

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO RAMON STAPLETON,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249184
Wayne Circuit Court
LC No. 03-001458-01

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carjacking, MCL 750.529a, armed robbery, MCL 750.529, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty to sixty years in prison for the carjacking and armed robbery convictions, two to five years in prison for the felony in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the trial court erred in denying his motion to suppress identification testimony. We disagree.

Issues of law relevant to a motion to suppress are reviewed de novo. *People v Hickman*, 470 Mich 602, 606; 684 NW2d 267 (2004). On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). When examining the totality of the circumstances, relevant factors include: 1) the opportunity for the witness to view the criminal at the time of the crime, 2) the witness' degree of attention, 3) the accuracy of a prior description, 4) the witness' level of certainty at the pretrial identification procedure, and 5) the length of time between the crime and the confrontation. *Id.*

For federal Sixth Amendment and Michigan state constitution purposes, the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. *Hickman, supra* at 609. In *Hickman*, the Michigan Supreme Court abolished the longstanding rule of *People v Anderson*, 389 Mich 155, 187; 205 NW2d 461 (1973), extending the right to counsel to all pretrial identifications as being without a constitutional basis, and adopted the straightforward analysis of *Moore v Illinois* 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977), and held that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. *Hickman, supra* at 611. The Court held that the right to counsel did not attach to on the scene identifications that take place before the initiation of adversarial judicial proceedings. *Id.*

The carjacking victim was able to see defendant's facial features during the incident. There was adequate lighting inside the vehicle when defendant opened the door. Additionally, before exiting the vehicle, the victim's acquaintance parked the vehicle in a spot where there were security lights to increase visibility. She described the perpetrator's clothing, race, and facial features. She was able to give police an accurate enough description for them to apprehend a person matching that description.

Police returned to the scene of the incident with defendant approximately two hours later for identification purposes. The victim was unable to see defendant through the car windows because they were fogged and asked police to pull defendant out of the car so that she could get a better look at him. The police brought defendant out of the vehicle and the victim asked them to place defendant's hood on his head so that she could get a "better look at him." She wanted to see defendant with the hood because that is how she remembered him during the incident. After the hood was placed on defendant's head, the victim positively identified defendant as the perpetrator of the crime.

Defendant contends that the police manipulated his clothing until his appearance more exactly matched the description the victim provided. However, the police acted at the victim's request in placing the hood on defendant's head. It was the victim, and not the police, who was instrumental in changing defendant's appearance to assist her in identifying defendant as the person who carjacked her. In fact, the victim wanted to be sure she did not misidentify defendant. Moreover, any hesitancy in the victim's identification of defendant was before the jury, and goes to the weight of the identification, rather than its admissibility. *Kurylczyk, supra* at 303.

The pre-trial identification process here does not implicate the right to counsel. Adversarial judicial criminal proceedings had not yet been initiated. *Hickman, supra* at 611. At the time of the identification, defendant was not entitled a right to counsel for federal Sixth Amendment and Michigan state constitution purposes. Therefore, defendant was not denied due process of law, where the procedure used was not unfairly suggestive nor did it lead to a substantial likelihood of misidentification.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski