three defense theories at trial. The first theory was alibi, i.e., that he was with his mother at the time the robbery occurred. The second theory was that he was misidentified by the complainant. The third theory was that the complainant fabricated the robbery at the ATM to

* Circuit judge, sitting on the Court of Appeals by assignment.

conceal the true story concerning how he lost his wife's car, i.e., that the complainant was in the area of Six Mile and Sorrento in the middle of the night with someone he did not want to be seen with (a prostitute), and that this person kept the complainant's wife's car. For the purpose of establishing this third theory, the defense strategy was to show that the ATM was so inconveniently located for the complainant with respect to his job and home that it would have been unusual for the complainant to visit the area of Six Mile and Sorrento to use that particular ATM. Thus, on cross-examination, defense counsel asked the complainant whether he lived in Detroit, to which the complainant answered "No, I did not at the time." However, the prosecution immediately objected on the ground of relevance, and the court sustained the objection. Defense counsel was then able to elicit without objection the complainant's testimony that he stopped at the ATM while coming home from his job, and that his job was ten miles away from the ATM. When defense counsel asked the complainant whether there was an ATM located more conveniently to his job, the complainant answered both "That's irrelevant," and "That's the ATM that I went to, sir." When defense counsel requested the court to instruct the complainant to answer the question, the court told defense counsel to move on to a more relevant line of questioning. Defense counsel subsequently made an offer of proof that the complainant lived at least six miles from the ATM where he was robbed. The court stated that it stood by its earlier ruling.

Defendant argues that the trial court erred in limiting defense counsel's cross-examination of the complainant concerning where the complainant lived. Specifically, defendant contends that to raise the inference that it would have been unusual for the complainant to travel to that particular ATM at 1:45 a.m. to get only $10, it was crucial to establish that the ATM was inconveniently located not only with respect to the complainant's job, but also with respect to the complainant's home. Defendant also contends that the court erred in precluding defense counsel's attempt to obtain the complainant's concession that other ATM machines were more conveniently located.

A primary interest secured by the constitutional right to confrontation, US Const, Am VI; Const 1963, art 1, § 20, is the right of cross-examination. *People v Mack*, 218 Mich App 359, 360; 554 NW2d 324 (1996); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, the scope of cross-examination is within the discretion of the trial court. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992); *People v Dale Williams*, 191 Mich App 269, 275; 477 NW2d 877 (1991). The right to confrontation does not confer on a defendant an unlimited right to cross-examine on any subject. *Canter, supra*. Rather, a trial court retains great latitude insofar as the right to confrontation is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, collateral matters, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Adamski, supra*; *Canter, supra*. Nevertheless, a defendant's right to confrontation is violated when limitations are placed on his ability to cross-examine a witness to bring out facts from which bias, interest, prejudice, ulterior motive, or a lack of credibility might be inferred. *Mack, supra*; *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995); *Adamski, supra* at 139, 141.

In this case, defense counsel was attempting to cross-examine the complainant to establish that the complainant had an ulterior motive for testifying falsely, i.e., that the complainant allegedly did not want the real reason revealed concerning how he lost his wife's car. However, the fact that the ATM

machine was located six miles from the complainant's home, without more, does not necessarily indicate that it was inconveniently located for the complainant. Rather, the ATM machine could have been located on the complainant's way home from his job. Thus, the evidence submitted by way of defense counsel's offer of proof was only marginally relevant.[1] Accordingly, we conclude that the trial court did not err in limiting defense counsel's cross-examination of the complainant.

Alternatively, even assuming that error occurred, we conclude that the error was harmless. A violation of the constitutional right to confrontation by a restriction on cross-examination is a trial error occurring during the presentation of the case to the jury. Therefore, such error is subject to a harmless-error analysis. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994); *Mack*, *supra* at 364. When such error occurs, we quantitatively assess the error in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. *Anderson*, *supra* at 405-406; *Mack*, *supra*. This requires the beneficiary of the error, here, the prosecution, to prove, and the court to determine, beyond a reasonable doubt that there is no reasonable possibility that the error complained of might have contributed to the conviction. *Anderson, supra* at 406. In *Adamski, supra* at 140, this Court set forth the following considerations to be evaluated in determining whether a restriction on cross-examination was harmless error:

> (1) the importance of the complainant's testimony to the prosecutor's case; (2) whether the excluded testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the complainant's testimony; (4) the extent of the cross-examination of the complainant; and (5) the overall strength of the prosecutor's case.

