STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2000
v	No. 202894 Recorder's Court
JAMES N. PARSONS, Defendant-Appellant.	LC No. 96-502568

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to sixteen to twenty-five years' imprisonment. Defendant appeals as of right. We remand for transcription of the jury voir dire and affirm on all other grounds.

I

Defendant first argues that the jury voir dire should have been transcribed. We agree. At the time that defendant ordered the transcripts, MCR 6.425(F)(2) excluded transcription of the jury voir dire unless a defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or otherwise showed good cause. Since that time, MCR 6.425(F)(2) has been amended to require the transcription of jury voir dire in all cases. *People v Neal*, 459 Mich 72, 79; 586 NW2d 716 (1998). Furthermore, if a transcript was ordered prior to the date of the amendment, and a defendant preserved this issue by challenging the constitutionality of MCR 6.425(F)(2), the case must be remanded to the lower court for transcription of the voir dire. *Id.* at 81-82. Because defendant ordered the transcript prior to the date of the amendment and preserved this issue by challenging the constitutionality of the court rule, this case must be remanded to the lower court for transcription of the jury voir dire.

II

Defendant argues that he was deprived of his right to due process when he was interrogated without the benefit of *Miranda*[1] rights. We disagree. The issue whether a person is in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently by this Court after de novo review of the record. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

It is well settled that *Miranda* warnings are required only during custodial interrogation. Id. at 449; *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). This Court looks to the totality of the circumstances when determining whether a defendant was in custody at the time of an interrogation. *Zahn, supra* at 449. The key question is whether the defendant reasonably believed that he was not free to leave. *Id*.

The circumstances in this case show that defendant voluntarily agreed to talk to the police and to have Officer Lott come to his house. Although there is a dispute as to how they ended up talking inside the police car, defendant admitted that he ultimately agreed to get inside the police car to talk to the officers and agreed to have his picture taken. The entire interrogation occurred in the police car in front of defendant's sister's house, where defendant was living at the time. In fact, his sister testified that defendant was cordial with the officers when they left the house and that they did not depart on bad terms. These circumstances illustrate that defendant was not taken into custody or deprived of his freedom in any significant way, and it cannot be said that he reasonably believed that he was not free to leave.

III

Defendant argues that he was deprived of his right to counsel at the photographic lineup. We disagree. Defendant moved to exclude the complainant's identification of him at a *Wade*[2] hearing, and the trial court denied his motion. We review a trial court's ruling at a suppression hearing for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (Griffin, J) (1993); *People v Hayden*, 132 Mich App 273, 287; 348 NW2d 672 (1984). Clear error exists where this Court is left with the definite and firm conviction that a mistake has been made. *Kurylczyk, supra* at 303.

Generally, there is no right to counsel at a precustodial, investigatory photographic lineup. *Id.* at 302. If the circumstances of the underlying investigation and lineup are unusual, however, counsel may be required. *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). Such unusual circumstances warranting a right to counsel were present in *People v Cotton*, 38 Mich App 763; 197 NW2d 90 (1972), when the defendant was not in custody at the time of the photographic lineup, but had previously been in custody and had been provided counsel during

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1996).
[2] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

two prior lineups. *Kurylczyk, supra* at 299-300. No such unusual circumstances existed in this case. The right to counsel generally attaches only with custody, and, as explained previously, defendant was not in custody at the time of the photographic identification. See *McKenzie, supra* at 472.

Defendant also contends that the picture of him used in the photographic lineup impermissibly drew attention to his photo. A photographic lineup is impermissibly suggestive when, based on the totality of the circumstances, it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *Kurylczyk, supra* at 306. The relevant inquiry is not whether the photograph was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification. *Id.* When making this determination, relevant factors include: the opportunity for the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the perpetrator, the witness' level of certainty in identifying the perpetrator at the pretrial lineup, and the length of time between the crime and the lineup. *Id.*; *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

The trial court examined all six photographs in the array and determined that defendant's picture was not impermissibly suggestive. Further, the totality of the circumstances did not give rise to a substantial likelihood of misidentification. We agree. The complainant had ample opportunity to view defendant in her home. She stared at defendant while he slowly walked toward her from down the hallway and stood "eyeball-to-eyeball" with him in her brightly lit house. She also saw defendant in full sunlight as he turned around outside to close the sliding door. The photographic lineup occurred within a few weeks after the break-in, and, at the lineup, the complainant knew without a doubt that picture number five of defendant was the man who had been in her house. Therefore, according to the factors enunciated in *Kurylczyk, supra* at 306, and *Colon, supra* at 304-305, the totality of the circumstances did not give rise to a substantial likelihood of misidentification.

Defendant also contends that the dark area above his head in the photo rendered the lineup impermissibly suggestive. Differences in the composition of photographs have been held not to render a lineup impermissibly suggestive. *Kurylczyk, supra* at 304-305. The fact that defendant's picture had a dark area or shadow above defendant's head, therefore, did not render the lineup impermissibly suggestive.

IV

Defendant next contends that hearsay and other acts evidence should not have been admitted during the *Wade* hearing. We disagree. We review evidentiary decisions for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999). An abuse of discretion occurs when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

A trial court is not bound by the rules of evidence when determining whether evidence is admissible. MRE 104(a); MRE 1101(b); *People v Barrera*, 451 Mich 261, 274; 547 NW2d 280

(1996). The purpose of a *Wade* hearing is to determine the admissibility of evidence; specifically, whether a trial court should suppress an identification of a defendant because of an allegedly improper lineup. *People v Fordham*, 132 Mich App 70, 76; 346 NW2d 899, rev'd on other grounds 419 Mich 874 (1984). In this sense, a *Wade* hearing is similar to a *Walker*[3] hearing, at which a trial court determines whether to suppress a defendant's confession because of the alleged involuntary nature of the confession. *Id*. This Court has held, pursuant to MRE 104(a), that the rules of evidence do not apply to *Walker* hearings. *People v Richardson*, 204 Mich App 71, 80; 514 NW2d 503 (1994). Because the purpose of both hearings is to determine the admissibility of evidence, the rules of evidence likewise do not apply in *Wade* hearings.

V

Defendant argues that the trial court should have instructed the jury on larceny in a building. We disagree.

When an issue involves a request for a lesser included offense instruction, this Court first determines whether the lesser offense is a cognate lesser included offense or a necessarily included lesser offense. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). If an offense is a necessarily included lesser offense, it is impossible to commit the greater offense without also committing the lesser offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325, amended 453 Mich 1204 (1996). The trial court must instruct the jury on a necessarily included lesser offense if the instruction is requested. *Lemons, supra* at 254.

On the other hand, a cognate lesser included offense shares some common elements and is of the same class or category as the greater offense, but it has additional elements not found in the greater offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). A trial court, if requested, must instruct the jury on a cognate lesser included offense if the evidence adduced at trial would support a conviction of the lesser offense. *Id*. at 444; *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

Larceny in a building, MCL 750.360; MSA 28.592, is not a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). See *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000); *People v Goliday*, 153 Mich App 29, 34; 394 NW2d 476 (1986). First-degree home invasion does not require the commission of a larceny as does larceny in a building; it merely requires that a person have the intent to commit a felony or larceny while breaking and entering a dwelling or entering a dwelling without permission. *Warren, supra* at 347-348. It is possible to commit the greater offense without also committing the lesser offense. Thus, instruction was not required on larceny in a building as a necessarily included lesser offense.

Assuming that larceny in a building is a cognate lesser included offense of first-degree home invasion, defendant was not entitled to a jury instruction on larceny in a building because

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[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

he did not request such an instruction. A trial court must instruct the jury on a cognate lesser included offense if the evidence adduced at trial would support a conviction of that offense *and* if the defendant requests the instruction. *Hendricks, supra* at 444; *Pouncey, supra* at 387.

VI

Defendant argues that the trial court erred by ordering restitution without first determining defendant's ability to pay. In denying defendant's supplemental motion for new trial, challenging the order of restitution, the trial court indicated "restitution is required under MCL 769.1a." However, there is no written order imposing restitution in the lower court file. It is well settled that a trial court speaks through its written orders. *People v Davie (After Remand)*, 225 Mich App 592, 600; 571 NW2d 229 (1997). Consequently, we hold that no restitution was imposed in this case.

VII

Defendant's last issue on appeal is that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, because of such representation, he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must show that but for trial counsel's errors, there is a reasonable probability that the result of the proceeding would have been different and must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant claims that he was denied the effective assistance of counsel because trial counsel failed to object to the above claims of error and failed to move for a mistrial. However, defendant's arguments that the jury voir dire should have been transcribed, that defendant was denied his right to counsel during the photographic lineup, and that the lineup impermissibly drew attention to his photograph were properly preserved for appeal. Because counsel's failure to object to the remaining issues would not have affected the outcome of the case, defendant was not denied the effective assistance of counsel at trial.

Defendant also claims that his attorney failed to move for a mistrial. Given our holdings, however, such a motion would have been frivolous, and a criminal defense attorney is not required to make meritless or frivolous motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Therefore, defendant was not denied the effective assistance of counsel on the basis of his attorney's failure to move for a mistrial.

Remanded to the lower court for transcription of the jury voir dire and affirmed on all other grounds. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald