STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEX LEWIS,

Defendant-Appellant.

UNPUBLISHED
January 30, 1998

No. 193160
Recorder's Court
LC No. 94-009993

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of bank robbery, MCL 750.531; MSA 28.799, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and his sentences of two years for the felony-firearm conviction, and twenty-five to fifty years for the bank robbery conviction. We affirm in part, and remand in part.

A bank robbery occurred on June 27, 1994. The police arrested defendant in his home without a warrant on August 29, 1994. Defendant participated in two live lineups that day, at which he was identified by the bank teller who was robbed, and the bank teller immediately adjacent to her at the time of the robbery. An arrest warrant was issued on August 30,1994, and defendant was arraigned on September 1, 1994.

At trial, five persons made in-court identifications of defendant, including the two tellers discussed above, a third bank teller, a bank customer, and a bank manager. In addition, the two tellers who had identified defendant at the lineups were questioned regarding their lineup identifications, as was the officer who conducted the lineups, and a photo of the lineup was introduced into evidence. The prosecution also referred to the lineup identifications in opening statement and closing argument.

I

Defendant argues that his constitutional rights were violated by the admission of lineup identification testimony that was the fruit of an illegal arrest. Before trial, defendant filed a motion to suppress the lineup identifications as unduly suggestive, or, in the alternative, for a *Wade*[1] hearing. The

trial court held a *Wade* hearing and determined that defendant had not been denied due process.[2] Defendant had also filed a motion to dismiss before trial, on the ground that he was arrested in his home without a warrant and without probable cause. Defense counsel withdrew the motion on learning that at the time of defendant's arrest, there were outstanding warrants for defendant's arrest on separate matters. However, on the first day of trial defense counsel reinstated the motion, arguing that there was no indication in the record that defendant was arrested on the outstanding warrants, and further arguing that the arresting officers were unaware of the outstanding warrants when they arrested defendant.

In response, the prosecution argued:

> On the date the crime occurred there was a photograph of the defendant, that photograph was taken and the mugshots were compared. There was an attorney that was placed at a showup and the defendant was identified as the perpetrator of the bank robbery.
>
> On the very same day that was known to the police. [sic] The police gave this information to an arrest crew. It was known by the federal agents. It was also known by the Detroit Police Department when they went to his house on August 29th of 1994.
>
> Now, at that time, as the Court has indicated, the defendant had capiases and he had capiased on File No. 94-6099 and 94-6101, which was Possession of Controlled Substance file and Possession with Intent to Deliver a Controlled Substance on July the 29th of 1994.
>
> The case law is clear that the police do not have to have an arrest warrant in their possession and [sic] they enter to arrest where an outstanding warrant exists on unrelated charges. And so that's exactly what they did.
>
> And I would cite to the Court People v Buckner at 717 Fed 2nd 297, and also MCLA Statute 29.8974. And basically they were seeking the defendant, they had probable cause to seek the defendant. The defendant was already on capias status and these things were taken in account. Also the defendant at the time that this occurred was at a certain address that was known to the police and when they showed up, he opened the door and was there present. So, it is not as though he resisted when they showed up. He opened the door. There he was, and he was taken and he was arrested for Bank Robbery.
>
> The People would submit there would be no basis for a Motion to Dismiss based upon facts in this case.
>
> THE COURT: Yes, the facts do show and the file has indicated there were two capiases on two cases which are still pending, two separate file numbers and they both are capiases. These capiases were outstanding at the time the crime was committed and the officers had probable cause. This is not a false arrest, and I notice that this

> matter goes back to September 1994, and there is a Motion to Adjourn, the attorney was ill. Calendar Conference was 11/18/94; 11/18/ 94 Notice of Alibi filed, Motion for Bond Reduction, Motion for Wade Hearing, Motion to Suppress, just about everything that you could possibly think of has been done in this matter and this matter has been pending for over a year now.
>
> The Court has reviewed the file. I'm thoroughly familiar with the facts in this matter and there were no infirmities about this arrest or line-up procedures, so I don't see any reason why we cannot proceed. We must proceed. The defendant's Rights have been protected. Okay.

The trial court denied defendant's motion to dismiss without holding an evidentiary hearing, and trial began. After six of the seven prosecution witnesses had testified, the prosecutor informed the court outside the jury's presence that she had incorrectly argued in response to defendant's motion to dismiss that a photographic showup had been conducted with an attorney present before defendant's arrest, when in fact there had been a live lineup after defendant was arrested.[3]

II

We review de novo the trial court's determination that the arrest was lawful. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). When a defendant moves to suppress evidence on the basis that it was illegally obtained, the prosecution bears the burden of showing that the seizure was justified by a recognized exception to the warrant requirement. *People v Wade*, 157 Mich App 481, 485; 403 NW2d 578 (1987).

