STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2010
v	No. 289376 Wayne Circuit Court
BRANDON D. CROSBY, Defendant-Appellant.	LC No. 08-006797

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carjacking, MCL 750.529a, and larceny from the person, MCL 750.357. We affirm.[1]

On appeal, defendant argues that Jarga Ward's out-of-court identification of him was tainted and improperly admitted. We disagree. We will not reverse a trial court's decision to admit identification evidence unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*.

"The fairness of the identification procedure must be evaluated in the light of the totality of the circumstances." *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 302. Factors to consider include the "opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id*. at 306 (citation omitted).

[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Here, the identification procedure defendant complains of occurred when Ward, Theresa McCaa, and Tiffany McNelly, the victims, went to the police station about 90 minutes after the incident to identify the perpetuators. All three began looking through photo books of possible suspects. Each of them was seated at a table with their own stack of books to view. Ward was not able to identify anyone in her photo books and after she finished looking through her books, she went over to McCaa and they looked in a book together. They both saw a photograph of defendant. Ward testified at trial that "[w]e both identified him." We fail to see how this identification procedure was unduly suggestive.

Further, even assuming that McCaa showed Ward the photograph of defendant, which is unsupported by the record, we would still conclude that the identification procedure was not impermissibly suggestive given the totality of the circumstances. Ward's trial testimony indicated that she had ample opportunity to observe defendant during the incident, which lasted five to seven minutes. During this time, Ward observed a group of men approach their vehicle in a Dodge Durango. Both McNelly and Ward testified that defendant was the only person in the Durango not wearing a face covering. The men threatened the victims with guns, at which point Ward and the others ran from the vehicle. Although Ward was fleeing the car and calling 911 from her cell-phone during the incident, she testified that she watched defendant walk from the Durango to the victims' vehicle, get into the driver's seat, and drive away. About 90 minutes after the incident, Ward identified defendant in the photo book. Moreover, McNelly also identified defendant in the courtroom as the person who took the car. Given the foregoing, admission of Ward's identification was not clearly erroneous.

Lastly, because counsel is not required to advocate for a meritless position, defendant has failed to show that defense counsel was ineffective for failing to move to suppress Ward's identification. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck