

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES BARBEE,

Defendant-Appellant.

UNPUBLISHED

October 2, 2001

No. 223457

Wayne Circuit Court

LC No. 99-000326

Before: Cavanagh, P.J. and Markey and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions of two counts of armed robbery, MCL 750.529, for which he was sentenced to two and a half to fifteen years in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the trial court erred in failing to suppress the victims' identification testimony. The trial court's ruling on the admission of identification evidence is reviewed on appeal for clear error, which "exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process. In order to challenge an identification on the basis of lack of due process, "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 the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established "that is untainted by the suggestive pretrial procedure." [*People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001) (citations omitted).]

Because counsel was present, the burden of proof is on defendant to factually support his claim that any pretrial confrontation was impermissibly suggestive. *People v Horton*, 98 Mich App 62, 68; 296 NW2d 184 (1980).

Darius Simpson confronted defendant at a pretrial corporeal line-up and at the preliminary examination. Defendant contends that the pretrial line-up was unnecessarily suggestive because Simpson was told that two suspects were in the line-up. Merely telling a witness that a possible suspect is in the line-up does not taint the identification procedure unless the defendant is the only person in the line-up or is singled out in some way. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Smith*, 108 Mich App 338, 343-344; 310 NW2d 235 (1981). In fact, Simpson failed to identify anyone during the line-up. As noted in *People v Barnes*, 107 Mich App 386, 390; 310 NW2d 5 (1981), if Simpson had felt compelled to select someone from the line-up, he would have identified two men as his assailants. Even if the line-up were unduly suggestive, the error was harmless because the suggestiveness did not register with Simpson, who failed to identify anyone. *People v Belenor*, 71 Mich App 10, 13; 246 NW2d 355 (1976), rev'd on other grounds 408 Mich 244 (1980). Thus, Simpson's inability to identify defendant at the line-up did not render his subsequent in-court identification inadmissible but simply created a credibility issue for the jury. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995).

Simpson did identify defendant at the preliminary exam. While such a confrontation may be so suggestive as to require suppression of identification testimony, *People v Solomon*, 47 Mich App 208, 217; 209 NW2d 257 (Lesinski, C.J., dissenting), adopted 391 Mich 767; 214 NW2d 60 (1974), not all preliminary exam confrontations are impermissibly suggestive. *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975). Factors to be considered in evaluating the possibility of misidentification "include 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 v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).

The preliminary exam was held less than three weeks after the crime occurred. Simpson had a good opportunity to view the robbers, having spoken to them outside the store and having walked with them from the store to the bus stop before the robbery took place. There is no evidence that his attention was distracted. While defendant contends that Simpson did not describe defendant in his witness statement, there was no evidence to that effect at the evidentiary hearing. There was no indecision in Simpson's testimony about defendant being one of the robbers and his role in the robbery.

Defendant also contends that Simpson's identification testimony was impermissibly influenced by certain circumstances at the preliminary exam. However, he has not cited any authority in support of this contention, thereby abandoning it on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Because defendant failed to show that any pretrial confrontation was impermissibly suggestive, an independent basis for Simpson's identification testimony need not be established. *People v Syakovich*, 182 Mich App 85, 89; 452 NW2d 211 (1989).

The issue has not been preserved as to Jawhon Simpson's identification testimony because defendant failed to object to his testimony at trial or move to suppress his identification testimony. *Id.* Because defendant has not established clear error with respect to the admission of

Jawhon Simpson's testimony, we decline to review the issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper