STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2005
v DEMETRIC DONTE WEBB, Defendant-Appellant.	No. 253605 Wayne Circuit Court LC No. 03-010369-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TONY CARROIL BAILEY, Defendant-Appellant.	No. 253706 Wayne Circuit Court LC No. 03-010369-02

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In Docket No. 253605, defendant Demetric Donte Webb appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, for which he was sentenced to concurrent sentences of eleven to twenty years' imprisonment. In Docket No. 253706, defendant Tony Carroil Bailey appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction to be served before concurrent sentences of eleven to twenty years' imprisonment for the armed robbery convictions. We affirm.

On appeal, defendant Webb claims that the trial court deprived him of his due process right to a fair trial by refusing to appoint an expert in the field of eyewitness identification to demonstrate the fallibility of eyewitness testimony. We disagree.

We review a trial court's denial of a motion for appointment of an expert witness for an abuse of discretion. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995); *People v*

Hill, 84 Mich App 90, 96; 269 NW2d 492 (1978). An abuse of discretion occurs when the trial court's decision is "so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002). However, we review de novo evidentiary issues which implicate due process. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

MRE 702, as it was in effect at the time of defendant Webb's trial, provided:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An indigent criminal defendant is entitled to the appointment of an expert at public expense if he cannot otherwise "safely proceed" to trial. MCL 775.15; *People v Davis*, 199 Mich App 502, 518; 503 NW2d 457 (1993). Reversal of a denial of an indigent defendant's request for a court-appointed expert is warranted only if such denial results in a fundamentally unfair trial. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997).

We conclude that defendant Webb was afforded the opportunity to adequately present his attack on the witness' identification by means of cross-examination, argument and the trial court's instructions to the jury. Defendant Webb's counsel questioned all of the eyewitnesses who identified defendant Webb, emphasizing the traumatic conditions under which the identifications occurred and the brevity and limitations of the eyewitnesses' observations of defendant Webb during the robbery. In addition, two eyewitnesses provided descriptions of defendant Webb that differed slightly from his actual appearance at the time of the robbery. Further, defense counsel offered defendant Webb's own testimony and the testimony of his girlfriend as an alibi defense which, if believed, would have cast doubt on the identification testimony. During closing argument, defense counsel emphasized the weaknesses of the witnesses' identification of defendant Webb. Specifically, defense counsel addressed the inaccuracies in the witnesses' description of defendant Webb and the failure of one of the witnesses to identify defendant Webb from the photographic array. Finally, the trial court instructed the jury on CJI2d 3.06 (witness credibility), and CJI2d 7.8 (identification), which informed the jury of the appropriate considerations in determining the reliability of eyewitness identifications. Given these circumstances, we find no error requiring reversal.

Next, defendant Webb argues that his right to due process of law was violated by the admission of identification evidence from a photographic array when a corporeal lineup was required. We disagree.

We review a trial court's factual findings in a suppression hearing for clear error, while its ultimate ruling is reviewed de novo. *People v Lewis*, 251 Mich App 58, 67-68; 649 NW2d 792 (2002). A photographic lineup is generally impermissible when the defendant is in custody or available to appear at a corporeal lineup. *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). However, a photographic lineup is permissible in place of a corporeal lineup if "there [is an] insufficient number of persons available with defendant's physical

characteristics." *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

Here, the officer-in-charge made considerable efforts to organize and conduct a corporeal lineup, but he was unable to do so because of the lack of suitable participants. The photographic lineup was conducted because of the unavailability of participants who possessed similar characteristics to those of defendant Webb, and not because of a lack of police effort to locate suitable participants. "There is no authority that requires the police to make endless efforts to attempt to arrange a lineup." *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Under these circumstances, we conclude that the use of a photographic array in lieu of a corporeal lineup was permissible.

Nor was defendant's right to due process of law violated by the absence of proof of an independent basis for the related in-court identification. An independent basis for identification testimony is necessary where a pretrial identification procedure was impermissibly suggestive. *Kurylczyk*, *supra* at 303. At the pretrial hearing, defendant Webb asserted that the photographic array was unduly suggestive because he has a darker complexion and more pronounced facial hair than the other individuals in the array.

"Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Kurylczyk*, *supra* at 304 (citation omitted). Differences in the physical characteristics of the individuals in the array do not necessarily render the procedure impermissibly suggestive. *Id*. at 312. Such discrepancies "are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants." *Id*., quoting *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988 (1991). Only then is there a substantial likelihood that discrepancies among the participants, rather than the defendant's appearance, formed the basis of the witness' identification. *Kurylczyk*, *supra* at 312.

There is nothing about the other individuals in the photographic array that rendered defendant Webb "substantially distinguishable." The record indicates that the array contained six color photographs of African-American males wearing either white or blue shirts, each with some form of an "Afro" hairstyle and facial hair. Although defendant Webb had a darker complexion than any of the other participants, the witness never said that she chose defendant Webb based on his darker skin tone. Rather, the witness testified that she identified defendant Webb from the array because of his face. Moreover, the witness identified defendant Webb despite his having a different hairstyle in the photograph from the style he had during the robbery. With regard to the amount of facial hair, the witness testified that she did not recall if defendant Webb had facial hair at the time of the robbery. Clearly, these minor distinctions had no bearing on the witness' selection of defendant Webb from the array. Accordingly, the composition of the photographic array did not render it impermissibly suggestive. See *Kurylczyk*, *supra* at 312. Because the photographic array was not impermissibly suggestive, this Court need not consider whether there was an independent basis for the in-court identification. See *id*. at 303.

Both defendants argue that the admission of other bad acts evidence constituted error requiring reversal. We disagree.

We review a trial court's factual findings in a suppression hearing for clear error, and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake has been made. *Lewis*, 251 Mich App at 67. However, when the underlying determination involves a preliminary question of law, such as whether a rule of evidence prevents admission, the question is reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

The evidence of defendants' participation in two other armed robberies of hair braiding salons in the vicinity of the salon that was robbed in this case was admitted under MRE 404(b)(1). In order to admit such "bad acts" evidence, the following factors must be present: (1) the prosecutor must offer the evidence for a reason other than the character or propensity theory; (2) the evidence must be relevant under MRE 402, as enforceable through MRE 104(b); and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Furthermore, at the request of counsel, the trial court may provide a limiting instruction pursuant to MRE 105. *Id*. With regard to the common scheme, plan or system exception, our Supreme Court in *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), explained that the evidence of other acts must suggest the existence of a plan and not merely a succession of similar spontaneous acts, but unlike evidence of other acts used to prove identity, the plan need not be unusual or distinctive; rather, it need only exist to strengthen the inference that the defendant utilized that plan in committing the charged offense. *Id.* at 65-66.

The evidence in this case was offered to prove defendants' scheme, plan or system in performing these robberies. The evidence was relevant to show that defendants had a plan or system of robbing hair-braiding salons. The other armed robberies had specific similarities to the instant armed robbery, including that the robbers targeted hair braiding salons in the Detroit area; one of the robbers was armed with a gun while the other robber searched the salons for money; the robbers made certain demands of the employees and customers and threatened to kill them if they did not give them money; the robbers confiscated money from the victims' purses and took or attempted to take their jewelry; and the robbers cut the telephone lines and made it impossible to use any phones. Additionally, all three robberies occurred within a short period of time on the same day. The evidence was relevant to show the improbability that the robbery of the salon in the instant case was an isolated incident and to support an inference that defendants' actions were part of a larger robbery scheme.

Furthermore, the trial court did not err in determining that the probative value of this evidence was not outweighed by the danger of undue prejudice. MRE 403. In the instant case, the evidence of other acts had substantial probative value in showing a scheme, plan or system for committing the charged armed robbery. Moreover, the prejudicial effect of this evidence was reduced by a limiting instruction to the jury. We conclude that the trial court did not err in denying defendants' motion to suppress this evidence.

Defendant Bailey claims that the trial court erred in denying his motion for a directed verdict as to one of the counts of armed robbery and that the evidence was insufficient to support his conviction of that count. We disagree.

"'When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor,

viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.'" *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002), quoting *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Although one of the victims, Binta Barry, did not testify at trial because she was unavailable, the prosecution presented sufficient evidence that she was robbed through the testimony of the other victim. The elements of armed robbery are "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004) (citations omitted). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Only the second element is at issue.

Defendant Bailey concedes that "[t]here was some confusing unobjected-to hearsay testimony from [the other victim] about Barry's property." He argues that "[t]his unclear hearsay testimony did not establish beyond a reasonable doubt that there was a felonious taking of Benita Barry's money from her person or in her presence." We disagree. Although the other victim testified that she did not see defendant Bailey take money from Barry's purse, and did not look in Barry's purse before or after the robbery, she did testify that defendant Bailey threatened to kill Barry and forced Barry to accompany defendant Webb to the back of the salon to get the money, that she herself saw that both purses had been moved and items had been placed on a table, and that she heard Barry tell the witness' brother that "she don't got the money she just have." Based on this testimony, a rational fact-finder could have found that the essential elements of armed robbery of Barry were proven beyond a reasonable doubt, and the trial court did not err in denying the motion for a directed verdict.

Defendant Bailey also asserts that he was denied his constitutional right to confront Barry. However, he failed to object on this basis at trial. Moreover, he did not request that Barry be produced, and did not request a jury instruction on the prosecutor's duty in this regard. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 764-765. We find no plain error. Barry's hearsay statement regarding her money was not testimonial in nature. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Further, it is likely that had there been an objection, the prosecution would have established an excited utterance under MRE 803(2).

Defendant Bailey next argues that he was deprived of his right to a jury trial when the trial court erroneously instructed the jurors regarding their scope of authority to act as jurors. When a party specifically approves an action by the trial court, the party waives its right to appeal the issue. *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). Apart from objecting to the trial court's jury instruction on fleeing from the crime scene, defendant Bailey's counsel expressed satisfaction with the trial court's jury instructions. Therefore, this issue is waived. Nevertheless, we note that the trial court properly instructed the jury on the applicable law and on its role in reaching a verdict, including its duty to determine the credibility of witnesses and to weigh the evidence.

Finally, defendant Bailey challenges the sentences that the trial court imposed. However, a defendant waives appellate review of right of a sentence, whether it deviates from or is within the guidelines, where he understandingly and voluntarily enters into a plea agreement to accept that sentence. MCR 6.302; *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). Defendant Bailey was sentenced in accordance with a valid plea agreement relating to two other cases of armed robbery pending against him. In exchange for pleading guilty to one count of armed robbery in another case, the other pending counts of armed robbery against defendant Bailey were dismissed and he received sentencing concessions that affected his sentence in the instant case. Because the sentences imposed in the instant case were part of a plea agreement into which defendant Bailey entered freely, knowingly and voluntarily, he is precluded from now asserting error concerning those sentences.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder