STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JAY SANDERS,

Defendant-Appellant.

UNPUBLISHED
April 15, 2010

No. 288099
Wayne Circuit Court
LC No. 08-007464-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JAY SANDERS,

Defendant-Appellant.

No. 288100
Wayne Circuit Court
LC No. 08-006148-FC

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

In these consolidated appeals, defendant stood trial before the court on multiple charges stemming from the robberies of two Detroit area supermarkets. In Docket No. 288099 (lower court #08-007464-FC), the trial court convicted defendant of armed robbery, MCL 750.529, assault with the intent to rob while armed, MCL 750.89, being a felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In Docket No. 288100 (lower court #08-006148-FC), the trial court convicted defendant of two counts of armed robbery and one count of felony-firearm. The trial court sentenced defendant to concurrent terms of 15 to 20 years in prison for the three armed robbery convictions and the assault conviction, two to five years in prison for the felon in possession conviction, and a consecutive two-year term for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant challenges on appeal only the trial court's determination that a pretrial lineup in which defendant appeared did not qualify as unconstitutionally suggestive. This Court reviews for clear error a trial court's factual findings relating to a motion to suppress, but we review de novo the trial court's legal conclusions and its ultimate ruling on a motion to suppress. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). Where a defendant has representation by counsel at the identification procedure, he "bears the burden of showing that the lineup was impermissibly suggestive." *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

"A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *Murphy*, 282 Mich App at 584 (internal quotation omitted).

> Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. Physical differences generally relate only to the weight of an identification and not to its admissibility. [*Hornsby*, 251 Mich App at 466.]

"Additionally, the fact a victim is told the attacker is in the lineup does not alone render a lineup unduly suggestive." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

With respect to defendant's complaint that the trial court in deeming the lineup not unduly suggestive improperly focused on the presence of defense counsel and counsel's lack of any objection to the identification procedure, defendant correctly observes that the trial court considered the presence of counsel at the lineups as a notable factor in its analysis. However, our review of the record reveals that the trial court had awareness that the totality of the circumstances governed the constitutionality of the identifications and expressly considered other circumstances relevant to this case, including the heights, weights, and ages of the lineup participants. Because the record makes apparent that the trial court's decision did not rest entirely on whether defendant had representation by counsel at the lineup, we reject defendant's suggestion that the trial court applied an incorrect legal standard.

Defendant maintains that because the police placed no other men with braided hair in the lineup and informed the witnesses that the robbery suspect would appear in the lineup, the trial court erred in finding the lineup constitutional. However, the evidence presented at the *Wade*[1] hearing does not bear out defendant's assertion that the lineup amounted to an unduly suggestive identification procedure. The witnesses at the *Wade* hearing, Zina Abro and Diane Kinaia, worked as cashiers at the Banner Supermarket on Schaefer in Detroit, which defendant robbed during business hours on April 22, 2008 (LC No. 08-006148-FC). Abro and Kinaia estimated

[1] *Wade v United States*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

that the robbery took place over the course of between "a little more" than five minutes and 10 to 15 minutes. Both witnesses related that when they arrived at the lineup location, the police advised them that their assailant was among the six men comprising the lineup.

Abro and Kinaia agreed that the supermarket robber had worn a towel on his head, but that the towel left visible a portion of the robber's braided hair. Abro, who identified defendant from the six-man lineup within seconds, testified as follows about her recognition of defendant:

Defense counsel: Were you able to see?

* * *

His hair?

Abro: I wasn't paying attention to his hair. I mean I seen his face. He was right in front of me.

Defense counsel: Did you give a description of this individual to the police officers?

Abro: Well, they asked me how he looked like, . . . just says he's a black guy. He look like he have like a little bit big nose.

Defense counsel: Did you say anything about his hair?

Abro: Well, I remember his—really his hair wasn't showing all his hair because he had a towel on his head.

Defense counsel: You didn't tell the police officer in particular it was an individual with braids?

Abro: No, but when I seen him I remember his braids was showing a little bit from the towel, but I didn't see the whole head, no, I don't.

Defense counsel: But when you were asked in particular a description of this person did you not tell the police officers that this individual has braids?

Abro: I think I did, yeah.

* * *

Defense counsel: When—you say it didn't take you but a few seconds to point out who did it?

Abro: I knew him right away.

Defense counsel: The other individuals who were lined up next to Mr. Sanders here, majority of them had like short haircuts?

Abro: Honestly, I didn't look at the—

* * *

Honestly, when I walked in right away he caught my eyes. I remember him right away, why would I look at the other guys?

Defense counsel: You didn't bother looking at the rest of them?

Abro: No. No. He caught my eyes in the same second. I remember him right away. I know him.

Defense counsel: In particular Mr. Sanders' braids caught—

Abro: I don't look at his braids right away. I remember his face. How can I forget it, someone have a gun in front of my face?

* * *

Defense counsel: Your attention, you said you were [s]cared—saw a gun more than his face, right?

Abro: When I'm looking his attention, he gonna kill me or not? I was gonna die. I was scared, yeah, of course I look at him. I want to see what he gonna do. He gonna kill me? He gonna let me go? I don't know.

Kinaia recounted that she had looked at defendant "the first time when I was giving him the money." With respect to Kinaia's ability to identify defendant at the lineup, she elaborated as follows:

Defense counsel: Okay. And when you viewed this line-up of these six individuals, how long did it take you to point Mr. Sanders out?

Kinaia: I pointed him out right away.

Defense counsel: So he immediately caught your eye?

Kinaia: Right.

* * *

Prosecutor: What did you recognize about Mr. Sanders, was there anything in particular about him?

Kinaia: His nose and his braids.

Prosecutor: His nose and his braids. What about his nose?

> *Kinaia*: Well, just the way—just right when I saw him right away I knew it was him and then his braids.

The only other evidence admitted at the *Wade* hearing consisted of "showup & photo identification record[s]" documenting Abro's and Kinaia's attendance at April 30, 2008 lineups. According to the documentation, the lineups attended by both Abro and Kinaia included six men of the following ages and general physical descriptions: Frederick Simon, age 19, 5'9" tall, 200 pounds; Johnathan Wade, age 17, 5'8" tall, 155 pounds; John Lipscomb, age 24, 5'9" tall, 180 pounds; Timothy Sanders, age 26, 5'9" tall, 165 pounds; Jamar Taylor, age 19, 5'10" tall, 175 pounds; and Patrick Bouzer, age 17, 5'8" tall, 156 pounds. In the prosecutor's closing argument, he proposed that "Officer [Terence] Sims, the officer in charge who was supervising officer at these line-ups . . . would testify that all of the men of the line-up were of African American [race], of similar complexion, of similar height" and weight; defense counsel conceded in reply that "there are some similarities as far as the race and the weight and the height," but emphasized defendant's distinctive braids.[2]

The trial court explained as follows that it viewed the lineup as constitutional:

> There's only just so much control over what you have as to what they look like on the day the incident occurred. The issue is was it unduly suggestive on the day that the identification was made at the lineup and I have to tell you you have failed in your burden of persuasion that this was unduly suggestive because there was an attorney there, and the attorney if the attorney thought that they wanted someone else, you know, with braids or they thought that these people looked, you know, he's the only one who looked different, look at the ages, they're all within the ballpark and the height. We got five nine, five eight, five nine, five nine, five ten, five eight, they're all very similar height and their weights are not bad, you know, they're not. They're not overly suggestive by weight either.
>
> So what you have is a constitutional line-up, which of course, is subject to cross-examination as to the weight. The fact that Ms. Kinaia said that she pointed out number four but not 100 percent, well, that's cross-examination at trial for identification, along with the identification jury instruction.

We accept for purposes of our analysis defendant's contention that the prelineup announcements to Abro and Kinaia that the robber would appear in the lineup, together with defendant's status as the only lineup participant with braids, may have given rise to some level of suggestion in their lineup identifications of defendant. But the totality of the relevant circumstances convinces us that defendant's lineups passed constitutional muster.

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[2] Defendant declared in the course of a discourse about his waiver of a jury trial that took place on the same day as the *Wade* hearing that he had a different complexion than the other lineup participants. However, defendant has failed to supply this Court with photographs or any other evidence tending to substantiate his different complexion suggestion, thus abandoning it on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

> When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification. Some of the relevant circumstances were outlined in *Neil v Biggers*, [409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972),]:
>
> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification 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." [*People v Kurylczyk*, 443 Mich 289, 306 (opinion by Griffin, J.), 318 (opinion by Boyle, J., concurring in part and dissenting in part); 505 NW2d 528 (1993).]

Here, both Abro and Kinaia had an opportunity to view defendant for at least several minutes during the robbery of a supermarket that took place in business hours, and both saw defendant, whose face was uncovered, from a short distance away; Abro related at the *Wade* hearing that she had focused her attention directly on defendant because she wondered whether he intended to shoot her or not, and although Kinaia conceded that she had experienced some pain after defendant struck her shoulder with his gun and fear when he pointed the gun at her, her *Wade* hearing testimony reflected that she likewise had focused on defendant's face when handing him money; the *Wade* hearing transcript shows that Abro previously and consistently had described to the police that the robber wore braided hair, but contains no mention of any prior identifications or descriptions of the robber by Kinaia; Abro averred that she immediately and positively recognized defendant at the April 30, 2008 lineup, which occurred only eight days after the robbery, and although Kinaia conditioned her April 30, 2008 identification as having been "not 100 percent," she selected defendant within seconds[3] and at no point hinted toward anyone else as having committed the robbery. Furthermore, as the trial court expressed on the record, the six lineup participants, apart from their hairstyles, were of substantially similar ages and physical builds. The lone physical discrepancy among lineup participants emphasized by defendant, his braided hair, would not ordinarily constitute a basis for a finding of undue suggestiveness,[4] and does not amount to an unduly suggestive discrepancy here given the *Wade* hearing testimony by Abro that she recognized first and foremost defendant's face, and Kinaia's testimony that she primarily recognized defendant's face and nose, then his braids secondarily.

[3] The documentation of Kinaia's lineup attendance states that the entire identification procedure occurred between 1:59 p.m. and 2:00 p.m.

[4] The Supreme Court in *Kurylczyk*, 443 Mich at 312, cited with approval two cases of this Court in which challenged lineups were found not impermissibly suggestive: one where "the defendant was the only participant with a visibly scarred face," citing *People v Horton*, 98 Mich App 62; 296 NW2d 184 (1980), and another where "the defendant was the only participant with both a mustache and a goatee," citing *People v Hughes*, 24 Mich App 223; 180 NW2d 66 (1970).

In conclusion, "[n]othing in the record demonstrates a clear error by the trial court when it concluded that the corporeal lineup was not impermissibly suggestive to these [two] witnesses." *Kurylczyk*, 443 Mich at 314 (opinion by Griffin, J.).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder