STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYZIA AMOUNTRAE GARDNER, a/k/a TYIZA GARDNER,

Defendant-Appellant.

UNPUBLISHED
June 12, 1998

No. 196960
Kalamazoo Circuit Court
LC No. 95-001504 FC

Before: Gage, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, first-degree home invasion, MCL 750.110a; MSA 28.305(a), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was also convicted of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to prison terms of thirty to fifty years for the armed robbery conviction, twenty to thirty years for the home invasion conviction, and two years each for the felony-firearm convictions. He appeals as of right. We affirm.

Troy Brockelbank testified that he answered a knock at his front door and three black males, each armed with a handgun, entered his home. Two of the men ransacked the house while the third, whom Brockelbank subsequently identified as defendant, kept his weapon trained on Brockelbank and his roommate, Chad Bryson. Although defendant was wearing a "two-toned tan and camouflage" mask, at one point defendant raised the mask long enough to order Brockelbank to "give him all my money," then pulled it down again, thus affording Brockelbank the opportunity to see defendant's face "from the bottom of his neck to the top of his forehead."

The robbers fled after spending approximately fifteen to twenty minutes inside the house. Shortly after the robbers left, Brockelbank was standing on the front porch when a car with three occupants drove past. At that point Bryson stated, "Here they come," and for that and other reasons Brockelbank concluded that the car was a "get-away" car. Brockelbank jumped into another vehicle

and had the driver, Brent Oberlin, follow the fleeing car for some time, eventually obtaining its license plate number but avoiding any confrontation with its occupants.

Bryson largely corroborated Brockelbank's description of the robbery. Like Brockelbank, Bryson averred that he had a view of defendant's entire face from a couple of feet away when defendant momentarily lifted his camouflage mask to issue an order during the holdup.

Both Brockelbank and Bryson identified defendant in two showups and a lineup, as well as in court, as the person who had consistently held a gun on them.

I

Defendant argues that he was denied a fair trial by several instances of prosecutorial misconduct. Prosecutorial misconduct issues are decided case-by-case, evaluating the remarks in context, reading them as a whole and considering them in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). In the absence of an objection to an allegedly improper remark, appellate review is precluded unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction or a failure to review the issue would result in a miscarriage of justice. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

First, defendant claims that during opening statements the prosecutor improperly invited the jurors to put themselves "in the victim's shoes." We disagree. The comments, although unorthodox in style, were not improper. Further, even if improper, defendant did not object to the comments and appellate review of the comments is therefore foreclosed because a timely objection could have cured any error. *Id.*

Second, defendant claims that a detective's statement on direct examination that defendant told him that "the only thing he was guilty of is he was driving without a license," violated a motion in limine precluding evidence that defendant was arrested on the night of the crime for driving without an operator's license. Defendant moved for a mistrial on the ground of plaintiff's violation of the pretrial order and, after discussion, the trial court denied the motion, stating that the comment was "not only . . . inadvertent, but every effort was made to prevent any prejudice from taking place. It does not appear to me that there is any effect on the jury because of the comment." Defense counsel declined the court's offer to give the jury a cautionary instruction. We agree with the trial court's reasoning and conclude that defendant was not denied a fair trial as a result of the inadvertent introduction of the evidence. *People v Histed*, 56 Mich App 630, 634-635; 224 NW2d 721 (1974).

Third, defendant asserts that the prosecutor improperly disparaged defense counsel by various comments made during rebuttal argument. We have reviewed the allegedly improper remarks in context, *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), and conclude that the remarks were not so prejudicial as to necessitate reversal of defendant's conviction in the absence of an objection. *Duncan, supra.*

Fourth, defendant contends that the prosecutor's comments during closing argument improperly shifted the burden of proof. Defendant did not object to the comments, and our review of the record reveals that the comments were not so prejudicial as to necessitate reversal of defendant's conviction. *Id.*

Fifth, defendant maintains that the prosecutor improperly vouched for its witnesses. Again, defendant did not object to the allegedly improper remarks. Nonetheless, it appears that the prosecutor, responding to certain of defense counsel's remarks during her closing argument, simply pointed out to the jury that several prosecution witnesses had no personal interest in falsely accusing defendant. This is quite different from the proscribed procedure whereby a prosecutor vouches "for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Last, defendant argues that the prosecutor improperly stated during rebuttal argument that "there were a lot of people involved" in the crime. Defendant did not object to the comment, and our review of the record reveals that the comment was not so prejudicial as to necessitate reversal of defendant's conviction. *Duncan*, *supra.*

II

Defendant asserts that the trial court erred by permitting police officers to give opinions regarding the strength of the victims' identification of defendant. We disagree. The officers were qualified to state their belief in the efficacy of the showup/identification process, and the trial court did not abuse its discretion in admitting the testimony. *People v Newcomb*, 190 Mich App 424, 429-430; 476 NW2d 749 (1991).

III

Defendant maintains that error requiring reversal occurred when the trial court admitted inadmissible hearsay evidence. We disagree. Any prejudice incurred as a result of the improper admission of the evidence was cured by the trial court's cautionary instruction. *Duncan*, *supra.*

IV

Defendant contends that the trial court erred by admitting the victims' lineup and in-court identifications because the trial court suppressed the victims' showup identification that occurred shortly after the crime and there was no independent basis for the victim's post-showup identification of defendant.

Shortly after the robbery, and acting on information supplied by the victims, Kalamazoo public safety officers Larry Leach and Martin Buffenbarger stopped a car solely occupied by defendant and placed defendant in the rear seat of Buffenbarger's cruiser. Soon thereafter, police brought the victims to the scene, defendant was removed from the cruiser, and both victims separately identified defendant as one of the robbers.

The trial court did not suppress the showup identification on the ground that it was impermissibly suggestive. Indeed, the trial court specifically noted that it expressed no opinion regarding the "science" of the showup. Rather, the trial court suppressed the showup identification on the ground that defendant was entitled to counsel at the showup. Nontheless, defense counsel objected to the victims' post-showup identifications as "stemming from an improper and suggestive showup at the scene."

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1994); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977).

To determine whether an in-court identification would result from a sufficiently independent basis, the trial court must hold a hearing and consider all relevant factors. *Kachar, supra* at 96-97; *People v Steiner*, 136 Mich App 187, 194; 355 NW2d 884 (1984). Appropriate factors include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the crime; (3) the length of time between the crime and the disputed identification; (4) discrepancies between the pretrial identification description and the defendant's actual appearance; (5) any prior proper identification of the defendant or failure to identify the defendant; (6) any prior identification of another as the culprit; (7) the mental state of the witness at the time of the crime; and (8) any special features of the defendant. *Kachar, supra* at 95-96. An independent source for identification exists only when the suppression hearing judge can find that:

> the identifying witness by drawing on his memory of the events of the crime and his observations of the defendant, has retained such a definite image of the defendant that he is now able, in court, to make an identification of the defendant without dependence upon or assistance from the tainted pretrial confrontation and unaffected by any promptings or suggestions which there took place. [*Kachar, supra* at 97.]

The trial court held a *Kachar* hearing at which both of the victims testified extensively. Brockelbank and Bryson clearly testified during direct examination that they could identify defendant based solely on their observation of him during the robbery. Although the trial court apparently erred in its interpretation of some of the *Kachar* factors, the court noted that the victims were close in proximity to defendant and were able to observe him and note his physical characteristics. The court also noted that the victims' descriptions of defendant were consistent and that the victims never identified someone other than defendant as the robber. The trial court concluded that it was persuaded that had the showup not occurred the victims could still identify defendant as a result of the recollection of the robbery. We believe that, based on the evaluation of these factors, the trial court correctly found that there was an independent basis for the victims' post-showup identification of defendant and that the court did not abuse its discretion in denying defendant's motion to suppress the identification.

V

Defendant argues that the trial court abused its discretion by refusing defendant's request for the appointment of an expert witness to testify regarding identification issues. The decision to admit or exclude expert testimony regarding the process by which people make pretrial identifications is entrusted to the trial court's discretion and will not be altered on appeal absent an abuse of discretion. *People v Hill*, 84 Mich App 90, 96; 269 NW2d 492 (1978).

MCL 775.15; MSA 28.1252 requires that for an expert witness to be appointed, a defendant must show to the trial court's satisfaction that he cannot safely proceed to trial without that witness. *In re Attorney Fees of Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). Here, it appears that defendant wanted an expert to testify generally regarding the pitfalls inherent in eyewitness identification. However, defendant failed to show how he would be prejudiced by the failure of the court to appoint an expert. Hence, we conclude that the trial court did not abuse its discretion by denying defendant's motion for appointment of an expert.

VI

Defendant argues that instructional errors denied him a fair trial. We disagree. Defendant's challenge to the giving of CJI2d 3.2(3) instead of CJI 3:1:04 is without merit. *People v Hubbard (After Remand))*, 217 Mich App 459, 486-487; 552 NW2d 493 (1996). Similarly, the court's refusal to accede to defendant's request to add to CJI2d 7.8 language from *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), dealing with allegedly inherent unreliability of eyewitness testimony, was not erroneous. *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996).

VII

Defendant contends that the trial court erred by refusing to compel discovery of evidence of a robbery that was discussed in a newspaper, the details of which defendant alleged might be exculpatory. The trial court's determination of evidentiary issues, including its decisions on discovery requests, are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; ___ NW2d ___ (1998).

Here, the trial court denied defendant's motion to compel discovery on the grounds that (1) defendant had not shown that the information was unavailable to him; (2) the assertion that it might affect the trial was only a bare allegation; (3) the information that was known indicated that the "new" offense was not similar in modus operandi to that with which defendant was charged; and (4) there were no grounds to conclude that the requested data might somehow aid defendant in his trial. Considering the facts on which the trial court acted, we conclude that the trial court did not abuse its discretion by denying defendant's motion. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996).

VIII

Defendant asserts that the sentences imposed are disproportionate. Appellate review of an habitual offender sentence is limited to consideration of whether the sentences are proportionate. *People v McCoy*, 223 Mich App 500, 506; 566 NW2d 667 (1997). Defendant's sentences are

proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

IX

Defendant maintains that he was denied the effective assistance of counsel at trial. Because defendant failed to move for an evidentiary hearing regarding this issue, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Here, the five particulars upon which defendant bases his argument are either not error or, but for the error, the result of the proceedings would not have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

X

Defendant asserts that the trial court erred by impaneling an "anonymous" jury. Defendant has not supplied this Court with any evidence that the jury selected in this case was actually "anonymous." No evidence was presented indicating that defendant and defense counsel lacked access to the juror's names and/or questionnaires. Thus, this issue as presented is without merit.

XI

Last, defendant argues that the cumulative effect of the errors in this case denied defendant a fair trial. See *People v Brown*, 76 Mich App 733, 739; 257 NW2d 233 (1977). We disagree. Whatever error may exist in this case, whether viewed individually or collectively, is insufficient to require reversal of defendant's convictions.

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski