

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

HENRY LOUIS PERSON,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2002

No. 227642

Ingham Circuit Court

LC No. 99-075360-FC

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for armed robbery, MCL 750.529, assault with a dangerous weapon, MCL 750.82, and two counts of felony-firearm, MCL 750.227b. We affirm.

Defendant first contends that he was denied a fair trial and the effective assistance of counsel because evidence was improperly admitted at trial that implicated him in the commission of other crimes. Defendant claims that at trial witnesses made several references to the instant victims' and other individuals' attendance at lineups involving defendant, thus raising the improper inference that defendant was a suspect in other crimes.

This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Because defendant did not preserve this issue, he must demonstrate that a plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find no error in the admission of the testimony concerning the lineups at which defendant was identified or in the content of the testimony itself. Even if the testimony defendant challenges on appeal was unfairly prejudicial and improperly admitted at trial, defense counsel's failure to object to it at trial forfeited the issue for appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). An unpreserved nonconstitutional error is presumed harmless and does not merit reversal unless the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra* at 774. In this case, the admission of the statements did not offend the judicial process or result in the conviction of an innocent defendant because the jury was presented with ample, properly admitted evidence from which it could find that all elements of

the charged crimes were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

With respect to defendant's argument that he was denied the effective assistance of counsel by his attorney's failure to object to the witnesses' testimony, we note that a reversal based on ineffective assistance of counsel is justified only if a defendant affirmatively shows that his counsel's performance fell below an objective standard of reasonableness and prejudiced him to the extent that he was denied a fair trial. *People v Mitchell*, 454 Mich 145, 158, 164-167; 560 NW2d 600 (1997); *People v Williams*, 240 Mich App 316, 330; 614 NW2d 647 (2000). Because we find no error in the admission of the challenged testimony, defendant's claim that he was denied the effective assistance of counsel is without merit.

Defendant next asserts that he was denied a fair trial because a police officer's volunteered comment that defendant refused to participate in a lineup until he consulted with his attorney violated his right to protected communication with counsel. We detect no indication that the officer's comment invited the jury to draw some adverse inference from the fact that defendant exercised his right to counsel before agreeing to participate in the lineup. See *People v Benson*, 180 Mich App 433, 438-439; 477 NW2d 755 (1989) (affirming a trial court's decision to allow a police officer to testify regarding the defendant's absolute refusal, despite having counsel present, to participate in a lineup because he would have been the tallest participant), reversed in part on other grounds 434 Mich 903 (1990).

Furthermore, the attorney-client privilege enjoyed by defendant was never placed in jeopardy by the officer's reference to counsel's involvement in defendant's eventual participation in the lineup. The challenged testimony simply reflected the police officer's own conclusion about defendant's alleged conversation with defense counsel. Moreover, the officer would not have been prohibited from relaying any information exchanged between defendant and his attorney if the officer had been in a position from which she had actually overheard the content of the conversation. *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001).

Defendant's final assertion of error concerns testimony about, and the prosecutor's argument with respect to, both defense counsel's and the prosecutor's involvement in the arrangement of the pretrial lineup. Defendant suggests that advisement of the jury regarding the attorneys' presence implicitly approved the lineup's fairness and precluded the jury from reaching a conclusion that the lineup was conducted unfairly and that it was unduly suggestive. This contention is also without merit.

The prosecution is prohibited from vouching for the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000). However, the prosecution may remark on the evidence admitted at trial and all reasonable inferences that can be drawn from the evidence as they relate to the prosecution's theory of the case. *Bahoda*, *supra* at 282. A prosecutor's remarks cannot be viewed in isolation—the scope of appellate review must include the context in which the remarks were made. *Schutte*, *supra* at 721. Remarks that might otherwise be improper do not necessarily require reversal when they are made in response to issues raised by a defendant. *Id.*

At trial, defendant averred a claim of misidentification largely premised on his light complexion and the fact that the other lineup participants had darker complexions. The weight, not the admissibility, of identification evidence is at issue when a lineup is comprised of participants whose physical characteristics differ significantly from a defendant's physical characteristics, and the defendant believes that these physical differences prejudiced the witnesses' identification. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997); *Benson*, *supra* at 438. The prosecution properly advanced testimony and argument tending to contradict that the lineup was unfairly suggestive because this evidence and argument directly responded to defendant's emphasis on the lineup's suggestiveness. *Schutte*, *supra* at 721.

Defendant's attempt to characterize testimony regarding the lineup as inadmissible hearsay lacks merit. The prohibition against the admission of hearsay does not apply here because the police officers did not testify about the lineup attendees' statements during the lineup. MRE 801(c). The testimony was properly limited to the officers' accounts of the circumstances surrounding the lineups at which the witnesses identified defendant. *People v Prophet*, 101 Mich App 618, 623-624; 300 NW2d 652 (1980).

Affirmed.

/s/ Hilda R. Gage  
/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter