

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 19, 2013

v

JOSHUA EDWIN GATES,

Defendant-Appellant.

No. 311615
Kent Circuit Court
LC No. 11-010189-FC

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant, Joshua Edwin Gates, appeals as of right his conviction, following a jury trial, of armed robbery.¹ The trial court sentenced Gates, as a fourth-offense habitual offender,² to serve 20 to 60 years' imprisonment. Because the on-scene identification of Gates was not impermissibly suggestive, we affirm.

I. FACTS

Leonaida Garrido testified that she was working behind the register of a Family Dollar store when a man entered the store carrying a knife. Garrido testified that the man demanded that she open the cash register, which she did. The man took the cash register and the money inside and ran out of the store.

Garrido testified that the man was dressed like a woman and wore a yellow shirt up around his breasts and a brown shirt wrapped around his face, but she only saw the man's eyes because she was afraid. Charlene Washington testified that she saw the man and primarily described him by his clothing, but also testified that she saw his eyes.

Melissa Pinney, the store's manager, described the man as an African-American man. Pinney testified that the man wore a yellow shirt tied up around his breasts, a light-colored scarf over his face, and a brown do-rag covered by a tan hat. Pinney testified that she could see the

¹ MCL 750.529, MCL 750.530.

² MCL 769.12.

robber's sideburns, the tips of his ears, his eyes, and his eyebrows, and saw that the man's hair was braided where it was exposed.

According to Sergeant Chat McKersie, he responded to the dispatch. Gates, who was wearing a dark hat and a dark brown coat over a yellow shirt, began to run after seeing Sergeant McKersie's police car. Sergeant McKersie caught Gates with the help of his canine partner, and found a cash register till, brown clothing, a yellow shirt, and a pale towel near where he first spotted Gates.

Officer Steven Corkins testified that he also responded to the dispatch. Officer Corkins testified that he arrested Robert Johnson, who was lying on steps behind a house in the area near an old, broken cash register. Officer Corkins testified that after he arrested Johnson, he saw another officer with Gates and realized that Gates better fit the robber's description.

Detective Tom Heikkila testified that he arrived shortly after Gates and Johnson were apprehended and decided that an on-scene identification was appropriate because officers had arrested the suspects immediately. Detective Heikkila testified that Gates and Johnson were both African American, but that Johnson was older, smaller, and thinner than Gates. Officer Corkins testified that Gates and Johnson had similar complexions, but Johnson's hair was bald on top with short stubble on the sides and Gates's hair was braided.

Detective Heikkila testified that he brought Garrido, Washington, and Pinney separately to where officers were holding Gates and Johnson in separate police cars. Detective Heikkila testified that, when each witness arrived, Gates and Johnson got out of the cars and turned around. Detective Heikkila testified that Garrido, Washington, and Pinney all stated that Johnson was not the robber, and only Pinney identified Gates as the robber. Detective Heikkila testified that all three women identified the clothing as the robber's clothing.

Pinney testified that she identified Gates as the robber because, while he was wearing different clothing, she recognized his eyes, pants, height, facial hair, and build. Garrido and Washington testified that they were unable to identify Gates because he was wearing different clothing, though Washington testified that she later became sure that Gates was the robber and identified him to officers after looking at his pants, clothing, and body structure.

The jury found Gates guilty of armed robbery.

II. ON-SCENE IDENTIFICATION

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings.³ However, to preserve an issue, the defendant must challenge it before the

³ *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009).

trial court.⁴ Here, Gates did not challenge the evidence of his on-scene identification at trial. Thus, this issue is not preserved.

We review unpreserved issues for plain error affecting a party's substantial rights.⁵ An error is plain if it is clear or obvious.⁶ The error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.⁷

B. LEGAL STANDARDS

Obtaining a prompt, on-scene investigation is a reasonable police practice.⁸ On-scene identifications promote fairness by assuring greater reliability and assisting the police to immediately determine whether a suspect is an unrelated bystander.⁹ A prompt on-scene identification does not implicate a defendant's right to counsel.¹⁰ However, an identification can violate a defendant's rights to due process if it is impermissibly suggestive and leads to "a substantial likelihood of misidentification."¹¹

"[A] suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification."¹² To determine the likeliness of misidentification, courts should consider a variety of factors, including

the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's 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.¹³

C. APPLYING THE STANDARDS

⁴ *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2012).

⁵ *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *Danto*, 294 Mich App at 605.

⁶ *Carines*, 460 Mich at 763.

⁷ *Id.*

⁸ *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997).

⁹ *Id.*; *People v Libbett*, 251 Mich App 353, 360-361; 650 NW2d 407 (2002).

¹⁰ *People v Hickman*, 470 Mich 602, 604-607; 684 NW2d 267 (2004).

¹¹ *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (Opinion by GRIFFIN, J.); *Neil v Biggers*, 409 US 188, 196-197; 93 S Ct 375; 34 L Ed 2d 401 (1972).

¹² *Kurylczyk*, 443 Mich at 306.

¹³ *Id.* at 306, quoting *Neil*, 409 US at 199-200.

Gates contends that the trial court erred by admitting evidence of Pinney's on-scene identification because the identification was impermissibly suggestive under the totality of the circumstances. We disagree.

Gates bases his assertion in part on a lack of physical evidence connecting Gates to the crime. We are not convinced that a court should consider this circumstance when determining whether a witness's identification was impermissibly suggestive. To the contrary, circumstances which may lead a witness to identify a defendant "on the basis of some external characteristic, rather than on the basis of the defendant's looks" tend to lead to a higher likelihood of misidentification.¹⁴ We thus decline to consider the lack of physical evidence connecting Gates to the crime as a circumstance weighing in favor of impermissible suggestion.

Gates also contends that the identification was impermissibly suggestive because Gates and Johnson were the only two participants and they had different physical characteristics.

We recognize that Gates and Johnson had different physical characteristics. Detective Heikkila testified that Johnson was older, smaller, and thinner than Gates, and Officer Corkins testified that Gates and Johnson wore their hair differently. However, differences in physical characteristics are only one factor that may lead to a substantial likelihood of misidentification, and do not necessarily render a witness's identification impermissibly suggestive.¹⁵ The question is "not whether the lineup is suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification."¹⁶

Here, when faced with the same lineup, two other witnesses were unable to identify Gates as the robber, though Washington testified that she later determined that Gates was the robber after considering the clothing. Thus, the witnesses were aware that they could identify *neither* man as the robber. We conclude that the inclusion of only two men in the identification did not, in and of itself, render the identification impermissibly suggestive.

Additionally, the remainder of the circumstances weigh strongly in favor of admissibility. Here, Pinney had the opportunity to view Gates during the commission of the crime from a relatively short distance. She testified that she noticed several of the robber's features in addition to his clothing, including his build, complexion, hair style, sideburns, eyes, eyebrows, and the tips of his ears. Officer Corkins testified that Gates matched the witnesses' description of the robber. Pinney testified that she identified Gates on the basis of his eyes, pants, height, facial hair, and build. These are primarily physical characteristics. Detective Heikkila testified that Pinney seemed very sure that Gates was the robber after observing him for some time. A very short time passed between Pinney's original view of Gates and her identification—Pinney testified that only about 15 minutes had passed.

¹⁴ *Kurylarczyk*, 443 Mich at 305.

¹⁵ *Id.*

¹⁶ *Id.* at 306.

Given these circumstances, the identification was not impermissibly suggestive. Thus, testimony regarding Pinney's on-scene identification of Gates did not clearly or obvious violate Gates's rights to due process. We conclude that the trial court's admission of this evidence did not constitute plain error.

We affirm.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Elizabeth L. Gleicher