

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE RICHARD POSEY,

Defendant-Appellant.

UNPUBLISHED

January 14, 2010

No. 289820

Wayne Circuit Court

LC No. 08-000833-FC

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

PER CURIAM.

A jury convicted defendant, Willie Posey, of three counts of armed robbery.¹ The trial court sentenced Posey to three concurrent prison terms of 126 to 240 months each. He appeals as of right. We affirm. We decide this appeal without oral argument.²

I. Basic Facts And Procedural History

On the evening of January 1, 2008, Jasmine Banks, Tiara Davis, and Leslie Sanford were robbed outside of their grandmother's Detroit home. All three victims identified Posey as one of two robbers. The defense theory was misidentification based on differences between the victims' descriptions to the police on the night of the incident and Posey's appearance in court.

Banks and Davis, who were attending a gathering at the home, left the house to walk to a car parked in front of the house. Davis noticed two men walking nearby. As Banks and Davis continued walking toward the car, Banks heard someone say, "Don't move." Banks looked directly at the man's face and saw Posey pointing an object that appeared to be a gun at her face. Posey demanded money, but Banks said she had no money, so Posey then snatched her purse. When Banks ran around the side of the car, a white man, later identified as Neil Bilbrey, blocked her, demanded money, and directed her to be quiet. Banks again stated that she did not have any money and threw her coat at Bilbrey to prove she had nothing.

¹ MCL 750.529.

² MCR 7.214(E).

Banks and Davis explained that in the meantime, Posey had approached Davis on the other side of the car, pointed the object at her face, and demanded money. When Davis responded that she had no money, Posey also snatched her purse. Unbeknownst to Banks and Davis, Sanford, Davis's brother, was sitting in the front seat of the car talking on a cell phone. Sanford indicated that when he realized a robbery was taking place, he opened the car door, but before he could get out, Posey struck him in his mouth with an object that was either "a play gun or a real gun." Sanford returned a punch and, in turn, Posey pointed the gun at him, demanded money, and took his cell phone from his hand. By this time, other people had come out onto the porch, observed what was happening, went back in the house, and returned with several others. Posey and Bilbrey fled, but the group gave chase, eventually catching Bilbrey.

The witnesses provided descriptions of Posey to the police. Upon Bilbrey's arrest, he claimed that Posey forced him to participate in the robbery and provided information about Posey's location. The police went to a vacant house where they observed Bilbrey's girlfriend, Ashley Kurtz, and a black man outside the house. After confirming that Kurtz was not being held against her will, the officers entered the house where they found and arrested Posey because he matched the description of the robber.

The next day, Banks and Davis identified Posey as the robber in a corporal lineup. Michael Blake, one of the family members who chased Posey following the robbery, could not identify anyone in the lineup. Sanford did not attend a lineup. At trial, Banks, Davis, and Sanford identified Posey and indicated that they were certain about their identification. Banks, Davis, Sanford, and a police officer explained that since his arrest on the night of the incident, Posey appeared to have gained weight, gained muscle or "beefed up," changed his hair, and his skin appeared lighter.

II. Mistrial

A. Standard Of Review

Posey argues that the trial court abused its discretion by denying his motion for a mistrial based on an improper character reference and an unduly suggestive identification procedure. This Court reviews for an abuse of discretion a trial court's ruling on a motion for a mistrial.³ "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."⁴

B. "Narcotics User" Reference

During the prosecutor's direct examination of Sergeant Cregg Hughes, the following exchange occurred in which Sergeant Hughes referred to Posey as a "narcotics user":

³ *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

⁴ *Id.* (internal citations omitted).

Q. And how soon after—let’s talk specifically about the defendant in this case today. How soon after Mr. Posey was brought in did you first see him?

A. Mr. Posey I don’t believe that I saw until the next day on January 2nd sometime in the early afternoon.

Q. And when you saw him, how did he appear?

A. Well the first thing that came to my mind was *a narcotics user* when I saw him.

Defense counsel objected, arguing improper and prejudicial character evidence, and the trial court sustained the objection. Defense counsel then moved for a mistrial, and the trial court heard arguments outside the presence of the jury. Defense counsel argued that a mistrial was required because the response was designed to improperly taint Posey. The prosecutor responded that she was attempting to lay a foundation for the introduction of the booking photograph, which had already been discussed, and that the inappropriate response could be cured with a jury instruction. The trial court admonished Sergeant Hughes for making the inappropriate comment and cautioned him about his future testimony. After the jury returned, the trial court gave the following instruction:

Members of the jury, I’m instructing you to disregard Sergeant Hughes’ unsolicited, unwarranted comments about Mr. Posey appearing to be some kind of drug user. He knows that was wrong to say and I think he is just trying to prejudice you.

Posey correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant.⁵ However, “an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.”⁶ Here, the response was an unsolicited answer to a properly asked question intended to elicit a response about how Posey physically looked on the date after his arrest. Indeed, the main issue in this case was identification and, during defense counsel’s cross-examination of the eyewitnesses, defense counsel elicited that Posey’s appearance at trial differed from descriptions of him on the night of the robbery. It is reasonable to expect that the prosecutor was anticipating an answer similar to the one Sergeant Hughes gave when the question was again asked after the trial court’s ruling:

Q. How did Mr. Posey look? What did he look like when you first saw him the day after his arrest?

A. He was skinny. He was dirty. He was unkempt. He was—his hair was kind of like that but it was more out of control.

⁵ See MRE 404(b)(1).

⁶ *Haywood*, 209 Mich App at 228.

* * *

Q. And is that photograph, People's Exhibit Number 1, a fair and accurate description of how Mr. Posey appeared when you saw him the day after his arrest?

A. It was.

Moreover, Posey's right to a fair trial was protected by the trial court's instruction to the jury to disregard the remark. In its final instructions, the trial court further instructed the jury that it was required to follow the court's instructions and that it was to decide the case based only on the properly admitted evidence. "Jurors are presumed to follow their instructions[.]"⁷

C. Suggestive Identification Procedure

On the first day of trial, Banks and Davis saw a booking photograph of Posey, which had an indication on it that Kurtz had identified Posey as the person who planned the robbery. Kurtz did not testify at trial. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process."⁸ An improper suggestion may arise when a witness is shown only one person because the witness is tempted to presume that the photograph is of the assailant.⁹

Contrary to defendant's reliance on *People v Gray*, this case did not involve a standard photographic identification where a witness was shown a photograph to determine if she could identify the suspect. Rather, at the time of trial, Banks and Davis had already identified Posey in a corporal lineup and at the preliminary examination. Michael Blake, who also saw Posey's booking photograph on the first day of trial, testified that he could not identify Posey at a lineup on the day after the robbery, but was able to identify him at trial. In addressing this inconsistency, Blake explained that his cousin had shown him a photograph of Posey that was included in some paperwork, and he assumed Posey was the robber, but he was not sure.

Defense counsel sought a mistrial based on the victims observing Posey's photograph before testifying and identifying him as the robber. After further discussion and testimony, it was brought out that the prosecutor had given paperwork to Davis that inadvertently included Posey's booking photograph. Davis kept the photograph and showed it to Banks and Blake. Davis denied that her identification of Posey at trial was based on the photograph. In denying the motion for a mistrial, the trial court found an independent basis for the in-court identifications of Banks and Davis because both had identified Posey at a lineup immediately and had seen him at the preliminary examination and at other court hearings.

⁷ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

⁸ *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

⁹ *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

The record supports the trial court's finding that there was an independent basis for the in-court identifications of Banks and Davis. The following factors are considered in determining whether an independent basis exists for the admission of an in-court identification:

(1) [P]rior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant.^[10]

Here, Banks and Davis did not have a prior relationship with Posey, but each testified that she was certain of her identification of him as the robber. Banks testified that the robbery occurred over the course of five to seven minutes, and both witnesses testified that they had a good opportunity to observe Posey during the incident. Posey was only a short distance from each victim when he pointed a gun, demanded money, and snatched the purses from their hands. Banks explained that Posey was "right on the side of [her]" and she "looked directly at his face." Davis explained that she got a "good look at" Posey and "looked him dead in his eyes." The area was sufficiently lit by a porch light and streetlight.

Thus, the witnesses had a substantial opportunity to view Posey. In addition, Banks and Davis had both identified Posey in a corporal lineup the day after the robbery. Banks identified Posey within "30 seconds," and Davis identified him immediately. Davis explained that she could identify Posey "as soon as [she] saw him" because she "could not forget that face" and "could not get the picture of him out of her mind." Banks explained that she identified Posey because she remembered his face, hair, and the jacket he was wearing.

A few weeks later, Banks and Davis again both identified Posey at the preliminary examination and testified that they were sure about the identification. Davis noted that at the time of the preliminary examination, Posey was still "skinnier" and had not yet gained weight. Neither Banks nor Davis had made incorrect identifications, or identified anyone other than Posey. Although their descriptions differed somewhat from how Posey appeared at the time of trial, there was testimony that their descriptions were similar to Posey's appearance when he was arrested on the night of the robbery.

Although the victims did not provide any special identifying characteristics of Posey, there was no evidence that he had any unusual characteristics about his appearance that the victims should have noticed, such as visible birthmarks, scars, or tattoos. It is not necessary that all factors be given equal weight,¹¹ and, considering the victims' substantial opportunity to

¹⁰ *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).

¹¹ *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977).

observe Posey and the totality of the circumstances, the trial court did not clearly err in finding that there was an independent basis for their identifications. For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

III. Ineffective Assistance of Counsel

A. Standard Of Review

Posey argues that defense counsel was ineffective for failing to request the appointment of an expert on eyewitness identification. Because Posey failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record.¹²

B. Legal Standards

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise.¹³ To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error.¹⁴

C. Applying The Standards

We conclude that Posey has failed to demonstrate that defense counsel's decision not to request an identification expert was objectively unreasonable, or that there is a reasonable probability that the outcome would have been different had an expert witness been requested. MCL 775.15 provides a trial court with discretion to appoint an expert witness for an indigent defendant upon request.¹⁵ The statute requires a defendant to show that an expert's testimony is required to enable the defendant to "safely proceed to a trial." To be entitled to the appointment of an expert witness, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert.¹⁶ It is not enough for the defendant to show a mere possibility of assistance from the requested expert.¹⁷ Without an indication that expert testimony would likely

¹² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

¹³ *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

¹⁴ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

¹⁵ *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

¹⁶ *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

¹⁷ *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003).

benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness.¹⁸

Here, Posey has failed to make the necessary showing that an expert was necessary for him to safely proceed to trial. Through cross-examination and other evidence, defense counsel was able to challenge the strength and reliability of the identification testimony and elicit apparent discrepancies and arguable bases for questioning the accuracy of the identifications.

We note that during voir dire, defense counsel emphasized that identification was the central issue at trial. During opening argument, defense counsel highlighted some of the problems with the victims' identifications of Posey as the robber. Throughout trial, defense counsel elicited several weaknesses in the eyewitnesses' identifications, including the differences between their descriptions of the robber on the night of the incident and how Posey actually appeared at trial, as well as the fact that the incident was brief and occurred in the dark with poor lighting. Defense counsel elicited Banks's admission that, after the robbery, she was uncertain if she could identify the assailant if she saw him again and questioned her about being more focused on the gun than on the perpetrator's face.

Further, defense counsel questioned the victims about whether the stress of having a gun pointed in their faces made it difficult for them to accurately identify the assailant. Defense counsel cross-examined Banks and Davis about whether they identified Posey at the lineup based on what he wore (a black jacket) instead of his actual physical appearance. He also elicited that Sanford did not attend a lineup. In addition, defense counsel cross-examined the officer who conducted the lineup, eliciting that there was only a written report but no photographic evidence of the physical features of the lineup participants.

Also, counsel highlighted issues with Davis's recall through questioning about her confusion as to whether the same prosecutor was at the preliminary examination, and issues with Sanford's recall by questioning him about how many females were outside during the robbery. In closing argument, defense counsel summarized the testimony and vigorously argued that Posey's identification was not established beyond a reasonable doubt.

Because counsel was able to challenge the reliability and accuracy of the identification evidence through means of argument, cross-examination, and other evidence, Posey has failed to show that defense counsel was ineffective for failing to request the appointment of an identification expert, or that he was prejudiced by the absence of such an expert at trial. Consequently, Posey cannot establish a claim of ineffective assistance of counsel.

Affirmed.

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

¹⁸ *Jacobsen*, 448 Mich at 641; *Carnicom*, 272 Mich App at 617.