STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAHSHAN MCCONNAL, a/k/a RONNIE MCCONNAL,

Defendant-Appellant.

UNPUBLISHED
September 24, 1999

Nos. 195879; 203437
Recorder's Court
LC No. 93-008766

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of receiving and concealing stolen property over $100, MCL 750.535; MSA 28.803, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced, according to the initial judgment of sentence, to one to five years in prison for the receiving and concealing stolen property conviction, a concurrent three to twenty year prison term for the armed robbery conviction, and a consecutive two year prison term for the felony-firearm conviction. Thereafter, defendant's conviction for receiving and concealing stolen property was vacated, and defendant was resentenced to three to twenty years in prison for the armed robbery conviction and to a consecutive two year sentence for the felony-firearm conviction. He now appeals as of right. We affirm.

DOCKET NO. 195879

I. Background Facts

At approximately 11:30 p.m. on July 21, 1993, Lorenzo Wiley pulled into a Detroit gas station. After pumping and paying for his gas, Wiley got into his car and turned on the ignition. At that point, defendant, armed with a nickel-plated revolver, approached Wiley and demanded the keys to the car. Wiley left the keys in the ignition and exited the car. Defendant then drove off in Wiley's car. Approximately three hours later, Wiley's car was spotted by two Detroit police officers. The officers followed the stolen car until defendant parked it in a driveway. When the officers approached

defendant, he ran off. Defendant was soon apprehended by two other Detroit police officers. Defendant was in possession of Wiley's keys at the time he was captured.

II. Defendant's Challenge to Identification Evidence

Defendant first argues that he was denied his right of due process when the trial court admitted into evidence both Lorenzo Wiley's preliminary examination and in-court identifications of defendant. "On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993)(Griffin, J., joined by Mallett, J.)[1]. Accord *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

A. Preliminary Examination Identification

> In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. [*Kurylczyk, supra* at 302-303 (citations omitted).]

Furthermore, "[e]rror in admitting testimony tainted by impermissibly suggestive procedures . . . warrants reversal only where the error is not harmless beyond a reasonable doubt." *People v Hampton*, 138 Mich App 235, 239; 361 NW2d 3 (1984).

Defendant argues that Wiley's preliminary examination identification of defendant was impermissibly suggestive because Wiley had failed to identify defendant at a pretrial corporeal lineup, and because the preliminary examination, itself, was unduly suggestive. Defendant points out that after Wiley had identified the wrong man at the lineup, a police officer asked Wiley if he would consider anyone else in the lineup to be "a close second choice." Defendant argues that by asking Wiley to pick out another individual, the officer was in effect telling Wiley that he had identified the wrong man. Arguing that a preliminary examination is by its nature suggestive of defendant's guilt, defendant asserts that Wiley, knowing that he had picked out the wrong man at the lineup, was impermissibly steered toward identifying defendant at the preliminary examination.

The court must consider all relevant factors concerning a preliminary examination identification to determine if the identification violated due process. *People v Solomon*, 47 Mich App 208, 218-219; 209 NW2d 257 (1973) (dissent of Lesinski, C.J.), adopted 391 Mich 767 (1974). Such factors "include the opportunity of the witness to view the [accused] . . . at the time of the crime, the witness' degree of attention, the accuracy of the witness's prior description . . . , the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401, 411 (1972). "Relevant too is whether the police did tell the witness that they had the right person in custody. . . . [and] the witness's failure to give any identifying characteristics on cross-examination." *Solomon, supra* at 219.

Here, the preliminary examination took place just over two weeks after the robbery. Wiley testified that the gas station at which the robbery occurred was well lit and that he observed defendant from a distance of two feet. There was no indication that Wiley was uncertain of his identification of defendant at the preliminary examination, or that the police told Wiley before the preliminary examination that they had the right person in custody. While the description of the perpetrator that Wiley gave to the police after the incident was not accurate with respect to defendant's height and facial hair, considering the totality of the circumstances, we conclude that neither the corporeal lineup nor the preliminary examination identification was impermissibly suggestive. Therefore, the trial court's decision to admit the preliminary examination identification was not clearly erroneous. *Kurylczyk, supra* at 303.