In *Anderson, supra* at 406, our Supreme Court also indicated that the treatment given the error during closing arguments is relevant to an assessment of the harmlessness of the error.

In this case, the complainant was the primary prosecution witness, and the trial was essentially a credibility contest between the complainant and defendant. The complainant's uncorroborated testimony was of paramount importance to the prosecution's case, without which the prosecution did not have a case.

However, defense counsel extensively cross-examined the complainant. During this cross-examination, the complainant denied that someone else, specifically, a young woman, had obtained his wife's vehicle, or that he knew there was at least one "streetwalker" in the area of the ATM machine. However, defense counsel also elicited the complainant's testimony that, although he had a five-dollar bill in his wallet and an ATM card that worked with other ATM machines, he traveled ten miles at 1:45 a.m. to get another ten dollars. This testimony raises the inference that it was out of the complainant's way to travel to this particular ATM machine. Although the testimony precluded by the trial court, i.e., that the complainant lived six miles from the ATM machine and that other ATM were more conveniently located, might have supplied additional particularized facts supporting this inference, these facts were essentially cumulative of the other evidence indicating that it was inconvenient for the complainant to visit the particular ATM machine located in the area of Six Mile and Sorrento.

Defendant was also able to present other evidence that supported his third defense theory. Specifically, defense counsel cross-examined the complainant about discrepancies in his testimony concerning the details of the crime and his statements to the police, not only for the purpose of raising the inference that the complainant misidentified defendant, but also for the purpose of raising the inference that complainant kept mixing up the details of his story because no robbery actually occurred. Finally, defense counsel elicited evidence from other witnesses that when defendant was arrested by the police, the police took defendant to another location near the area of Six Mile and Sorrento and arrested a woman known to be a prostitute.

Defense counsel then used this evidence to argue in support of the defense theory as follows:

> Ladies and gentlemen, in this case we're talking about a March 18, 1994 situation where my client is charged with having been, and you will recall, at Six Mile and Sorrento in the City of Detroit at about 1:45 a.m. with a shotgun. Now, I'm going to say to you that you heard—again, use your common sense. You heard [the complainant] say that he was at an ATM machine 10 miles from his job; that he did not live in the City of Detroit. Ladies and gentlemen, if he was there to get 10 dollars at an ATM machine at 1:45 a.m., 10 miles from his job, not even in the city where he lives, and he already had five dollars, what was he going to be doing with this additional 10 that he couldn't wait until early in the morning, or some other time. The learned prosecutor said to you, you know that it's common knowledge, he said, these ATM machines are well lit, he said, you know that. Well, you know it's common knowledge that these ATM machines are throughout this area, not just this city, this general area. So why is he going there, it doesn't make sense, at 1:45 a.m. in the morning to get 10 dollars, 10 dollars, 10 miles from your job, and in another city from where you live. That makes no sense. And that's why we brought it out, because we find out later that my client, when he was arrested, was taken by the police to the house of another person who was arrested who was a streetwalker, and taken downtown regarding the same time. Ladies and gentlemen of the jury, that's something to consider. Why was [the complainant] on this street at 1:45 a.m. at an ATM machine 10 miles from his job, and in another city from where he lived. That's very important, because we submit to you there was no robbery as you've been told about and that's why he gets mixed up in terms of what took place. That is why. And the prosecutor said does he have any reason to lie? Of course he does, because he's someplace where he didn't want to be known to have been. He had his wife's car and his wife's car was taken, but not that way. And so he can't go home with that. Yes, he did in fact as he said, he did report it right away. He reported it right away and probably told them about lojack and everything else. He did that because he had to have some reason as to why the car was taken, and he came up with the robbery.

We note that although the court sustained the prosecutor's objection to defense counsel's question to the complainant concerning whether the complainant lived in Detroit, defense counsel nevertheless used the complainant's response that he did not live in Detroit during closing argument.

Moreover, the prosecutor's closing argument assumed that the complainant lived some distance from the ATM machine:

> What happens next? [The complainant] says that he immediately went to the phone booth and called 911, not something that he waited a week to call the police and makes you wonder what's going on out there, as some of the questions suggest, maybe there's some hookers out there, maybe he was doing something else; why did you go to that ATM machine? You know, I listened to the questions and I thought to myself, God, is there some crime to go to an ATM machine that's not around your house?

