

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK DUANE LEWIS,

Defendant-Appellant.

UNPUBLISHED

March 3, 2000

No. 210026

Recorder's Court

LC No. 97-003617

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felony murder, MCL 750.316; MSA 28.548, 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 convictions stemmed from a shooting incident in which defendant and another man, under the guise of selling drugs to Ronald Holder and Clarence Greer, instead took their money (\$2000), and shot them. Greer died as the result of his wounds. Holder was shot nine times, but survived, and identified defendant as one of the attackers. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, life imprisonment for the felony murder conviction, and thirty to sixty years' imprisonment for the assault with intent to commit murder conviction¹ and appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to suppress the lineup identification of defendant by witness Micah McKay. Specifically, defendant alleges that the disparity in characteristics resulted in a highly suggestive lineup. We disagree. This Court will not reverse the trial court's decision to admit identification evidence unless it is clearly erroneous. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Defendant bears the burden of demonstrating that the lineup was impermissibly suggestive when represented by counsel at the lineup. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Differences in physical characteristics between the defendant and other members of the lineup goes to the weight of the identification, not admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997); *People v Barnes*, 107 Mich App 386, 389; 310 NW2d 5 (1981). In the present case, defendant alleged that the lineup was unfair based on disparity in physical traits and clothing. Defendant has failed to meet his burden of proof, *McElhaney*, *supra*, and

we cannot conclude that the trial court's decision to admit the evidence was clearly erroneous. *Kurylczuk, supra*.

Defendant next argues that he was denied a fair trial due to the loss of a videotape "that apparently showed the actual perpetrator" and the failure to provide an adverse inference instruction. We disagree. There is no denial of due process where the state has failed to preserve evidentiary material which might have been potentially useful unless a criminal defendant can show bad faith on the part of the police. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). In the present case, the victim testified that defendant may have entered a pharmacy which was located at a different location other than where the shooting occurred. Police officers obtained the tape from the pharmacy, but later lost the tape. Officer Shari Oliver testified that she saw the contents of the tape, which showed a man in a dark jacket entering the pharmacy. However, the tape's quality was insufficient to allow identification. Therefore, the officer could not attest that the man on the tape was defendant. In any event, the tape would only have demonstrated whether defendant actually entered the store. It had no bearing on the victim's identification of defendant as his assailant. Accordingly, the state's failure to preserve the evidence, in the absence of bad faith, was not a denial of defendant's due process rights, *Leigh, supra*, and there was no need for an adverse inference instruction.

Defendant next argues that the trial court erred in failing to admit testimony regarding the contents of the videotape in violation of the best evidence rule. We disagree. Defendant's contention that this videotape would have shown the real killer is without merit. The shooting occurred at a different location. MRE 1004(4) provides that the original is not required where the recording involves a collateral matter. Since this was a collateral matter, there was no violation of the best evidence rule, and the trial court did not err in allowing Officer Oliver's testimony regarding the contents of the videotape.

Lastly, defendant argues that the trial court erred in failing to exclude the testimony of McKay for violation of the sequestration order given at the preliminary examination. We disagree. The decision to exclude testimony of a witness who has violated a sequestration order is reviewed for an abuse of discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). McKay testified that he did not knowingly violate the sequestration order, but rather, entered the courtroom after the instruction was given. Furthermore, McKay testified that he only observed the back of defendant's head, and any identification of defendant was premised on his resemblance to a family friend of McKay's. A defendant who complains that a witness violated the lower court's sequestration order must demonstrate that prejudice resulted. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). Defendant has failed to meet this burden, and we cannot conclude that the trial court abused its discretion in allowing admission of the testimony. *Solak, supra*.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

¹ The felony murder and assault with intent to commit murder sentences were to be served concurrently, but consecutive to the felony-firearm sentence. Defendant was also convicted of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to a term of thirty to sixty years' imprisonment, but set aside the sentence because the prosecution had charged defendant under alternative theories, felony murder and premeditated murder. Defendant has not challenged the trial court's action in setting aside the second-degree murder sentence.