Absent exigent circumstances, the Fourth Amendment prohibits the police from entering a person's home to make a felony arrest without an arrest warrant and reason to believe that he is at home. *Payton v New York*, 445 US 573, 603; 100 SCt 1371; 63 L Ed 2d 639 (1980); *City of Troy v Ohlinger*, 438 Mich 477, 485; 475 NW2d 54 (1991). This is true regardless of the presence of probable cause. *Payton*, *supra* at 589, quoting *United States v Reed*, 572 F2d 412, 423 (CA 2, 1978). The essence of the exigency which would excuse the failure to obtain a warrant is the existence of circumstances known to the police which prevent them from taking the time to obtain a warrant because to do so would thwart the arrest. *People v Parker*, 417 Mich 556, 561; 339 NW2d 455 (1983).

The prosecution does not argue that there were exigent circumstances, but rather, argues that the outstanding warrants on separate matters rendered defendant's arrest lawful, and that the police "need not have the precise rationale for arrest in mind at the time of the suspect's arrest, so long as the Law views their actions as objectively reasonable."

Although a valid arrest warrant on unrelated charges can justify entry into a defendant's home to effectuate an arrest, the police must have reliable knowledge of the warrant at the time of the arrest. MCL 764.15; MSA 28.874(e); see *United States v Buckner*, 717 F2d 297, 301 (CA 6, 1983). There was no testimony at trial from which it could be concluded that the police had knowledge of the

outstanding warrants at the time of defendant's arrest. None of the officers involved in defendant's arrest were questioned regarding their knowledge of the outstanding warrants.

We remand for an evidentiary hearing to address whether there was probable cause to arrest defendant for the robbery[4] and whether the officers knew about the outstanding warrants or capiases. The prosecution's arguments regarding the independent source and inevitable discovery doctrines may be addressed to the trial court, as there is insufficient evidence on the instant record for us to address these claims at this time.

If the proceeding on remand establish that the lineup evidence should have been suppressed, the court shall determine whether the error in its admission was harmless. Ordinarily this court would engage in such an analysis. However, in the instant case, it is more appropriate that the trial court do so because there has been no testimony or findings regarding whether the two witnesses had sufficient independent bases for their in-court identifications,[5] and, additionally, this court is unable to determine whether the bank surveillance photos introduced at trial so resembled defendant as to render the evidence overwhelming and any error in the admission of the lineup evidence harmless.

III

Defendant also argues that the in-court identifications of the three witnesses who identified him for the first time at trial were suggestive and deprived him of a fair trial. Defendant argues that the in-court identifications should not have been allowed without establishing independent bases for them, but cites no authority in support of that argument. Moreover, the need to establish an independent basis for an in-court identification arises where a *pretrial* identification is tainted by improper procedure or is unduly suggestive. *People v Barclay,* 208 Mich App 670, 675; 528 NW2d 842 (1995). Because defendant does not argue that any of the three witnesses participated in unduly suggestive or procedurally improper pretrial identifications, the trial court did not clearly err by admitting the in-court identifications of these three witnesses.[6] *Id.*

IV

Defendant next argues that police investigator Budz's testimony that defendant was wanted for a second bank robbery and that the police had a mug shot of defendant on file deprived him of a fair trial. Because defendant did not object to this testimony, our review is for manifest injustice. *People v Grant,* 445 Mich 535, 547; 520 NW2d 123 (1994), *People v Kelly*, 423 Mich 261, 277; 378 NW2d 365 (1985).

On direct examination, the prosecutor asked Budz why he went to defendant's apartment on August 29, 1994:

> Q What was your purpose for going to that location, Mr. Investigator?
>
> A There was a man that we were looking for, for bank robbery, for two bank robberies. I, Special Agent Scott Wilson from the FBI, Investigator Carol Nichols requested a scout car, a uniformed scout car to assist us and we went to that location.

* * *

Q. Okay. And you indicated that you were with all of these people when the – when there was a person you were looking for, Alex Lewis would be the name?

A. Alex Lewis, we had a mug shot of him . . .

On redirect examination, Budz again referred to a mug shot of defendant:

Q. You're sure you did have a photograph that you showed the officers, correct?

A. I believe it was a mug shot that we showed them, what they call a Detroit Police Department Identification.

Q. I didn't ask that, though. I asked did you show a photograph?

A. Yeah.

Q. And I would just ask the last part be stricken.

THE COURT: Well, you stopped it, okay. He said –

Q. (By the prosecutor, continuing): Would that be your typical procedure you follow to give the other people participating in the arrest a photograph?

A. Correct.

Assuming the testimony was improper bad acts evidence under MRE 404, we do not believe this error alone rises to the level of manifest injustice.

V

Finally, defendant challenges his sentence as disproportionate. Even though we are remanding, we address this claim of error in the interest of judicial economy. The sentencing guidelines recommended a minimum sentence between three and eight years. The trial court sentenced defendant to twenty five to fifty years.

The trial court reviewed defendant's extensive record, observed that he disobeyed prison rules each time he went to prison and disobeyed society's laws upon release, and that he threatened to shoot a bank customer. The court characterized defendant as a very dangerous serial criminal who would stop at nothing.

We review a trial court's sentence determination for abuse of discretion, which occurs if the sentence is not proportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990). The key test of proportionality is not whether the sentence departs from or adheres to the recommended guidelines range, but whether it reflects the

seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). While the sentence was a substantial departure from the guidelines,[7] given the seriousness of the offense and defendant's record we conclude it was not disproportionate.

Affirmed in part, and remanded in part. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

[1] *United States v Wade*, 388 US 218; 18 L Ed 2d 1149; 87 S Ct 1926 (1967).

[2] Defendant challenged the line-up identifications by the bank teller that had been robbed and the teller immediately alongside her at the time of the robbery. The trial court held a *Wade* hearing, at which the sergeant who conducted the lineup testified that an attorney on call at the time, Mr. Kinzer, was present at the two lineups. Defendant testified that the same sergeant who conducted the two lineups challenged in the instant case had conducted a separate lineup at which a female attorney was present, and that the female attorney told defendant to make sure that his lawyer saw her report because the lineup had been suggestive. On cross-examination defendant testified that the allegedly suggestive lineup occurred the day after the lineups at issue in the instant case, which were attended attorney Kinzer. The trial court ruled that there was no evidence that the two lineups defendant challenged in the instant case were suggestive.

The trial court also held a hearing on defendant's motion for rehearing, after which it again concluded that there was no nexus between the allegedly suggestive lineup and the two lineups challenged in the instant case.

[3] The following colloquy occurred:

> MS. MILLER (*counsel for the prosecution)*: Your Honor, I had adopted my pleading I made in our responce [sic] to the defendant's Motion to Dismiss. And just for a point of clarification, that pleading in Paragraph 5, sub-Paragraph C, I said that on the date of August the 29th, there was a photographic showup that was conducted with an attorney present. That is not true. There was a live line-up that was held, but it was after the time of the arrest and I think that's been established by the record. So if I said that there was that, that simply is not the case.
>
> THE COURT: Those are pleadings. That's not part of the evidence in this case. So the witnesses have all said they were not shown any photographs. They are not really aware of the pleadings but that straightens out the record there.

> MS. REED (*defense counsel)*: Well, the reason for that was that that was part of the Motion to Dismiss because of an illegal arrest and that went to their probable cause as to whether or not they had conducted a showup before he was arrested, so the record now is clear there was no showup conducted before Mr. Lewis' arrest.
>
> THE COURT: Certainly, just a body line-up, no photographs. Okay.

[4] The focus is on the existence of probable cause, rather than the presence or absence of a warrant, because the remedy for a failure to obtain an arrest warrant for an in-home arrest where probable cause is present does not extend to suppression of all fruits of the arrest, only the fruits of the wrongful entry into the home. In contrast, where there is no probable cause, the remedy extends to all fruits of the illegal arrest, unless attenuation or inevitable discovery is shown. Here, the lineup was not a fruit of the illegal entry itself. *People v Dowdy*, 211 Mich App 562, 568-570; 536 NW2d 794 (1995).

[5] If there are insufficient independent bases to permit the in-court identifications, the error would most likely have been harmful, unless the bank surveillance photos clearly depicted defendant. If the in-court identifications would have been admissible, the error might still be harmful, *People v Harrison*, 163 Mich App 409, 420; 413 NW2d 813 (1987). The court should then assess all the evidence and determine whether the error was harmless beyond a reasonable doubt. *People v Anderson, (After Remand)*, 446 Mich 392, 404; 521 NW2d 538 (1994).

[6] We note that defendant did not request that the witnesses be required to attend a line-up before being permitted to make an in-court identification.

[7] We observe that while the prosecutor stated her agreement with the scoring of the guidelines, and the court did not address the scoring of the guidelines, opting instead to reject the entire concept of guidelines, and also declare their inadquacy in the instant case, the court's assessment of the circumstances of the case and defendant's record would appear to support a scoring that would include the sentence imposed. The court regarded defendant's conduct in threatening to shoot one of the bank customers as an aggravating circumstance. The court could have assessed 25 points under OV 2 for subjecting the victims to terrorism (conduct designed to increase substantially the fear and anxiety suffered during the offense.) This would have increased the offense severity score from 30 to 55, changing the level from III to IV. Additionally, defendant received no points for his juvenile record. However, it appears he should have received five points under PRV 4, for 2 or 3 prior low severity juvenile adjudications, raising his PRV score to 50, and his level to D. The C III range is 96 - 240 months, and the D IV range is 120 -300 months or life.