

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HARRIS NICHOLSON,

Defendant-Appellant.

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UNPUBLISHED

July 27, 2010

No. 291851

Wayne Circuit Court

LC No. 08-017968-01-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right following his bench trial convictions for armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to six to 15 years' imprisonment for the armed robbery and carjacking convictions, to be served concurrently with one another and consecutive to the mandatory two-year sentence for felony-firearm. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the identification procedure in this case was unduly suggestive. A trial court's decision to admit identification evidence generally will not be reversed unless it is clearly erroneous. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

The victim testified that he was rear-ended when he slowed down for a traffic light. The victim pulled over to the side of the road. The Dodge Durango that had rear-ended him pulled over in front of him. There appeared to be three occupants in the Durango. The victim got out of his vehicle, which was still running. Two men from the Durango ran up to him. One of the men carried a black semi-automatic gun. The individual with the gun told the victim to "give me what you got" and the other individual told the victim they were taking the car. The man with the gun was standing approximately three feet away from the victim. The victim gave them the money he had in his pocket and ran. The man with the gun was wearing all black and had on a hoodie. Still, the victim could see his face clearly. The victim believed the whole experience lasted ten seconds.

The victim viewed photo arrays the day after the carjacking. Defendant was not in custody at the time. The victim could not make a positive identification but indicated that two of

the individuals looked like the perpetrator. The victim was asked to come back to the police station a few days later to view a live lineup. An attorney was present and did not object to the composition of the lineup. There was conflicting evidence regarding whether the officers told the victim that the suspect was in the lineup. The officers told the victim that the individuals could speak and all seven individuals were asked to step forward and speak. The victim then narrowed it down to two people. Those two individuals stepped forward again and said something. The victim then made a positive identification of defendant, noting the tattoo on his neck. The victim admitted that he did not tell the officers about the tattoo when he was initially interviewed. The victim also admitted that he may have told police that the robber was five eight or five ten, but the robber was actually shorter.

Even if the victim was advised that the suspect was in the lineup, such information would not necessarily render the lineup unduly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Defendant suggests that the victim was unduly influenced by repeated exposure to defendant's image. 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. *People v Murphy (On Remand)*, 282 Mich 571, 584; 766 NW2d 303 (2009). We find that the procedure used in this case was not impermissibly suggestive.

Defense counsel does not argue that there were any discrepancies between defendant's physical appearance and the physical appearance of the other lineup participants. Rather, he focuses on the repeated exposure to defendant's image and the discrepancies between the victim's description of his assailant with defendant's actual physical characteristics. The victim told police that the robber was five foot eight or ten inches tall and weighed approximately 160 pounds. Defendant was actually only five feet three or four inches tall and weighed 119 pounds.

The victim had a good opportunity to view the perpetrators, who were only three feet away from him. The man with the gun was wearing a hoodie, but the victim could still see his features. The robber was shorter than the victim, who was approximately five foot ten. The incident lasted approximately ten seconds. The victim was 90 percent sure that defendant was the perpetrator after viewing him in a lineup and hearing him speak. He positively identified defendant in court as well. There is simply nothing in the record to support defendant's contention that the identification procedure was impermissibly suggestive.

Defendant next argues that the evidence was insufficient to support his convictions. Alternatively, defendant argues that the verdict was against the great weight of the evidence. We disagree.

There was no dispute that the victim was robbed and carjacked. The only issue at trial was whether defendant was the perpetrator. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt and that defendant was the perpetrator. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Whether defendant was the victim's assailant was a matter of credibility and weight, which was left for the trier of fact to decide. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *Wolfe*, 440 Mich at 526. Similarly, defendant has failed to show that the evidence preponderates heavily against the verdict or that

the victim's testimony was impeached to such an extent that it was deprived of all probative value such that the judge could not believe it. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). The case hinged on the identity of the robber. The victim clearly and unequivocally identified defendant as his assailant. Although there were discrepancies in the description the victim gave to police, the victim did not waiver in his belief that defendant was the perpetrator.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

/s/ Cynthia Diane Stephens