STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2004
v ROCCO DUVIAL TRAVIS, Defendant-Appellant.	No. 249203 Wayne Circuit Court LC No. 02-013002-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DEMETRIUS RAMONE JOHNSON, Defendant-Appellant.	No. 249211 Wayne Circuit Court LC No. 02-013002-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant Demetrius Johnson appeals as of right his sentence following a conviction by a jury of two counts of armed robbery, MCL 750.529. He was sentenced to concurrent terms of eight to fifteen years' imprisonment for each count. Defendant Rocco Travis appeals as of right his conviction following a jury trial of two counts of armed robbery, MCL 750.529. He was sentenced to concurrent terms of ten to fifteen years' imprisonment for each count. This case arose when two women reported that they had been robbed at gunpoint by two men later identified as Johnson and Travis. We affirm but remand for correction of Johnson's presentence information report (PSIR).

Johnson first argues that the trial court erred by attributing ten points rather than no points to OV 4. We disagree.

A trial court's imposition of a sentence within the legislative guidelines range must be affirmed absent an error in scoring or reliance on inaccurate information. *People v Babcock*, 469

Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10). Scoring of a sentencing guidelines variable is reviewed for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003), citing *People v Witherspoon (After Remand)*, 257 Mich App 329, 334-335; 670 NW2d 434 (2003). "A scoring decision is not clearly erroneous if the record contains "'any evidence in support' of the decision." *Hicks, supra* at 522, quoting *Witherspoon (After Remand), supra* at 335.

MCL 777.22(1) provides that OV 4 should be scored for all crimes against a person. Because armed robbery is classified as a crime against a person, MCL 777.16y, OV 4 should have been scored in the instant case. When a victim suffers "[s]erious psychological injury requiring professional treatment," ten points must be assigned to OV 4. MCL 777.34(1)(a). No points are assigned if the victim did not suffer serious injury requiring treatment. MCL 777.34(1)(b). At trial, Krutz-Sabol testified that she was terrified; she thought she was going to die during the incident and kept picturing her six-year-old daughter as she looked as a baby. She testified that she still had dreams and nightmares about the robbery, and she quit her job at the casino because she was afraid to leave at 4:00 a.m., without knowing who might be waiting for her. Because evidence supported the court's score, the score was not clearly erroneous. *Hicks, supra* at 522, citing *Witherspoon (After Remand), supra* at 334-335. Thus, Johnson's sentence must be affirmed. *Babcock, supra* at 261.

Johnson next argues that he is entitled to have his PSIR corrected. We agree.

A trial court's response to a challenge to inaccuracies contained in a presentence report is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). "A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). If the challenged information did not affect the sentencing decision, resentencing is not required. *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991). Here, the record indicates that the erroneous information did not affect the court's sentencing decision, and defendant is not entitled to be resentenced. Nevertheless, if "the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *Spanke, supra* at 649, citing *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990).

Travis argues that a photographic lineup should not have been conducted when he was in custody. We disagree.

A trial court's decision whether to suppress identification evidence is reviewed for clear error. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). Clear error is found when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* When an accused is in custody, identification by photographic lineup should not be used unless (a) a proper lineup is impossible, (b) insufficient people matching the defendant's characteristics are available, (c) immediate identification is necessary, (d) the defendant is in custody far distant from where the witnesses are, or (e) the defendant refuses to cooperate and could destroy the reliability of the identification. *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, ___ Mich ___, ___; ___ NW2d ___ (2004), slip op at 1 (overruled to the extent that the right to counsel is extended to identifications occurring before the initiation of adversarial criminal proceedings). Here, the

investigator testified that he did not have enough prisoners matching Travis's description so he arranged a photographic lineup. The reason given was proper because it was specifically listed as an exception in *Anderson, supra.*[1]

Nevertheless, defendant argues that the photographic lineup, which did not lead to his positive identification, was unduly suggestive with respect to the corporeal lineup because he was the only common participant in both lineups. A defendant's right to due process is violated when a photographic identification procedure is so suggestive that it creates a substantial likelihood of misidentification. *People v Gray,* 457 Mich 107, 111; 577 NW2d 92 (1998).

"'[W]hen the witness is shown only one person or a group in which one person is singled out in some way, [the witness] is tempted to presume that he is the person.'" *Gray, supra* at 111, quoting *Anderson, supra* at 178. And defendant was not required to prove that the government intended to act suggestively, only that a series of events was suggestive. *Gray, supra* at 114 n 7, citing *United States v Emanuele,* 51 F3d 1123, 1129 (CA 3, 1995). Still, the question is not "whether the lineup . . . was suggestive, but whether it was unduly suggestive." *People v Kurylczyk,* 443 Mich 289, 306 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993). And whether an identification procedure is so suggestive that it leads to a substantial likelihood of misidentification is viewed in light of the total circumstances. *Id.* at 311-312, 318. The United States Supreme Court indicated that the following factors should be considered when evaluating the likelihood of misidentification:

> "[T]he 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." [*Kurylczyk, supra* at 306, 318, quoting *Neil v Biggers,* 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

With respect to the opportunity to view Travis, although the incident occurred about 4:00 a.m., both Lovrince and Krutz-Sabol testified that the lights were on at the gas station, and Lovrince and Krutz-Sabol testified that they could see each other's face. This indicated that the lighting was sufficient for Krutz-Sabol to see the gunman's face, and her position in the Jeep did not prevent her from viewing his face. Krutz-Sabol testified that the incident lasted approximately four minutes. Although not a great deal of time, it was long enough to identify

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[1] Defendant cites *People v Ealey,* 102 Mich App 301, 306-307; 301 NW2d 514 (1980) – where this Court found the photographic lineup improper because two or three prisoners matched the defendant's description, off-duty officers could have been called in despite the holiday to participate, and no attempt was made to contact neighboring police departments to arrange a lineup – to support his claim that the instant photographic identification was improper. However, *Ealey, supra,* is distinguishable from the instant case because here the investigator testified that he called neighboring precincts to try to arrange a corporeal identification before he resorted to the photographic identification. Although defendant is skeptical that insufficient individuals matching his description were in custody when the photographic lineup was arranged, defendant failed to cross examine the investigator on this aspect.

Johnson, note the position of the gun at her friend's jaw line, note the make and color of defendants' car, and write down the license plate. It was enough time to identify Travis as well. This factor would weigh toward the admission of the lineup results. With respect to Krutz-Sabol's degree of attention, she testified that part of her job at the casino was identifying people. She demonstrated that she was paying attention when she recorded the license plate, described the clothing worn by defendants, and recalled the direction from which defendants approached the Jeep before the incident. This factor would also weigh toward admission of the identification testimony.

With respect to her prior description of Travis, the description was fairly general. Officer Hostos testified that Krutz-Sabol described the gunman only as a black male in his twenties. This factor would weigh toward exclusion of the lineup identifications. With respect to Krutz-Sabol's level of certainty, she was unable to identify Travis in the photographic lineup. However, she complained about the quality of the photographs and indicated that she would prefer to participate in a corporeal lineup. She correctly identified Travis at the corporeal lineup the next day, and testified that she did so almost instantly. Moreover, she testified that she was one hundred percent certain of her choices. While there was some evidence weighing toward exclusion – namely the failure to identify Travis from his photograph – the evidence preponderated toward admission of the evidence.

With respect to the length of time between the crime and the confrontation, the incident occurred at 4:00 a.m., on October 5, 2002. Defendants were arrested October 7, 2002. Krutzs-Sabol participated in the photographic lineup on October 8 and the corporeal lineup on October 9. Thus, there were only a few days between the crime and the confrontation. The short time span weighed toward admission because there was insufficient time for the witness to forget details. Therefore, when viewing the totality of the circumstances, we are not left with a definite and firm impression that the court erred by admitting the pretrial identifications. *Williams, supra* at 537.

Affirmed but remanded to correct errors in Johnson's PSIR. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens