

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VENTURA RODRIGEZ MARTINEZ

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 250330

Washtenaw Circuit Court

LC No. 02-001282-FH

Before: Meter, P.J., and Wilder and Schuette.

PER CURIAM.

Defendant appeals by right his conviction for first-degree home invasion, MCL 750.110a(2). He contends that the trial court erred in denying his motion to suppress an in-court identification that was based on an impermissibly suggestive show-up identification and that he was denied his constitutional right to counsel at the show-up identification. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

A decision to admit an in-court identification based on a pretrial identification procedure will not be reversed on appeal unless it is clearly erroneous. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). 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. *Id.*, citing *People v Kurylczyk*, 443 Mich 289, 302, 306, 318 (1993). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis. *Kurylczk, supra*, 303, 318.

In *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 401 (1967), the United States Supreme Court provided factors to determine whether an identification is unduly suggestive in light of the totality of the circumstances: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. These factors were adopted by our Supreme Court in *People v Kurylczyk*, 443 Mich 289, 306; 55 NW2d 528 (1993).

Applying the *Neil* factors to the facts of this case, we conclude that the pretrial identification of defendant was not impermissibly suggestive. I. B. Remsen, the witness and victim, saw defendant from a distance of only six feet when defendant was in Remsen's home. He was able to ascertain defendant's general demeanor and noted his clothes, general features, and the coloring of his hair and eyes before defendant left his property. Based on Remsen's description, police were able to locate defendant in a bar within one hour of the home invasion. Moreover, Remsen had further opportunity to observe defendant when he followed him from his home to a church several blocks away. Remsen lost sight of defendant after defendant tumbled over a twelve-foot fence and landed in vegetation.

The testimony of the witness and police officers assigned to the home invasion indicate that Remsen was capable of paying attention to the details of defendant's physical appearance and demeanor. He admitted to being upset by defendant's presence in his home, but had the presence of mind to follow defendant and ask neighbors to call 911. The fear that resulted from defendant's invasion did not appear to taint the description of defendant that Remsen gave to police. In fact, it was the accuracy of that description which enabled police to apprehend defendant within one hour of the home invasion.

Remsen was certain that defendant was the man who invaded his home. While Remsen was still in the patrol car, he stated that defendant "look[ed] very much" like the intruder even though Defendant was twenty feet away. To ensure an accurate identification, Remsen asked permission to get out of the patrol car and move closer to defendant. From fifteen feet away, Remsen was able to positively identify defendant as the man who invaded his home. Less than one hour passed between the crime and the invasion.

Therefore, the pretrial identification was not unduly suggestive and the trial court did not err in refusing to suppress Remsen's in-court identification.

Defendant next contends that he was denied his constitutional right to counsel at the pretrial identification. Defendant did not have a constitutional right to counsel at that identification. A recent decision by the Michigan Supreme Court held that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. *People v Hickman*, 470 Mich 602, 603; 684 NW2d 267 (2004). In holding that there is no constitutional right to counsel until the initiation of adversarial judicial criminal proceedings, the Michigan Supreme Court explicitly overruled *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), upon which defendant relies, to the extent that it extends the right to counsel before the initiation of adversarial criminal proceedings. *Hickman*, *supra* at 603-604.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette