

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER BLAKE,

Defendant-Appellant.

UNPUBLISHED

October 14, 2004

No. 248770

Wayne Circuit Court

LC No. 01-011649

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted his jury convictions of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

On appeal, defendant argues that the trial court erred in denying his motion to suppress the in-court identifications of him because the corporeal lineup was impermissibly suggestive since he was the only participant fitting the physical description given by witnesses and there was no independent basis for the witnesses' in-court identifications. 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).

The fairness of an identification procedure is evaluated in light of the total circumstances. *People v Kurylczuk*, 443 Mich 289, 311-312, 318; 505 NW2d 528 (1993); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The test is whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Kurylczuk, supra*. When counsel was present at the lineup, as is the case here, 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). Once it is determined that a pretrial identification is tainted by improper procedure or is unduly suggestive, an independent basis must be established for an in-court identification. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Here, considering the totality of the circumstances, the lineup procedure used was fair and not "irreparably unreliable." See *Kurylczuk, supra*. Defendant specifically argues that his long, braided hair and his feminine facial features distinguished him from the other participants in the lineup. However, discrepancies as to physical characteristics among the lineup participants do not necessarily render the procedure defective; such differences "are significant

only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants.” *Id.* at 312, quoting *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988 (1991). Nothing about the other participants in the lineup rendered defendant “substantially distinguishable.”

The other participants had the same general complexion, height, weight and were similar in age to defendant. All of the participants wore the same jail uniforms at the lineup and four out of six participants in the lineup had braids. At the lineup, all three witnesses immediately identified defendant as the perpetrator. One witness testified that she immediately recognized defendant because “his face was just triggered in [her] mind,” although his hair was different than it was on the night of the offense. She stated that she identified defendant by his face, which she clearly saw in the well-lit area of the crime, not his hair. Another witness testified that he identified defendant by his face, particularly his eyes, which he clearly saw during the crime because it was a well-lit area and he was within four to five feet from defendant. A third witness also testified that she identified defendant based on his face. Therefore, the corporeal lineup was not “so impermissibly suggestive as to render the identification irreparably unreliable.” See *Kurylczuk, supra*. Accordingly, the trial court did not clearly err in admitting the identification testimony. Also, that police informed one of the witnesses that they had arrested men inside her stolen vehicle does not render the lineup unduly suggestive. See *McElhaney, supra* at 287. And, finally, because the corporeal lineup was not unduly suggestive, we need not consider whether there was an independent basis for the in-court identifications. If we did consider this issue, however, we would find such independent basis existed. See *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000), quoting *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Defendant next argues that the trial court erred in overruling his objection to the aiding and abetting jury instruction because there was insufficient evidence to support the instruction since he was the claimed principal. After de novo review, we disagree. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

An aiding and abetting instruction is proper where there is sufficient evidence that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Here, there was ample evidence from which a jury could conclude that defendant was the principal in the offenses, but there also was sufficient evidence to establish that defendant aided his co-participant, Johnny Bryant,¹ in committing the offenses. See *People v Smielewski*, 235 Mich App 196, 206-209; 596 NW2d 636 (1999).

On the night of the offense, Alina Jawad, Lakeisha Cook, and Benjamin Escobar saw Bryant, defendant, and four other men hanging around a black Lincoln, which was parked directly next to Jawad’s car. Bryant testified that he opened the door and pulled Jawad out of her

¹ Bryant had already been sentenced on the offenses after pleading guilty to all the charges.

car. A second man, who was seated in the Lincoln, leaned out with a gun, put it to her forehead, and told Jawad to give up her purse. A third man held Escobar at gunpoint. After the driver's purse and car keys were taken away, the three witnesses saw defendant and another man get into Jawad's car and drive off. When defendant got inside Jawad's car, he pointed the gun at Cook. A fourth man, armed with a gun, stood up through an open sunroof in the Lincoln, and ordered Escobar to throw him the bag Escobar was holding. All three of the witnesses identified defendant as the man who was armed with a gun and involved in the offenses. While much of the evidence hinged upon the credibility of the witnesses, issues concerning credibility and the weight to be given the witnesses' testimony are appropriately left to the trier of fact. See *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We conclude that the prosecution presented sufficient evidence from which a reasonable jury could find that defendant aided and abetted Bryant in committing the offenses. Consequently, the trial court did not err in giving the aiding and abetting instruction. Further, because the prosecutor presented sufficient evidence of the defendant's guilt under either theory, the defendant's right to a unanimous verdict was not violated by submission of the alternative theories to the jury. See *Smielewski*, *supra* 201-202.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter