

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES FLETCHER,

Defendant-Appellant.

UNPUBLISHED
March 26, 2002

No. 228692
Wayne Circuit Court
LC No. 99-011511

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of attempted armed robbery, MCL 750.92, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty-three months to five years imprisonment on the attempted armed robbery conviction to be served consecutively to the mandatory two years imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant and his cousin approached the victim as she was entering her home. Each man displayed a gun and defendant held his gun to the victim's head. Although it was dark, there was enough light to see their faces and they were very close to her. She began to scream and a struggle ensued as they pulled at her purse. Defendant struck the victim in the face, she fell to the ground and defendant's cousin (his co-defendant in this case) began kicking her. The two men fled when the victim's mother came to the door, taking with them the victim's cell phone, and her purse containing money, identification and other personal items. They were arrested shortly afterwards. Two days later, the victim identified defendant at a corporeal lineup and his cousin at a photographic lineup.

II

Defendant argues that the pretrial corporeal lineup in which he participated was unduly suggestive due to height variances and because defendant was singled out to make a statement. Because defense counsel was present at the lineup, defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545

NW2d 18 (1996). Our review of the record leads us to the firm conclusion that defendant has not carried his burden.

Prior to the bench trial in this case, a hearing was held on defendant's motion challenging the lineup procedure. *United States v Wade*, 388 US 218, 240; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). The victim and the police department investigator who conducted the lineup testified for the people and defendant testified in his own behalf. The attorney who observed the lineup in defendant's behalf did not testify.

The fairness of an identification procedure is evaluated in light of the totality of the circumstances. *People v Kurylczuk*, 443 Mich 289, 311-312 (Griffin, J.), 318, (Boyle, J.); 505 NW2d 528 (1993). A review of the totality of the circumstances in this case indicates that the lineup procedure used was fair and not "irreparably unreliable."

Factors relevant to the fairness of a lineup include the opportunity of the witness to view the culprit at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the culprit, the level of certainty demonstrated by the witness at the identification, and the length of time between the crime and the identification. *Kurylczuk, supra* at 306. The victim testified that at the lineup, she identified defendant "immediately" by sight and confirmed that identification after hearing him say "shut up, bitch"—the phrase which the perpetrator had used repeatedly on the night of the attack. The level of certainty demonstrated was high—she was sure "it was him." The officer who conducted the lineup testified that the victim recognized defendant "immediately" and pointed to him; her identification was unwavering; she was "very, very positive that that was him." The lineup took place just days following defendant's arrest; thus, the length of time that passed between the event and the identification was short.

Defendant argues that the height variances between himself and the others in the lineup rendered the process unduly suggestive. However, discrepancies as to physical characteristics among the lineup participants do not necessarily render the procedure defective, *Kurylczuk, supra* at 312, rather; differences generally pertain to the weight of an identification and not to its admissibility, *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Differences are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. *Kurylczuk, supra*.

Nothing about the other participants in the lineup rendered defendant "substantially distinguishable." In fact, there were six men in the lineup; the men were 5'6", 5'9", 5'9", 6'1", 6'3" and 7'3", respectively. Defendant was 6'3", and thus fell somewhere in the middle of the height variances. There is no authority for defendant's proposition that the fact that only one man was taller than him rendered the process suggestive—a proposition which also disregards common sense. Furthermore, a few men wore jackets or jerseys. These minor differences, however, do not invalidate the process. Differences in height, weight, clothing, or other aspects of appearance alone do not render a lineup unduly suggestive automatically. *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984). Also, the court viewed the photograph of the live lineup and concluded that it was not unduly suggestive.

Defendant did not carry his burden of showing that the lineup was impermissibly suggestive; accordingly, the court did not clearly err in denying defendant's motion to suppress.

III

Defendant also argues that there was insufficient evidence to support his convictions. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

For reasons discussed above, we conclude that the pretrial identification of defendant was not unduly suggestive. Thus, defendant's contention that because of the tainted pretrial identification, there was insufficient evidence identifying him as one of the robbers is inapt.

Defendant also challenges the sufficiency of the identification evidence on the ground that it was nighttime, and thus dark, and the fact that the perpetrator was wearing a hood and a scarf make it unlikely that Smith "ever got a good view." Defendant also focuses on the fact that the police never found any of Smith's personal items, including the money, and contends that "it is impossible" for someone to hide the money within minutes of a robbery. Defendant also points out that, despite the fact that the victim was beaten and bloodied, no blood was found on defendant.

None of defendant's contentions has merit. The victim testified that a nearby streetlight was on, and that she could see her attackers' faces because "they were so close." Furthermore, she heard defendant's voice when he repeatedly yelled "shut up, bitch." The men were "very close" and she noticed the clothes they were wearing. She described defendant as wearing dark clothes and a hood and dark jeans; she described the second man as wearing a red, gray, and black jacket. Defendant was only "two or three steps" from her when he hit her; although defendant initially had a scarf over his mouth, when he yelled at her, the scarf fell down to around his throat, and she was able to see his face.

As discussed above, the victim immediately and consistently identified defendant at the pretrial lineup as the one who robbed her and held a gun to her head. Additionally, there was testimony that when, shortly after the robbery, a police officer tried to pull over the car in which defendant and his cousin were traveling, they fled; after fleeing in their car for about one-half of a mile, they fled from the police on foot through a field near abandoned houses; when the police spotted them again, they were covered in burrs. Thus, the items stolen from the victim could have easily been discarded or hidden as the men fled on foot. The two men matched "to a T" the description of the two men who committed the robbery at gun point and their clothing matched that described by the victim.

Viewing the evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot