

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN DWAYNE PATWIN,

Defendant-Appellant.

UNPUBLISHED

January 19, 2012

No. 300013

Wayne Circuit Court

LC No. 10-002488-FC

Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his bench trial convictions for felonious assault, MCL 750.82, armed robbery, MCL 750.529, felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm while committing a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to one and a half to four years' imprisonment for the felonious assault conviction, 12 to 25 years' imprisonment for the armed robbery conviction, two to five years' imprisonment for the felon in possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

At approximately 5:30 or 6:00 p.m. on January 7, 2010, Samoil Diaconescu drove his Ford F-150 to Prevost Street in Detroit, Michigan. He was with his employee, Cornelius Ware, and Ware's friend, Matthew Fernandez. Diaconescu buys and sells cell phones for a living. He received a tip from "Shana" that a man named L.J. had phones to sell and would meet Diaconescu on Prevost. Diaconescu pulled up just down the street from the address that Shana provided. The men waited in the truck for approximately five to ten minutes for L.J. They called Shana, who told them to "wait two more minutes." Two men approached the truck on foot. Ware and Fernandez asked the men if one of them was named L.J. The men did not answer and instead started shooting at the truck.

Diaconescu testified that defendant was one of the men who approached the car and began shooting. He saw defendant holding what he thought was a revolver. After defendant fired the second shot, Diaconescu jumped out of the truck through the driver's side door and ran between two houses. Defendant chased Diaconescu and continued shooting at him five or six more times. Diaconescu tripped and fell. Diaconescu took everything out of his pockets and put

it on the ground. He had about \$100. According to Diaconescu, he was about a foot and a half to two feet away from defendant. He had a clear view of defendant's face. Defendant asked him "[w]here's all the money." Diaconescu told him that everything was in the truck. Defendant picked Diaconescu's money off the ground and went back to the truck. Diaconescu ran to a local store and asked the employees to call the police. He gave a statement to the police but did not give them Shana's number because he claimed that he did not have it and he did not want to get her involved. Diaconescu identified defendant as one of the shooters in court.

Fernandez testified that he fell on the floor in the backseat of the truck when the first shots were fired. When he looked up there was no one in the car, so he got in the front seat and attempted to "pull off." A man "snatched" him out of the truck, aimed a gun at him and made him empty his pockets. He gave the man his cell phone. Another man told the first man, "Don't shoot him." The two men got in Diaconescu's truck and Fernandez ran to a nearby store. Fernandez described the men that fired the shots as a "light-skinned short guy" and a "dark-skinned tall guy" with a five o'clock shadow or some facial hair. In court, Fernandez was unable to identify defendant as the shooter.

Ware testified that he was in the passenger seat of Diaconescu's truck and he was on the phone with Shana when the shooting began. He described the shooters as a "light-skinned man with a short haircut" and a "tall, dark-skinned man" wearing a hood. He testified that both men had handguns and were shooting. Ware stated that he was shot in his right hand as he was attempting to block his head with his hand and get out of the car. Ware ran to a nearby restaurant and was eventually taken to the hospital. In court, Ware was also unable to identify defendant as the shooter.

Investigator Emerson, the officer-in-charge on the case, testified that he did not take pictures or impound Diaconescu's truck, attempt to recover any bullets from the truck, dust the truck for fingerprints, get Diaconescu's phone records or make any other attempts to find Shana. Investigator Emerson testified that, in his experience, none of these actions would have furthered the investigation.

The trial judge found defendant guilty of felonious assault of Ware, armed robbery of Diaconescu, felon in possession and felony-firearm. Defendant was sentenced as set forth above. He now appeals as of right.

II. LINE-UP

Defendant first argues that the trial court erred in refusing to suppress Diaconescu's in-court identification of defendant, where the in-court identification was based upon the same line-up identification that the trial judge determined was unduly suggestive for both Fernandez and Ware and there was no independent basis to support the in-court identification. We disagree. Defendant failed to preserve the issue for appellate review because he did not move to suppress the identification testimony; as such, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Under that standard, defendant must show: (1) that an error occurred, (2) that the error was plain, and (3) that the error affected substantial rights. *Id.* at 763. The third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.*

On January 13, 2010, Officer Todd Eby conducted a live lineup. The lineup included five men. There was an attorney present. Officer Eby administered the lineup. He called each of the three complainants in to identify the suspect, individually. Another officer sequestered the other two complainants. Officer Eby testified that he took a picture of the lineup. He had to stagger the men in the lineup because his camera did not have a wide-angle lens to capture the entire lineup, with the men standing shoulder to shoulder. He stated that the men did not appear in the same order in the picture as they did in the actual lineup.

Officer Eby reviewed Diaconescu's, Fernandez's and Ware's statements prior to setting up the lineup. Ware described the suspect as a 22 year old, slim, dark-complexioned male, about 6 foot 3 inches, 160 to 170 pounds, with a low cut beard. Officer Eby testified that all the men in the lineup had facial hair and three of them had beards. Fernandez testified that there were two men with beards. Diaconescu described defendant as a "black male, 20 to 22, dark complexion, six foot to six two, 200 pounds. Thin, full beard like me, armed with a handgun." Diaconescu, Fernandez and Ware identified defendant as one of the men that shot at and robbed them. All three also indicated on the identification sheets that defendant shot at them.

The trial court described the lineup as follows:

[T]he person in the front bottom left – or front left area has a very light, thin mustache. I can't tell because of the graininess of the picture whether he might have some chin hair or not. The person in the rear – on the far left of the photograph, doesn't appear to have any facial hair although there might be the beginnings of a mustache. The person in the right front of the picture has much shaggier head hair than any of the other persons here and has a – it looks like a growth underneath his chin and underneath the cheek area, but not completely covering the face – and a little bit heavier moustache than the person to his right in the front. The person in the right rear appears to have a slight growth of chin hair just at the base of the chin. I can't – again, I can't tell whether there's a moustache forming there. The Defendant who is in the center is the only person with facial hair throughout. There's a patch on the front of his chin on a heavy to light beard from the – covering the bottom portion of his face, the sides of his face and a moustache that doesn't appear to quite touch the beard. The two people in the front - much was made that the descriptions were of one darker complexioned and one lighter complexioned person. The two people in the front certainly are much – or appear to be because of lighting, much lighter complexioned than the Defendant. While the two in the back appear to be somewhat darker complexioned – not as dark complexioned as the Defendant.

The trial judge made the following findings about the live lineup: (1) there were five men in the lineup; (2) the complainants did not communicate with one another during the live lineup procedure; (3) the positioning of defendant in the lineup photograph as opposed to the actual lineup was not significant; (4) the lineup was "enough suggestive" that Fernandez could pick defendant out during the lineup but would "not be able to [identify defendant] when he s[aw] him live"; (5) Ware "could have mistakenly identified" defendant "given all of the conditions and the discrepancies in the lineup"; (6) the lineup was "not unduly suggestive [so as to] throw it

out entirely; and (7) “the lineup was not so suggestive as to impermissibly taint [Diaconescu’s] identification.”

Defendant must show that, given all the circumstances, “the pretrial identification procedure was so suggestive . . . that it led to a substantial likelihood of misidentification.” *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). “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.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Furthermore, physical differences between the defendant and the lineup participants go to the weight of the evidence not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

In-court identifications by the same witness that was subject to the unduly suggestive lineup may still be allowed if there is an untainted, independent basis for the identification. *Kurylczyk*, 443 Mich at 302. Factors that can establish an independent basis include: prior knowledge of the defendant, opportunity for observation during the crime (including considerations such as length of observation, lighting and other factors affecting sensory perception), accuracies and discrepancies between the pre-lineup description and the defendant’s actual description, identification of another person before the lineup, failure to identify the defendant prior to lineup, the lapse of time between the crime and the lineup and various factors relating to the physical and psychological state of the victim. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

We find that the lineup was not so suggestive that it led to a substantial likelihood of misidentification. Defendant contended that the lineup was suggestive because defendant had a darker complexion than the other men and was the only man with a beard. Any physical differences between defendant and the other lineup participants did not “substantially distinguish” defendant from the others. Two of the men in the lineup had lighter complexions. Defendant had the darkest complexion; however, two of the men also had dark complexions. At least three of the men, including defendant, had some facial hair. Defendant was the only one in the lineup with full facial hair. These differences would not cause a substantial likelihood of misidentification. Additionally, as the trial judge correctly pointed out, any physical discrepancies go to the weight given to the identification rather than its general admissibility. The judge gave the other two witnesses’ lineup identifications little weight because they were not credible witnesses and they did not identify defendant in court. The trial judge stated that the lineup had “discrepancies in the stature of the people,” it was “enough suggestive” that one of the other witnesses could pick out defendant in the lineup but not in court, and it was “not the purest” lineup that he had ever seen. However, the judge repeatedly stated that the lineup was not unduly or overly suggestive. Although the trial judge used the word “suggestive,” he did not imply that the lineup was unduly suggestive so as to throw it out entirely for all the witnesses. He was merely explaining why he was giving little weight to the other two witnesses’ lineup identifications.

Finally, even if the lineup was unduly suggestive, there was an independent basis for Diaconescu’s in-court identification of defendant. Although Diaconescu did not know defendant and it was dark at the time of the shooting, Diaconescu testified that he was face-to-face, a foot

and a half or two feet away, from defendant. He had a brief conversation with defendant and was able to see defendant up close for a short period of time. Defendant is correct that the witness was probably upset and the crime happened quickly. However, the other factors weigh in favor of an independent basis: the witness's description was close to the actual description of defendant, the witness did not identify anyone else as the shooter before the lineup and the witness's in-court identification was only six months after the crime. The line-up was not unduly suggestive and there was an independent basis for Diaconescu's in court identification of defendant.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecution failed to present sufficient evidence that defendant was one of the shooters. We disagree.

We review sufficiency of the evidence questions de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

Identity of the defendant is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Jackson*, 487 Mich 783, 787; 790 NW2d 340 (2010). "The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). The elements of felony-firearm are (1) defendant carried or possessed a firearm (2) defendant possessed or carried the firearm during the course of a felony or an attempted felony. *People v Duncan*, 462 Mich 47, 50; 610 NW2d 551 (2000), quoting CJI2d 11.34. Finally, regarding felon-in-possession, "a person convicted of a specified felony is prohibited from possessing a firearm until five years after he has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense." *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004), quoting MCL 750.224f(2)(a).

We find that there was sufficient evidence to convict defendant of each of the enumerated crimes. Defendant argues that the prosecution failed to prove defendant's identity beyond a reasonable doubt because the lineup was unduly suggestive, there was no independent basis to support the in-court identification and there was no physical or forensic evidence to tie defendant to the crime. However, we have just concluded that the lineup was not unduly suggestive and that there was an independent basis for the witness's in-court identification. A reasonable trier of fact could have found that the prosecution established defendant's identity because the witness was face-to-face with defendant and he later identified defendant as the man who took his money and as one of the shooters.

IV. GREAT WEIGHT OF THE EVIDENCE

Finally, defendant argues that the verdict was against the great weight of the evidence. We disagree. In reviewing a great weight of evidence claim, we determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Conflicting testimony or questions of credibility are common and issues of credibility are for the trier of fact. *Id.* 642-643.

The verdict is not against the great weight of the evidence. Defendant argues that the “trial evidence weighs more heavily in defendant’s favor” because Fernandez’ and Ware’s refusal to identify defendant in court after being shown a suggestive lineup is more credible than Diasconsu’s testimony identifying defendant after being shown the same suggestive lineup. We have already concluded that the lineup was not unduly suggestive. The trial judge stated that any physical discrepancies go to the weight given to the identification rather than its general admissibility. Defendant also neglects to take into account that Diaconescu saw defendant face-to-face during the incident. Finally, defendant states that the “evidence weighs more heavily in defendant’s favor.” However, we evaluate whether the evidence preponderates heavily against the verdict and whether there is a serious miscarriage of justice. *Lemmon*, 456 Mich 642. Diaconescu’s testimony was not patently incredible, inherently implausible or seriously impeached. The verdict was not against the great weight of the evidence.

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly