STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2001
v	No. 217954 Wayne Circuit Court
FREDERICK R. GRAYER, Defendant-Appellant.	LC No. 97-010137

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Following a four-day jury trial, defendant was convicted as charged of one count of carjacking, MCL 750.529a; MSA 28.797(a), and one count of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced by the trial court to concurrent prison terms of twenty to forty years for each offense. Defendant now appeals as of right, and we affirm.

I

Defendant first contends he was denied due process and a fair trial by the use of an unduly suggestive photographic identification procedure that tainted subsequent identifications by a key prosecution witness. We disagree.

Approximately one month after the carjacking in question occurred, a parole officer contacted and met with an eyewitness to the incident as part of the officer's effort to process defendant for violation of parole. The parole officer testified that she showed the witness two photographs, both of defendant, after the witness said that she could identify the carjacker. The witness testified that she was shown three or four photographs, including two of defendant. According to the parole officer, the witness identified defendant from the photographs without hesitation or uncertainty. At that time, defendant was already in custody, having been arrested in the parole office only days before, and counsel was not present. The witness subsequently identified defendant at a live lineup and then at trial.

Before trial, defendant moved to suppress the identification evidence on the grounds that the photographic array was unduly suggestive and tainted the witness' later identifications at the

live lineup and at trial. Two *Wade*[1] hearings were held and the trial court ultimately denied defendant's motion to suppress, concluding that identification evidence was admissible because an independent basis existed for the witness' identifications. Defendant now contends on appeal that the admission of tainted identification evidence denied him due process and a fair trial.

On review, a trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion by Griffin, J.). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Kurylczyk, supra* at 303.

Photographic identifications should not be used, absent exigent circumstances, when a defendant is in custody. *Id*. at 298; *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). When a photographic lineup is used after a defendant is in custody, the defendant also has the right to have counsel present. *Kurylczyk*, *supra* at 302. In *Gray*, *supra* at 111, our Supreme Court explained:

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness when called by the police or prosecution either is told or believes that the police have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *Id.*

If an invalid identification procedure has been found, a second inquiry must be made to determine whether the witness had an independent basis to identify the defendant:

> If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Id*. at 302, 306, 318. Simply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective. *Id*. at 306. . . . When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of

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[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

> a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. *Kurylczyk, supra* at 306. [*People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).]

See also *Gray, supra* at 115-117.[2]

In the instant case, the record indicates that the photographic lineup violated the dictates of *Kurylczyk, supra* at 302, because it occurred in the absence of counsel despite the fact that defendant was in custody and no exigent circumstances existed. It is less clear whether the photographic display was actually "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification" in light of the discrepancy in the parole officer's and witness' testimony with regard to the number of photographs shown and the identity of the persons in those photographs. However, even assuming that the photographic identification procedure was improperly conducted or impermissibly suggestive, we nonetheless conclude, considering the totality of the circumstances and the requisite factors, *Colon, supra*, that the witness' subsequent identifications of defendant had a reliable independent basis, separate from the initial photographic display.

In so concluding, we first note that the witness did not have a prior relationship with defendant. She observed defendant perpetrating the offense and, after defendant took the victim's car, she pursued him in her car down several streets and through a residential neighborhood. The witness followed "right behind" defendant for several miles, estimating that the chase lasted approximately five to seven minutes. She stopped "side by side" with defendant at a red light and could "look right over [at] the car." The witness told defendant "I know what you did" and told him to pull over. The witness testified at one of the *Wade* hearings that she observed defendant's profile and "purposely looked to see what I could remember about him." She also noted that "[t]he window was down, my car was bigger than that car. I could look right down and look at [the defendant's] clothing." She spoke directly to him, as their cars sat side by side, before defendant drove away. She reiterated at both the *Wade* hearing and at trial that she made a deliberate effort to observe and remember the description of the driver and his clothing.

Moreover, the witness articulated differences that she noticed between defendant's appearance in the photographs, the live lineup, and in court. The witness consistently described the driver and that description accurately fit defendant. Her description of defendant's features, height, and clothing was similar to that given by the complainant in this case. Furthermore, despite defendant's contention that the photographic display necessarily tainted the witness' subsequent identifications at the live lineup and at trial, the circumstances surrounding this later identification support the existence of an independent basis. A police officer testified that the

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[2] "The remedy for a violation of the right to counsel is the same as the remedy for an unduly suggestive identification procedure: suppression of the in-court identification unless there is an independent basis for its admission." [*Gray, supra* at 114, n 8.]

witness "was quite adamant" that she could identify the driver at the corporeal lineup. In fact, the witness' identification at the live lineup was immediate and without hesitation. At trial, the witness made an in-court identification of defendant as the driver of the stolen vehicle and was able to relate the details of the car chase and the driver's clothing. She also testified that a few days after the incident, she was again driving by the shopping center and noticed a man wearing the same jacket who looked like defendant hiding behind a dumpster. She immediately reported what she had seen at the police mini-station.

The witness did not identify anyone else as the perpetrator. No evidence indicated that her physical, emotional state and involvement during the carjacking made her perceptions unreliable. Rather, her ability to recall at trial many descriptive details suggests that she kept a clear head while pursuing the carjacker.

We conclude, considering the totality of the circumstances with the requisite factors in mind, *Gray, supra*, *Colon, supra*, that the trial court did not clearly err when it concluded that an independent basis existed for the subsequent identifications of the witness, free from the taint of the improper photographic display. The facts indicate that the witness was not a casual observer of the incident; rather, her observations regarding the identification of defendant were deliberately made. She consistently described details of the carjacking incident and the driver's appearance and she actually spoke to defendant when her car stopped next to the stolen Neon at a traffic light. Defendant's claim in this regard is therefore without merit. *Gray*, *supra* at 118; *People v McAllister*, 241 Mich App 466, 471-473; 616 NW2d 203 (2000).

II

In a related argument, defendant contends the trial court committed error requiring reversal by sua sponte instructing the jury that the photographic identification procedure discussed above was "permissible under Michigan law" and was "all right."[3] The defense raised no separate objection at trial to this instruction and rested immediately after it was given.

Because defendant failed to object to the instruction given by the trial court, this issue has not been properly preserved for our review, *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In order to avoid forfeiture of this issue, defendant must demonstrate plain

[3] Defendant called his parole officer to testify about the photographic display shown by her to the prosecution's key witness. Immediately following her testimony, the court sua sponte issued the following instruction to the jury:

> [A]nother instruction that I want you to keep in mind is that you have heard testimony regarding the fact that Ms. Junkin [parole officer] showed two photographs of Mr. Grayer to the witness, Ms. Mencer.
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> I'm instructing you that that procedure is permissible under Michigan law. All right. Showing those two photos. All right.

error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

A claim of instructional error is reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions must be reviewed as a whole to determine whether the trial court made an error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). Even if imperfect, there is no error if the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id*. at 127. Nonetheless, a "court must properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). When a trial court instructs a jury on the defendant's theory of the case, it must do so correctly. *People v Heflin*, 434 Mich 482, 501; 456 NW2d 10 (1990).

The defense theory in this case was misidentification by the prosecution witness who identified defendant in the photographic array, at the live lineup, and at trial. The trial court's decision to admit the identification evidence, because it found that an independent basis existed, did not preclude defendant from arguing that the prosecution's key witness' subsequent identifications were tainted by the photographs she was shown. Cf. *People v Gilbert*, 55 Mich App 168, 172; 222 NW2d 305 (1974). Consequently, given our conclusion that the photographic identification procedure was not properly conducted, the trial court's instruction that such procedure was "all right" and "permissible under Michigan law," not only incorrectly stated the law but also detrimentally impacted the defense theory of misidentification. This was error.

Nonetheless, a careful review of the record leads us to conclude that the effect of this plain error was limited and does not warrant reversal of defendant's conviction under the circumstances, because the jury retained its ability to assess the reliability and accuracy of the witness' subsequent identifications. The trial court's instruction did not preclude the jury from fairly considering the defense theory of misidentification by assessing other possible indicia of unreliability in the corporeal and in-court identifications. The jury was still able to independently assess the reliability and accuracy of the subsequent identifications as well as the witness' credibility. Therefore, the function of the jury was not abrogated and the defense theory was not nullified to the extent that it affected defendant's substantial rights. In other words, we conclude that the instructional error was not so prejudicial that it affected the outcome of the trial. *Carines, supra; Grant, supra.*

III

Defendant lastly argues that his convictions for armed robbery and carjacking impose multiple punishments for the same offense in violation of both the federal and state constitutional prohibitions against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We disagree.

This precise issue has already been addressed and resolved in *People v Parker*, 230 Mich App 337, 343-345; 584 NW2d 336 (1998), in which this Court rejected the very argument raised by the present defendant:

> Although both crimes involve property loss to a person, either a motor vehicle or other property, the Legislature designed each statute to prevent a different type of harm. See *People v Guiles*, 199 Mich App 54, 58; 500 NW2d 757 (1993). It is clear from the language of the carjacking statute that the Legislature intended to prohibit takings accomplished with force or the mere threat of force. In contrast, it is clear from the language of the armed robbery statute that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon. A further source of legislative intent is the amount of punishment expressly authorized by the Legislature. . . . In the carjacking statute, the Legislature specifically authorized two separate convictions arising out of the same transaction. MCL 750.529a(2); MSA 28.797(a)(2). Although the Double Jeopardy Clauses restrict courts from imposing more punishment than that intended by the Legislature, the Legislature may authorize cumulative punishment of the same conduct under two different statutes. . . . From the subject and language of these statutes, we can conclude that that Legislature intended multiple punishments for violations of different social norms.
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> Defendant's carjacking and armed robbery convictions also do not violate the Double Jeopardy Clause of the federal constitution because they do not constitute the "same offense" under the same-elements test from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). . . . Under the *Blockburger* test, our inquiry is whether the two separate statutes each include an element that the other does not. *Id.* at 707. Here, the offense of carjacking does not require proof that the defendant intended to deprive the victim permanently of possession of the vehicle. *People v Terry*, 224 Mich App 447, 454-455; 569 NW2d 641 (1997). Armed robbery, a specific intent crime, requires this showing. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Also, the offense of armed robbery requires proof that the defendant was armed with a dangerous weapon. *Id*. The offense of carjacking has no such requirement.
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> Therefore, under both federal and state analyses, it is clear that the Legislature intended to separately punish a defendant convicted of both carjacking and armed robbery, even if the defendant committed the offenses in the same criminal transaction. . . .

Because we find the underlying analysis of *Parker* to be fundamentally sound, we need not address defendant's argument that *Parker* was wrongly decided. Moreover, defendant's attempt to distinguish *Parker* on its facts is unpersuasive. The record indicates that defendant took the victim's car at knifepoint. Defendant pinned the victim between her car door and the interior of her car and stated "don't make me kill you," as he held a knife to her chest. Defendant ordered her to put the key in the ignition and move over to the passenger seat. When the victim crawled over the console, her elbow hit the radio and caused it to blare. She took the opportunity to unlock the door and get out, and defendant then sped away in her car. The victim had groceries, a cell phone, and her purse in the car. Those items were never returned, although the

victim's car was eventually recovered.[4] The air bags and CD player were stolen and the car was severely damaged. These circumstances support defendant's convictions for the separate and distinct offenses of armed robbery and carjacking. *Parker, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

[4] The prosecution amended the information at the end of trial to identify the purse and cell phone as the property forming the basis of the armed robbery conviction.