

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LADARIUS KESHOUE GILBERT,

Defendant-Appellant.

UNPUBLISHED

June 17, 2008

No. 277879

Macomb Circuit Court

LC No. 2006-002154-FC

Before: Whitbeck, P.J., and O’Connell and Kelly, JJ.

O’CONNELL, J. (*concurring*).

I concur with the majority opinion. I write separately to address Hillary Juracek’s lineup identification of the defendant. Because I conclude that Juracek’s lineup identification of the defendant contained sufficient indicia of reliability, I would affirm the trial court’s decision admitting her identification of the defendant.

To establish that an identification procedure denied him due process, a defendant must show that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of a prior description, the witness’ level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. [*People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).]

Because Juracek testified that she saw defendant at the district court in a jail uniform on April 20, 2006, defendant claims that this pre-identification encounter was unduly suggestive, thereby tainting any subsequent identification of the defendant. I disagree. I note that Juracek also testified that she only saw him for a few seconds and that he was with three or four other people at the time. She also testified that she based her line-up identification on his eyes and eyebrow area and her memory of the event on April 10, 2006. During the robbery, the man she identified as defendant spoke to her, but she was unable to understand him and so she bent closer and “got a better look.” Although there was nothing distinctive about the eyes and eyebrows, she indicated that she “just remembered it.” It is reasonable for people to recognize certain features

of other individuals without being able to articulate any specific distinctive quality to those features.

Additionally, at the lineup, it was Juracek who requested that the individuals cover their faces as the perpetrators of the crime had done, and only after that time did she identify defendant. The lineup occurred on May 16, which is just slightly over a month after the incident. Given that our Supreme Court has indicated that 26 days is a “relatively short period between the [event] and the identification,” such that “the crime was still fresh in the victim’s mind,” *People v Gray*, 457 Mich 107, 120; 577 NW2d 92 (1998), the 36 days in the present case should not weigh against finding an independent basis. “Under the totality of the circumstances, defendant has failed to show that there was a substantial likelihood of misidentification.” *Colon, supra* at 305. I conclude that the witness identification was not based on any suggestiveness surrounding the pre-identification encounter, but had a sufficiently independent basis so that the lineup was not tainted.

I would find no error in the admission of the witness’ identification testimony.

/s/ Peter D. O’Connell