

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP T. ARNOLD,

Defendant-Appellant.

UNPUBLISHED

October 19, 2001

No. 224910

Wayne Circuit Court

Criminal Division

LC No. 99-001514

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of 51 to 120 months' imprisonment for the armed robbery conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant contends that his constitutional right to be free from unlawful searches and seizures was violated when police officers seized a sawed-off shotgun from him on the night of the incident. However, defendant failed to preserve this issue for appellate review by raising it below. Nevertheless, forfeiture of an issue may be avoided under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The *Carines* Court explained:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).]

It should be noted that the defendant, rather than the government, bears the burden of persuasion with respect to prejudice. *Carines, supra* at 763, quoting *Olano, supra* at 734; 113 S Ct. 1770.

Unfortunately, because no objection was raised below, there was no suppression hearing; therefore, the record does not clearly indicate all the circumstances surrounding the seizure. However, a police officer testified that, a few hours after the charged armed robbery, an employee of a second restaurant reported suspicious activity. When the police officer arrived, the employee pointed out defendant and his companion. The police officer testified that, to ensure his safety while questioning defendant and his companion, he conducted a limited pat down search of defendant. This pat down led to the discovery of the shotgun.¹

We have ruled that a “brief stop of a suspicious individual may be reasonable.” *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993). “In order for an investigatory stop to be reasonable, the police must have a particularized suspicion, based upon an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing.” *Id.* However, the reasonable suspicion necessary to justify an investigatory stop, although more than a mere “hunch,” is less than that necessary to establish probable cause.” *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Where the investigating officer has a reasonable suspicion that the individual stopped is armed and poses a danger to the officer’s safety, a limited pat down search for weapons during an investigatory stop. *Id.* at 99.

Here, the limited record developed on this issue established that a restaurant employee was concerned enough about her safety that she called the police. This concern stemmed from the presence of defendant and his companion near the restaurant. In fact, the officer may have been aware that two armed persons had robbed another restaurant earlier that night. While this concern alone is probably insufficient to establish probable cause to conduct a more extensive search, we believe that these facts were sufficient to justify an investigative stop by the police officers. *Champion, supra* at 98. Because the investigative stop was proper, and in light of the earlier armed robbery of a restaurant that evening by two individuals, the pat down search for weapons was permitted under the circumstances. *Id.* at 99. Thus, we conclude that the seizure of the shotgun did not violate defendant’s constitutional rights; therefore, defendant has failed to establish the requisite “plain error” necessary to avoid forfeiture of this issue.

Similarly, defendant contends that the trial court erred by allowing the admission of evidence that he was suspected of planning another armed robbery of a restaurant on the same evening. As noted above, a police officer testified regarding some of the events surrounding defendant’s arrest. The officer testified that he received some information from a restaurant employee pointing out defendant and his companion across the street as suspicious.² Because defendant did not object on this ground at trial, he has not preserved this issue. MRE 103(1)(a). We therefore review this issue under the plain error rule. *Carines, supra* at 763.

Generally, MRE 404(b)(1) governs a trial court’s decision to admit or exclude prior bad acts evidence. The rule provides:

¹ One of the victims identified a picture of this shotgun as the weapon that defendant held to his head during the armed robbery.

² The trial court sustained defendant’s objection to the prosecutor’s attempt to introduce the second restaurant’s employee’s testimony.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

When determining whether to admit evidence of other bad acts committed by the defendant, the court should conduct the following analysis:

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.” [*People v Sabin*, 463 Mich 43, 55; 614 NW2d 888 (2000), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).]

“MRE 404(b) is a rule of inclusion and courts should adopt a flexible approach when ruling on the admissibility of prior bad acts evidence.” *People v Hawkins*, 245 Mich App 439, 448; 628 NW2d 105 (2001).

As an initial matter, contrary to defendant’s argument, the trial court limited the evidence concerning the events at the second restaurant to those facts surrounding the seizure of the shotgun. Regardless, in light of the victim’s identification of this shotgun as the weapon used by defendant during the commission of the instant offenses, the evidence was relevant and admitted for a purpose other than to show defendant’s propensity to commit armed robberies. Moreover, because the trial court sat as the trier of fact, there was little danger of prejudice. Accordingly, we are not persuaded that defendant has demonstrated “plain error.” *Carines, supra* at 763.

Defendant also argues that the trial court improperly accepted his waiver of a jury trial. We review a trial court’s determination that a defendant validly waived his right to a jury trial for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). A finding is clearly erroneous where, after reviewing the entire record, we are “left with a definite and firm conviction that a mistake has been made.” *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). MCR 6.402(B) states a trial court must “ascertain, by addressing the defendant personally, that the defendant understands the right [to a jury trial] and that the defendant voluntarily chooses to give up that right and to be tried by the court. In other words, the waiver of a jury trial must be knowing and voluntary. See *Leonard, supra* at 595; .

Here, the record reveals that the trial court only asked a few questions to determine whether the waiver was knowing and voluntarily. However, the trial court specifically asked defendant if the waiver was being made freely and voluntarily, and further asked whether he had been promised anything or threatened in any way. The trial court also asked defendant whether

he wished to give up his right to a jury trial. Defendant signed a written waiver of his right to a jury trial, and defense counsel indicated on that form that defendant was advised of the constitutional right to a jury trial. It should also be noted that defendant's arguments challenging the effectiveness of his waiver are essentially: (i) the likely failure of defendant's educational system to adequately inform him of the constitutional right to a jury trial and (ii) the trial court's failure to state that the right to a jury trial specifically derived from the constitution. Defendant does not contend, however, that he actually did not understand the right to a jury trial or that his waiver was involuntary. Accordingly, we are not left with a definite and firm conviction that defendant's waiver was invalid. Consequently, the trial court did not clearly err by allowing defendant to waive his right to a jury trial.

Defendant next argues that the trial court abused its discretion by allowing a police officer to testify about a statement that he overheard defendant make at the lineup. The officer who assisted in conducting the lineup testified that, after the lineup attorney told defendant that he had been positively identified, defendant became very excited and upset. Defendant asked the attorney how he could be picked if the person who committed the robbery was wearing a ski mask. Defendant contends that the statement was a privileged communication to the lineup attorney.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Generally, a client's statements to an attorney are privileged, and inadmissible, "when they are made to counsel who is acting as a legal adviser and made for the purpose of obtaining legal advice." *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001). However, where a defendant fails to take reasonable precautions to keep his remark confidential the communication will not be privileged. *Id.* at 597-598. In the instant matter, the police officer testified that defendant made the statement in front of some of the other lineup participants. In addition, the police officer testified that he was only a few feet from both the attorney and defendant. Thus, defendant failed to take reasonable precautions to keep his statement confidential. Therefore, we conclude that the trial court did not abuse its discretion by finding the statement to be non-privileged.

Defendant contends that the corporeal lineup, from which he was identified by one of the victims, was impermissibly suggestive. Because defendant did not object or file a motion to suppress the lineup identification in the trial court, this issue has not been preserved. Again, this issue is nevertheless reviewed under the "plain error" rule. *Carines, supra* at 763.

The fairness of an identification procedure is evaluated in light of the totality of the circumstances. *People v Kurylczuk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). If counsel represented the defendant at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). However, "physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness." *Kurylczuk, supra* at 312, quoting *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds, 434 Mich 903 (1990). Our Supreme Court explained:

Differences among participants in a lineup, “are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the lineup. It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness’ identification.” [*Id.*, quoting *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988 (1991).]

Initially, we would note that we are troubled by the height difference of the participants in the corporeal lineup. However, the trial court opined:

[N]ow I’ve had a chance to review this photograph of the lineup. And, it does indicate that the defendant is taller than any of the other persons in there. But, even with that slight height difference, he’s, he’s not really distinguishable from the others.

It appears that the complexions and the facial characteristics of his as well as the others are very similar. So there’s nothing that would really make him stand out. I don’t think that height alone is something in this photograph that would make him stand out, [or] influence the selection of the defendant.

The police officer that conducted the lineup testified that all seven participants in the lineup had light facial hair or goatees.

Moreover, the victim that identified defendant testified that he focused on the eyes of the robber holding a gun to his head. He also testified that, at the lineup, he immediately recognized defendant as that robber. However, he noted that, before making a final identification at the lineup, he wanted to hear defendant’s voice. After hearing defendant’s voice, he then made the identification. Thus, the victim’s testimony indicated that, at the very least, defendant’s eyes and voice were more important to the identification than height. Therefore, we are not persuaded that the height difference was the basis of the identification. *Kurylczyk, supra* at 312.

It should also be noted that the other victim did not identify defendant, despite viewing the same lineup. This fact would tend to support the trial court’s opinion that the lineup, despite the height difference between defendant and the other participants, was not impermissibly suggestive. Consequently, after reviewing all the circumstances, we conclude that the lineup, despite its flaws, was not impermissibly suggestive.³ *Kurylczyk, supra* at 312.

Finally, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to object to the seizure of the sawed-off shotgun, the lineup identification, the trial court’s acceptance of defendant’s jury waiver, and the introduction of evidence that

³ The fact that the complainant is told that the perpetrator is in the lineup would not alone render the lineup unduly suggestive. *McElhaney, supra* at 287. Here, there was evidence that the victims were given the impression that the armed robbers were in the lineup. However, one victim only identified defendant, and the other victim did not identify anyone. Accordingly, we are not persuaded that the lineup was impermissibly suggestive on this alternative ground.

defendant was suspected of planning another robbery.⁴ Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). There is a strong presumption that counsel was effective. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). To overcome this presumption, defendant must establish that “(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different.” *Id.* Having found no plain errors with respect to these issues, we are not convinced that the result of defendant’s trial would have been different had counsel raised these issues below. Therefore, defendant has not established that he was denied the effective of assistance of counsel.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens

⁴ Although defendant also argues that the trial court erred in accepting his waiver of his right to testify this issue has not been properly presented for our review. See *Leonard, supra* at 588