

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD KEVIN GREGORY,

Defendant-Appellant.

UNPUBLISHED

November 20, 2001

No. 226961

Oakland Circuit Court

LC No. 99-167589-FH

Before: Zahra, P.J., and Hood and Murphy, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of second-degree home invasion, MCL 750.110a(3). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to eight to twenty years' imprisonment and appeals as of right. We affirm.

Defendant first argues that the trial court erred by allowing the in-court identification at trial when the identification was tainted by an identification at the first scheduled preliminary examination.¹ We disagree. The decision to admit identification evidence is reviewed for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). When a pretrial identification has been improperly conducted, an independent basis for any in-court identification must be established. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). In the present case, the victim's neighbor was unable to identify defendant in a live line-up due to the change in defendant's appearance since the time of the offense. However, when shown a photographic line-up that reflected defendant's appearance on the date of the offense, the neighbor was able to identify defendant in seconds. In light of the alteration of defendant's appearance, the second line-up was proper, *People v Baker*, 114 Mich App 524, 528; 319 NW2d 597 (1982). The record demonstrates clearly that the witness had an independent basis for the in-court identification at trial. *Gray, supra*.

Defendant next argues that he was denied due process when a jury did not determine his parole status, relying on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435

¹ There is no record evidence of what transpired at this hearing, and police officers, who testified at trial, were not questioned about this scheduled hearing date. Therefore, we assume, without deciding, that the allegation of taint is correct.

(2000). Defendant's argument, while creative, is completely without merit. Defendant's parole status was not an element of the crime charged in this case.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ William B. Murphy