

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD CAUSEY,

Defendant-Appellant.

UNPUBLISHED

June 26, 1998

No. 202175

Oakland Circuit Court

LC No. 96146699-FC

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to five to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant's first argument is that the trial court erred in denying his motion to suppress the victim's identification of him pursuant to a photographic lineup. A trial court's decision to admit identification evidence will not be reversed on appeal unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Michigan law recognizes a right to counsel for all pretrial identification procedures. *People v Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973); *People v Winters*, 225 Mich App 718, 722; 571 NW2d 764 (1997). In the case of photographic identifications, that right attaches with custody. *People v Kurylczuk*, 443 Mich 289, 301-302; 505 NW2d 528 (1993); *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). Generally, "custody" for these purposes requires that the defendant be in custody for the offense for which the lineup was held. *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986).

In the present case, defendant was in custody on an unrelated matter and the detective investigating the present case was not aware that defendant was incarcerated. Therefore, we find that the right to counsel had not yet attached at the time of the photographic lineup, and the trial court did not err in denying defendant's motion to suppress the identification on this basis.

Defendant also argues on appeal that, regardless of custody, he was entitled to counsel at the lineup because he was the focus of the investigation. However, this Court has held that the focus of the investigation test is no longer applicable and a defendant is not entitled to counsel at a precustodial investigatory photographic lineup unless the circumstances underlying the investigation and the lineup are unusual. *McKenzie, supra* at 472. We find that defendant has not demonstrated any unusual circumstances. Defendant had not been in custody on the charged offense, nor did the victim identify defendant prior to the photographic lineup. Moreover, the detective's testimony at the evidentiary hearing indicated that the intent of the photographic lineup was not to build a case against defendant, but was just as likely to clear him. Therefore, we find no error in the trial court's denial of defendant's motion to suppress the identification.

Next, defendant argues that the trial court abused its discretion in denying his motion for mistrial. This Court reviews a trial court's decision whether to grant a mistrial for an abuse of discretion. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). The test is whether defendant has been denied a fair trial. *Id.*

The prosecutor cross-examined defendant's sole witness at trial extensively regarding her failure to come forward sooner to clear defendant. On redirect, in response to a proper question by defense counsel, the witness made a statement implying that defendant had failed a polygraph examination. Defendant argues that this testimony entitled him to a mistrial. We disagree.

Generally, evidence that a polygraph examination was conducted and the results of such an examination are inadmissible at trial. *People v Barbara*, 400 Mich 352, 357; 255 NW2d 171 (1977); *People v Smith*, 211 Mich App 233, 236; 535 NW2d 248 (1995). However, references to polygraph examinations do not always constitute error requiring reversal. *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981). A reference may be a matter of defense strategy, the result of a nonresponsive answer, or otherwise be brief, inadvertent and isolated. *Id.*

Factors to be considered in determining whether a reference to a polygraph examination constituted error requiring reversal are: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *Id.* at 9. Applying these factors to the present case, we find that defendant was not deprived of a fair trial by the witness' inadvertent reference to the polygraph examination. The reference to the polygraph was not solicited by the prosecutor in an attempt to discredit defendant or to bolster a prosecution witness. In fact, it was in response to defense counsel's own questioning. Generally, such "unresponsive testimony," when given by a prosecution witness, will not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *Hackney, supra* at 531. The reference to the polygraph was brief and was not repeated, and the results of the test were not admitted into evidence. Furthermore, while defense counsel moved for a mistrial on the basis of the statement, she declined the trial court's offer to give a curative instruction to the jury. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for mistrial.

Finally, defendant argues that there was insufficient evidence that he was the perpetrator of the crime. When reviewing the sufficiency of the evidence in a jury trial, this Court must consider the evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

Defendant argues that the victim lacked the ability to make a proper and accurate identification. Defendant's claim is without merit. Although the record indicates that the victim suffered from a speech impediment and was somewhat mentally impaired, he consistently testified that it was defendant who had assaulted him. During the attack, defendant stepped under a streetlight and the victim testified that he could see his face from about twenty feet away. At another point in the attack, the victim testified that he and defendant were "face to face." He identified defendant in court as the same person who had assaulted him, stating that he was certain that it was the same man. While the only other eyewitness testified that defendant was not the man who attacked the victim, questions concerning the credibility of witnesses are to be resolved by the trier of fact. *People v Valasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). In the present case, the jury obviously found the testimony of the victim to be more credible than the testimony provided by the defense witness. We will not disturb such a determination on appeal. *Id.* Therefore, we find that the evidence presented at trial was sufficient to convict defendant of assault with intent to rob while armed beyond a reasonable doubt.

Affirmed.

/s/ Harold Hood

/s/ Barbara B. MacKenzie

/s/ Martin M. Doctoroff