

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VELEDEZ DEVEIN,

Defendant-Appellant.

UNPUBLISHED

July 2, 1999

No. 207857

Recorder's Court

LC No. 97-002809

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for carjacking, MCL 750.529a; MSA 28.797(a). Defendant was sentenced to ten to twenty years in prison. We affirm.

On appeal, defendant first claims that the circuit court erred in admitting evidence of an in-court identification, claiming that it did not have an independent basis. We disagree. A circuit 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). "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the 'totality of the circumstances.'" *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998), citing *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972).

In *People v Steiner*, 136 Mich App 187, 193; 355 NW2d 884 (1984), lv den 421 Mich 852 (1985), this Court listed eight factors discussed in *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977), to determine whether an in court identification is independent and untainted:

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification.

4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description. . . .
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup or showup of another person as defendant.
7. [T]he nature of the alleged offense and the physical and psychological state of the victim.
8. Any idiosyncratic or special feature of defendant. [*Steiner, supra*, 136 Mich App 193, quoting *Kachar, supra*, 400 Mich 95-96.]

Considering these eight factors together, the circuit court was not clearly erroneous when it determined that the in-court identification of defendant at the preliminary examination had an independent basis. Reviewing the evidence presented at the motion hearing, the victim observed defendant in good lighting. Further, the victim's testimony established that she observed defendant several times. She saw defendant as he approached, as he crossed the street, and then as he ran towards her. Defendant got as close as two feet to the victim. Further, the time between the crime and the victim's identification of defendant at the preliminary examination was two weeks, a relatively short period of time. Although the victim initially picked defendant out of a lineup, and then subsequently changed her mind, the fact remains that the victim did pick defendant out of lineup, and he was the first person picked. The circuit court had an opportunity to listen to the victim's testimony, and, based on its decision, concluded that the victim's explanation as to why she picked a second person was believable. Generally, this Court defers to the credibility determinations made by a circuit court. *McElhaney, supra*, 215 Mich App 278. Given the facts presented to the circuit court at the motion to suppress the in-court identification, we find that the circuit court was not clearly erroneous in concluding that the victim's in-court identification of defendant had an independent basis.

Defendant also claims the trial court erred when it admitted evidence of a toy gun at trial. Defendant contends that a sufficient foundation had not been presented for the admission of this evidence. We disagree. The admission of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998). There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997), lv den 456 Mich 925 (1998). To admit real evidence, a perfect chain of custody need not be established. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). "[A]ny deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *White, supra*, 208 Mich App 130-131.

Reviewing the evidence concerning the toy gun, it is clear that the chain of custody is not perfect; however, a perfect chain of custody is not needed to admit the evidence surrounding the gun. *White, supra*, 208 Mich App 130. Here, the evidence established that defendant was being chased,

and during that chase he fell. After defendant was placed into custody, two officers returned to the area where defendant had fallen and found the toy gun, which was silver in color. Although no specific time frame was given, from the context of the record it appears as though the two officers returned to this area within minutes of the time defendant had fallen there. Further, the victim had testified that the gun used by defendant was a silver pistol. Given this factual basis, the trial court did not abuse its discretion in allowing evidence of the toy gun at trial because the evidence was shown to a reasonable degree of certainty to be the gun used by defendant to steal the victim's car. Although the chain of custody was not perfect, this goes to the weight the evidence should be given, not its admissibility. *White, supra*, 208 Mich App 130-131.

Affirmed.

/s/ Michael J. Kelly

/s/ Kathleen Jansen

/s/ Helene N. White