B. Trial Identification

Defendant also challenges Wiley's identification of defendant at trial. Initially, we observe that defendant failed to preserve this issue for review by either objecting to the trial identification, or by including the trial identification in his motion to suppress the identification evidence. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Nevertheless, this Court may take notice of plain errors which affected substantial rights even if not raised before the trial court. MRE 103(d); *Grant, supra* at 545.

Defendant argues that there was no independent basis for Wiley's trial identification. We disagree. After reviewing the record, we conclude that a sufficient independent basis existed at trial for Wiley's in-court identification. Further, as we have just concluded, neither the corporeal lineup nor the preliminary examination was unduly suggestive. Accordingly, we find no plain error in the trial court's admission of Wiley's identification of defendant at trial. *People v Gray*, 457 Mich 107, 115-117; 577 NW2d 92 (1998).[2]

III. Rebuttal Testimony

Defendant next argues that the trial court erred in admitting the testimony of Detroit police officer Augustus Davis to rebut the testimony of defendant's alibi witness, Tawanda Williams. We disagree. Defendant failed to preserve this issue by objecting to the rebuttal evidence at trial. MRE 103(a)(1); *Grant, supra* at 545. Therefore, we will review this issue only to determine whether the error resulted in manifest injustice. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985).

"Rebuttal evidence is admissible to '"contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same."' The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947), quoting *People v Utter*, 217 Mich 74, 83; 185 NW 830 (1921) (citations omitted). The test to determine whether rebuttal evidence was properly admitted is "whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Figgures, supra* at 399 (citations omitted).

On eight separate occasions during the course of her testimony, Williams denied either having spoken with Davis or having been asked to come down to police headquarters to talk about information she might have regarding the case. Twice, Williams specifically denied having been approached by Davis on November 2, 1995. Williams also testified that the police had not responded to any messages she had left. Davis' testimony was limited to specifically contradicting these statements. For example, Davis testified that he spoke with a woman at Williams' home on November 1, 1995, who identified herself as Williams' sister. Davis indicated that Williams was the woman he had spoken with. He also testified that he left a message on Williams' telephone answering machine in the morning of November 2, 1995, and that he had spoken with Williams on the phone later that afternoon. According to Davis, Williams indicated during that telephone conversation that she would come down and make a statement the following day. Davis testified that Williams never showed on November 3, 1995.

Because Davis' testimony was limited to simply contradicting specific statements made by Williams, we conclude that it was properly admitted as rebuttal.[3] See *People v Vasher*, 449 Mich 494, 505-506; 537 NW2d 168 (1995); *People v McGillen #1*, 392 Mich 251, 266-267; 220 NW2d 677 (1974) (quoting 98 CJS, Witnesses, §§ 632, 633); *People v Hillhouse*, 80 Mich 580, 585; 45 NW 484 (1890). Therefore, we find no evidence of manifest injustice. *Kelly, supra* at 277.

IV. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct by improperly questioning Williams about her failure to come forward and inform the authorities of her alibi information before trial. We disagree. Defendant's argument is based on the erroneous belief that there are specific foundational requirements that must be met before a prosecutor can ask a witness about her failure to come forward before trial. As this Court observed in *People v Phillips*, 217 Mich App 489, 494; 552 NW2d 487 (1996), a prosecutor need not lay any particular foundation before questioning an alibi witness regarding the witness's failure to come forward before trial. Accordingly, the prosecutor's impeachment of Williams' alibi testimony with her failure to come forward before trial was proper and did not constitute prosecutorial misconduct.

V. Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to: (1) move to suppress Wiley's in-court identification of defendant; and (2) object to either Officer Davis' rebuttal testimony or to the prosecutor's questioning of Williams about her failure to come forward before trial. We disagree.

"To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Because we have determined that there was no error in each circumstance cited, we necessarily conclude that the outcome of the case was not negatively impacted by counsel's performance. Counsel need not make a

useless motion, or raise a meritless objection. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998); *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

DOCKET NO. 203437

VI. Sentencing

A. Violation of the Two-Thirds Rule

Finally, defendant raises a two-prong attack on the sentence imposed. First, defendant argues that the trial court erred by "resentencing" defendant to three to twenty years in prison for the armed robbery conviction. We disagree.

According to the transcript of the March 28, 1996 sentencing hearing, the court stated that defendant was sentenced to "serve a period of incarceration of no less than three years, no more than four years" in prison for the armed robbery conviction. Defendant asserts that he argued below that because this sentence violates the two-thirds rule, *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), the court should reduce the minimum sentence to two years and six months' imprisonment (i.e., two-thirds of the maximum sentence).[4] On appeal, defendant argues that the court erred when it "resentenced" defendant to serve a term of three to twenty years' imprisonment.

However, defendant's argument misstates the record or, at minimum, presents it in a highly misleading light. In fact, defendant moved for resentencing on the armed robbery conviction on the ground that the trial court's decision to vacate his receiving and concealing stolen property conviction entitled him to resentencing on his armed robbery conviction. The trial court stated in its written opinion granting defendant resentencing that it was doing so on this basis, *not* based on any violation of the two-thirds rule. At the resentencing hearing, the trial court stated that it was sentencing defendant to three to twenty years' imprisonment, which is consistent with the ensuing judgment of sentence. Defendant now seeks to avoid the consequences of his successful decision to move for resentencing below, namely that the initially imposed sentence for armed robbery, regardless of whether it is properly considered a sentence with a four year maximum or with a twenty year maximum, would be vacated. However, in light of defendant's request to the trial court that he be resentenced for armed robbery – and thus that his original sentence for that crime be vacated – we conclude that he may not now successfully challenge the decision to vacate his initial armed robbery sentence on appeal. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995) (referencing "general prohibition against requesting certain actions of the trial court and then arguing on appeal that these actions constituted error").

B. Alternative Incarceration Recommendation

Second, defendant argues that he is entitled to resentencing because the original judgment of sentence included an invalid recommendation that defendant be placed in boot camp. Again, we disagree.

The Special Alternative Incarceration Act, MCL 798.11 *et seq.*; MSA 28.2356(1) *et seq.*, allows for certain offenders sentenced to prison to serve alternative sentences in alternative incarceration units (commonly referred to as "boot camps') if they meet the statutory eligibility requirements. MCL 798.13(2); MSA 28.2356(3)(2); MCL 791.234a; MSA 28.2304(1). One of these eligibility requirements is that the prisoner at issue cannot be serving a sentence for armed robbery. MCL 791.234a(2)(h)(i); MSA 28.2304(1)(2)(h)(i). Accordingly, defendant was not eligible for boot camp.

Defendant is asking this court to reopen his sentence because the recommendation printed on his original judgment of sentence that defendant be placed in a boot camp was invalid.[5] We decline to do so for two reasons. First, the judgment of sentence issued following resentencing does not contain a similar notation. It is that judgment which is the subject of defendant's appeal. Second, under the circumstances of the case at hand, we find the elimination of such language from an otherwise valid judgment of sentence to be a purely ministerial act that does not warrant full resentencing. See *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] Justice Boyle, joined by Justice Riley, concurred in all parts of *Kurylczyk* cited in this opinion. Thus, these portions of *Kurylczyk* constituted a majority opinion of the Michigan Supreme Court.

[2] Defendant stresses the fact that Wiley was unable to positively identify defendant at the corporeal lineup. However, the record shows that defendant was one of the two individuals identified by Wiley at the lineup. Therefore, the issue of the lineup goes to the weight of the identification testimony, not its admissibility. *Gray, supra* at 122. In other words, "the victim's testimony addresses the level of certainty of the identification, not the existence of the identification itself. While this may be fertile ground for cross-examination, it should not prevent the introduction of the in-court identification." *Id.*

[3] Furthermore, Officer Davis' testimony was admissible consistent with MRE 608(b) because it was admitted to demonstrate Williams' bias or prejudice against the authorities and in favor of defendant, rather than to impeach her credibility.

[4] Actually, two-thirds of a four year sentence, expressed in months would be two years and *eight* months' imprisonment.

[5] Specifically, the language at issue reads: "NO OBJECTION TO BOOT CAMP."