

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CECIL MCINTOSH, JR.,

Defendant-Appellee.

UNPUBLISHED

October 1, 1999

No. 210184

Recorder's Court

LC No. 97-005273

AFTER REMAND

Before: Doctoroff, P.J., and Smolenksi and Whitbeck, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree premeditated murder, MCL 750.316; MSA 28.548, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The prosecutor appealed from the trial court's order granting defendant's motion to suppress the lineup identification by Robert Williams and denying defendant's motion to suppress the lineup identification by Eugene Anderson. We remanded the case to the trial court for clarification of its ruling with respect to whether the lineup was impermissibly suggestive with respect to either, or both, of the witnesses. *People v McIntosh*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 1999 (Docket No. 210184). This case is now before us after remand. We affirm in part and reverse in part.

On appeal, the prosecution argues that, where Anderson and Williams viewed the same lineup, the trial court erred in finding that the lineup was impermissibly suggestive with respect to Williams, but was not impermissibly suggestive with respect to Anderson. On remand, the trial court clarified its ruling that the corporeal lineup was impermissibly suggestive with respect to both Anderson and Williams. The court further found that an independent basis existed for an in-court identification by Anderson, but that an independent basis did not exist for an in-court identification by Williams. We review the trial court's ruling regarding the admission of identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993)(Griffin, J). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.*

Pretrial identification procedures that are unnecessarily suggestive or conducive to irreparable mistaken identification can amount to a denial of due process. *People v Anderson*, 389 Mich 155, 168-169; 205 NW2d 461 (1973). However, a suggestive lineup is not necessarily a constitutionally defective lineup. *Kurylczyk, supra* at 306. 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. *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972); *Kurylczyk, supra* at 302. Among the factors to be considered are “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Neil, supra* at 199; *Kurylczyk, supra* at 306. Contrary to the prosecutor’s argument, because such factors may differ for two witnesses viewing the same lineup, a particular lineup may be impermissibly suggestive with respect to one witness, but not to another. If a pretrial identification procedure was impermissibly suggestive, testimony regarding the pretrial identification is inadmissible at trial. *Kurylczyk, supra* at 303. Where, as here, counsel was present at the identification procedures, the burden of proof is on the defendant to show that the lineup was impermissibly suggestive. *People v Horton*, 98 Mich App 62, 68; 296 NW2d 184 (1980).

Here, defendant moved to suppress the lineup identifications of Anderson and Williams on the ground that the corporeal lineup was impermissibly suggestive because defendant was the only person in the lineup who was bald and had a scar on his head. Physical differences between a defendant and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. *Kurylczyk, supra* at 312. Physical differences are significant “only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the lineup.” *Id.* The totality of the circumstances surrounding the identification must be examined to determine whether the identification procedure was unduly suggestive. *Kurylczyk, supra* at 311-312; *People v Hughes*, 24 Mich App 223, 225; 180 NW2d 66 (1970) (lineup in which defendant was the only person with a goatee was not unduly suggestive where witness observed defendant in a well-lighted area from a distance of two feet, viewed defendant again at the scene of the crime, and lineup was conducted two weeks later).

Here, Anderson, who was the front seat passenger, testified that he saw the face of the driver of the other vehicle for approximately three to five seconds when the shooter’s vehicle pulled up along the driver’s side of the car in which Anderson was riding, and again when the shooter’s vehicle was stopped next to the passenger side of the vehicle in which Anderson was riding. In addition, the description of the perpetrator that Anderson gave to the police after the shooting sufficiently matches defendant’s description, in that Anderson described the perpetrator as a black male with a dark complexion, approximately twenty-one to twenty-five years old, and bald. Anderson described the shooter as having a mustache, but testified at the *Wade* hearing that he was not sure whether the shooter had a mustache. Furthermore, Anderson’s testimony indicated a high degree of certainty of his lineup identification. Anderson testified that “as soon as I saw him I knew who he was right off the bat.” Significantly, Anderson explained that he did not identify defendant at the lineup on the basis of his baldness, but that “[i]t was his face; I knew him.” Anderson positively identified defendant at a prior

photographic lineup. Finally, the corporeal lineup was conducted approximately two and one-half months after the shooting. The two and one-half month time period between the shooting and the lineup was not significant. *Kurylczuk, supra* at 307-308.

Considering the totality of the circumstances surrounding the lineup, we conclude that the trial court clearly erred in finding that the lineup procedure was impermissibly suggestive with respect to Anderson. Anderson's description of the shooter immediately after the shooting indicated that the shooter was bald. We have reviewed a photograph of the corporeal lineup, and it is clear from the photograph that defendant was the only completely bald person in the lineup. However, other factors surrounding Anderson's identification indicate that the lineup was not so suggestive "that it led to a substantial likelihood of misidentification." *Neil, supra* at 199; *Kurylczuk, supra* at 302. Despite the fact that defendant was the only bald person in the lineup, Anderson testified that he did not identify defendant on the basis of his baldness, but that he recognized defendant's face. Anderson observed the shooter's face on two occasions during the incident, albeit only for a short time. The fact that Anderson felt certain of his identification, and that he positively identified defendant at an earlier photographic lineup also supports a finding that the lineup did not lead to a substantial likelihood of misidentification. Considering the totality of the circumstances surrounding Anderson's identification of defendant at the corporeal lineup, we conclude that the trial court clearly erred in finding that the corporeal lineup was impermissibly suggestive with respect to Anderson. Therefore, we reverse the trial court's order suppressing evidence regarding Anderson's identification of defendant at the corporeal lineup.

However, we agree with the trial court's finding that the lineup was impermissibly suggestive with respect to Williams. Williams, who was sitting in the passenger side back seat at the time of the shooting, testified that he briefly saw the shooter's face the first time the cars were side by side. Williams did not see the shooter's face when the two cars were stopped at the stoplight, but only saw the back of his bald head. The description of the shooter that Williams gave to the police sufficiently matches defendant's description in that Williams described the shooter as bald black male, with a dark complexion, and a scar on his forehead. Williams also described the shooter as having a thin goatee. At one point, Williams testified that he chose defendant the corporeal lineup because he remembered how his face looked from the side. However, he also testified that he identified defendant on the basis of his scar and bald head. Williams failed to identify defendant at a prior photographic lineup, but identified another person as the shooter. Finally, the two and one-half month delay between the shooting and the corporeal lineup was not significant. *Id.*

On the basis of Williams' testimony, we cannot conclude that the trial court's finding that the lineup was impermissibly suggestive amounted to clear error. Williams only observed the shooter's face for a few seconds on one occasion. Unlike Anderson, Williams indicated that he chose defendant at the lineup because of his bald head and scar. Furthermore, Williams identified another person as the shooter in a photographic array. On the basis of these facts, we cannot conclude that the trial court clearly erred in finding that the corporeal lineup was impermissibly suggestive with respect to Williams, and in granting defendant's motion to suppress evidence of Williams' identification of defendant at the corporeal lineup.

Because of our conclusion that the trial court correctly determined that the lineup was impermissibly suggestive with respect to Williams, we must determine whether an in-court identification by Williams is admissible. Where a pretrial identification procedure is found to be impermissibly suggestive, a witness may still identify a defendant in court if an independent basis for an in-court identification can be established that is untainted by the suggestive pretrial procedure. *Kurylczuk, supra* at 303. The burden is on the prosecutor to show by clear and convincing evidence that there is an independent basis for an in-court identification. *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977). Here, the trial court determined that an independent basis for an in-court identification by Williams did not exist.

In determining whether an independent basis for an in-court identification exists, courts should consider: 1) the witness' prior relationship with, or knowledge of, the defendant; 2) the witness' opportunity to observe the offense, 3) the length of time between the offense and the disputed identification, 4) the accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description, 5) any prior proper identification or failure to identify the defendant, 6) any prior identification of another person as the defendant, 7) the nature of the alleged offense and the physical and psychological state of the victim, and 8) any idiosyncratic or special features of the defendant. *People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998); *Kachar, supra* at 95-96.

Considering the factors listed above, we conclude that the trial court properly determined that an independent basis did not exist for an in-court identification by Williams. First, there was no prior relationship between defendant and Williams, who first saw defendant on the day of the shooting. Therefore, this factor does not support a finding of an independent basis. *Gray, supra* at 117. Second, Williams only observed defendant's face once from the back seat of the car for a very short amount of time. He did not see defendant's face at the stoplight. Thus, Williams had a minimal opportunity to observe the shooter. Third, as already stated, the two and one-half month delay between the shooting and the corporeal lineup is not significant. *Kurylczuk, supra* at 307-308. Fourth, the description of the shooter that Williams gave to the police after the shooting sufficiently matched defendant's actual description. Fifth, Williams failed to identify defendant at the photographic lineup. Sixth, Williams identified another person in the photographic lineup as the assailant. Seventh, there is no indication in the record that Williams' physical or psychological state at the time of the incident affected his ability to identify the shooter. Finally, defendant had distinctive features in that he was bald and had a scar on his forehead. Williams described the shooter as being bald, with a scar on his forehead. However, under the facts of the instant case, the fact that the shooter had distinctive features does not necessarily support a finding of an independent basis where the suggestiveness of the lineup directly related to those distinctive features.

Thus, significant factors exist indicating the lack of an independent basis for an in-court identification by Williams – the lack of a prior relationship between Williams and defendant, the short amount of time during which Williams observed the shooter, Williams' failure to identify defendant at the photographic lineup, and Williams' identification of someone else as the shooter at the photographic lineup. Furthermore, we do not view the remaining factors as significant factors indicating an independent basis in the instant case. Under these circumstances, we cannot conclude that the trial

court clearly erred in finding that an independent basis did not exist for an in-court identification by Williams and in granting defendant's motion to suppress an in-court identification by Williams.

Therefore, we affirm the trial court's order granting defendant's motion to suppress the corporeal lineup and in-court identifications by Williams. We reverse the trial court's order to the extent that it grants defendant's motion to suppress Anderson's corporeal lineup identification.

/s/ Martin M. Doctoroff

/s/ Michael R. Smolenski

/s/ William C. Whitbeck