

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JONES, JR.,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 192589

Macomb Circuit Court

LC No. 93-000236-FC

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424. He was sentenced to seven and one half to twenty years' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, and two to five years' imprisonment for the CCW conviction. The armed robbery sentence and the felony-firearm sentence are to run consecutively. The CCW sentence is to run concurrently with the felony-firearm sentence. Defendant appeals as of right. We affirm.

On the eve of the incident, the victim, a cashier at the Sunoco gas station at 10 Mile and Gratiot, was approached by defendant, who asked to use the gas station's business phone. When the victim declined, defendant grabbed the phone out of the victim's hand, pulled a gun out of either his waistband or his pocket and pointed it at the victim. Defendant then told the victim that he had five seconds to give him the money or he would die. Defendant instructed the victim to lie down, which he did. Defendant then opened the cash register and took approximately \$800. When the door closed behind defendant, the victim got up, told a nearby customer that he had just been robbed, and called the police. The victim described defendant as a tall black male with a small beard, wearing sunglasses, a black baseball hat and a black coat trimmed in mink. Approximately three weeks later, the victim chose defendant from a lineup of three people at the Eastpointe Sheriff's Department. During trial, the victim identified the sunglasses and the coat as items defendant was wearing during the incident. The victim also identified the gun as similar if not exactly like the gun defendant used during the incident.

After the victim told the customer that he had been robbed, the customer, and his two passengers, chased defendant for a mile and a half. During the chase, a witness wrote down defendant's license plate number (DXJ 902). When defendant began waving a gun at the customer's car, the customer stopped, put the car in reverse and drove to the police station. The customer subsequently picked defendant out of a lineup of five or six people. He again identified defendant in court.

An investigator with the Eastpointe Police Department, ran a license plate check on DXJ 902, and determined that the license plate was for a 1992 Plymouth Sundance, registered to a couple residing at 26278 Castleton in Southfield. On the day following the incident, several detectives went to the Southfield address with a search warrant. The car with the matching license plate was parked in the driveway. When the officers searched the house, they found a revolver behind the bar in the basement. They also located a jacket, trousers, sunglasses and a hat. Defendant was eventually found hiding behind the paneling in the basement.

Defendant first argues that the trial court erred in admitting identification evidence because it was tainted by a suggestive confrontation before the lineup. Specifically, defendant argues that on January 5, 1993, the day of the adjourned preliminary examination and prior to participating in a lineup identification on January 14, 1993, the victim and the customer saw him being led into the courthouse in jail clothing by the sheriff's department and that this viewing tainted their subsequent identification of him at the lineup and at trial. Defendant moved to suppress the identification evidence and an evidentiary hearing was held. In denying defendant's motion, the trial court concluded that, based on the testimony of the witnesses, their identification of defendant was not tainted. The court further concluded that the prosecution established an independent basis for each witness' identification by clear and convincing evidence.

A trial court's decision to admit identification evidence is reviewed for clear error. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive. *Id.*

With respect to the customer, there is no evidence that his pretrial or trial identification of defendant was tainted. The customer testified at the evidentiary hearing that he did not see defendant being brought into court on the day in question. He further testified that he was positive that defendant was the person who robbed the gas station. The customer indicated that his identification of defendant was based on what he saw on the evening of the incident. We find that the trial court did not clearly err in concluding that the customer's pretrial identification of defendant was not tainted. Because there was no impropriety in the pretrial identification, there was no need to establish an independent basis for the identification. *Id.* In any event, we agree with the trial court that given the customer's testimony concerning the circumstances surrounding his good opportunities to view defendant at the scene and during the chase, the evidence clearly established that there was an independent basis for his identification.

With respect to the victim, he testified that he thinks he may have seen defendant being led into the district court with other prisoners, but he was not positive. We initially note that the fact that the victim may have seen defendant being led into the courthouse in jail clothing does not necessarily taint his subsequent identification of defendant. In any case, we conclude that the trial court correctly determined that an independent basis was established for the victim's in-court identification of defendant.¹ The victim testified that he was able to pick defendant out of the lineup because he "looked at everybody" and knew that defendant was the culprit "because [he] saw [defendant] at the gas station . . . with a gun." The victim testified at length concerning the circumstances surrounding the incident and his good opportunities to observe defendant during the crime. His observations were made in good light and at a relatively close range. There was no indication that the victim's abilities were impaired. The victim never wavered on his identification of defendant as the culprit.

Moreover, even if the trial court's decision to allow the identification was error, it would be harmless beyond a reasonable doubt in light of the other evidence against defendant. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531; 560 NW2d 651 (1996). Considering the evidence of the get-a-way car being traced to defendant and finding clothing similar if not identical to that believed to be worn by the robber, the victim's and customer's testimony was cumulative in nature and thus harmless. Defendant was not denied a fair trial by the admission of the identification evidence.

Defendant next argues that the trial court committed reversible error by refusing to instruct on either the legal definition of "firearm," CJI2d 11.34 (6) and (7), or the defense of inoperable weapon, CJI2d 11.6. Again, we disagree. No error results from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). A trial court need not give requested instructions that are unwarranted by the facts. *People v Dalton*, 155 Mich App 591; 400 NW2d 689 (1986).

Here, the instructions requested by defendant are not supported by law or the facts. As defendant concedes, "[o]perability is not and has never been an element of felony-firearm." *People v Thompson*, 189 Mich App 85, 87; 472 NW2d 11 (1991). Similarly, an affirmative showing of operability of the weapon is not required to establish a prima facie case of CCW. *People v Gardner*, 194 Mich App 652, 655-656; 487 NW2d 515 (1992). An affirmative defense to carrying a concealed weapon can be made by the presentation of proof that the weapon would not fire and could not readily be made to fire. *Id.* at 656. In this case, however, defendant produced no evidence, nor argued an affirmative defense, that the weapon was inoperable. Simply because a gun is "old and worn" does not mean that it is inoperable. Because defendant did not present any evidence that the firearm was inoperable at trial, the jury was entitled to conclude that the weapon was operable. *Id.* at 657. The trial court properly declined to give CJI2d 11.6 and CJI2d 11.34 (6) and (7) as neither instruction was warranted by law of the facts of this case.

Defendant also argues that he was improperly sentenced. We disagree. A sentence must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Defendant's sentence for armed robbery, which is at the low end of the guidelines' range of four to twenty years, is presumed proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant

has failed to present any evidence of unusual circumstances such as would overcome the presumption of proportionality. In imposing defendant's sentences, the trial court addressed the issues of the protection of society, punishment, defendant's prior criminal record and the circumstances of this case. Defendant claims that, because he has drastically reformed, the trial court erred in considering his prior record in imposing sentence. Defendant does not dispute the existence of his prior criminal history, but simply argues that it should not be considered. Defendant has not provided any legal support, by way of case law or otherwise, to support his argument. Moreover, as defendant admits, the court did consider his reformation. In fact, the court stated that if it were not for the reformation, it would "not hesitate to give [defendant] a sentence of not less than 15 years." Because defendant's sentence is proportional to the offense and the offender, he is not entitled to resentencing.

Affirmed.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra

¹In *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), the Supreme Court set forth factors the court should use in determining whether an independent basis exists.