Accordingly, in light of the other evidence presented that supported defendant's defense theory that the ATM was inconveniently located for the complainant, as well as the closing arguments, we are convinced beyond a reasonable doubt that there is no reasonable possibility that any error in the court's limitation of the complainant's cross-examination might have contributed to defendant's conviction. *Anderson, supra* at 406; *Adamski, supra*.

Next, defendant argues that the trial court clearly erred in refusing to suppress the complainant's trial testimony concerning his pretrial identification of defendant as the armed robber because the pretrial corporeal lineup procedures were so impermissibly suggestive as to violate due process. Defendant further argues that this Court should remand for a hearing to determine whether the complainant had an independent basis for his in-court identification of defendant.

A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Because defendant was represented by counsel at the lineup, he bears the burden of establishing that the lineup was impermissibly suggestive. *Id*. The suggestiveness of a corporeal lineup must be examined in light of the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993). Generally, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. *Id*. Rather, differences among participants in a lineup are significant only to the extent they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. It is then that there exists a substantial likelihood that the differences among lineup participants, rather than recognition of the defendant, is the basis of the witness' identification. *Id*.

At the hearing on defendant's motion to suppress in this case, the trial court held that defendant failed to establish that the lineup procedure was impermissibly suggestive because any disparities between the physical characteristics of defendant and the other lineup participants were not substantial. After reviewing the record, we conclude that the court's finding was not clearly erroneous. *Kurylczyk, supra; McElhaney, supra*. Because the pretrial lineup procedure was not impermissibly suggestive, there was no need to establish an independent basis for the complainant's in-court identification of defendant. *McElhaney, supra*.

Next, defendant argues that the trial court erred in admitting into evidence photographs of defendant's corporeal lineup because the photographs did not accurately reflect the conditions of the lineup. We disagree. The admission of photographs as evidence is a matter within the discretion of the trial court. *People v Mooney*, 216 Mich App 367, 377; 549 NW2d 65 (1996). Photographs are admissible where substantially necessary or instructive to show material facts or conditions. *Id*. The fact that a photograph is more effective than an oral description and, to that extent, likely to excite passion and prejudice, does not render the photograph inadmissible. *Id*.

In this case, the officer who conducted the lineup testified that the photographs accurately represented the lineup at the time it was viewed by the complainant except for the fact that the some of the lineup participants had to move somewhat from their original positions so that they were in front of the camera and not behind a beam. As noted by the trial court, although the photographs, being black and white, did not accurately represent the skin tones of the lineup participants, they did accurately represent the participants' relative height, weight and general features. They were, therefore, relevant because they tended to rebut defendant's claim that the lineup was impermissibly suggestive because some of the participants were much younger than defendant and because defendant's thick mustache singled him out. MRE 401; *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995). The probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra*. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the photographs. *Mooney, supra*.

Finally, defendant alleges a number of instances of prosecutorial misconduct during opening and closing argument. However, with one exception, defendant did not object to any of these instances. With respect to the one instance to which defendant objected, defendant argues that the prosecutor erroneously urged the jury to view defendant's testimony that he may have been suspected in an uncharged retail fraud incident as improper character and impeachment evidence. However, the court instructed the prosecutor to limit his comments to the evidence. Moreover, the prosecutor's statements concerning the retail fraud incident, taken in context, concerned the reason for defendant's being found hiding in a shower when he was arrested by the police, i.e., whether defendant's being in the shower was indicative of flight or whether defendant was in the shower because he was believed the police were going to speak to him about an incident of retail fraud. The prosecutor's comments concerning the alleged incident of retail fraud did not deny defendant a fair and impartial trial. *McElhaney, supra* at 283.

After reviewing the other alleged instances of prosecutorial misconduct to which no objection was lodged, we conclude appellate review is precluded because either a curative

instruction could have eliminated any prejudice resulting from the remarks or our failure to consider the issues will not result in a miscarriage of justice. *Id*.

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

[1] The record reveals that defense counsel did not want to elicit exactly where the complainant lived, but rather was interested only in the general distance that the complainant's home was located from the ATM. Thus, no issue was raised with respect to the complainant's safety.