

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEE GATEWOOD,

Defendant-Appellant.

UNPUBLISHED

November 12, 1996

No. 180300

LC No. 94-050226

Before: MacKenzie, P.J., and Jansen and T.R. Thomas*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. He subsequently pleaded guilty to a charge of habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to twelve to twenty-five years' imprisonment and now appeals as of right. We affirm.

On March 23, 1994, Stacey Sorensen was working at a convenience store when she was robbed at knife point by two individuals. While one individual held a knife to her throat, Sorensen had a clear view of the other man, whom she later identified as defendant. The day after the robbery, the police showed Sorensen photographs which had been taken by a surveillance camera during a previous robbery of a different establishment. Sorensen was told that the individuals in the photographs were suspects in a different robbery. Sorensen immediately identified the individuals in the photographs as the men who robbed her. At a police lineup shortly thereafter, Sorensen identified defendant as one of the men who robbed the store. At trial, Sorensen again identified defendant as the one of the robbers.

Defendant now contends that Sorensen's identifications of defendant were irrevocably tainted when she was shown pictures of defendant and was told that he was suspected of a previous robbery. We disagree. Before the start of trial, the court conducted a hearing outside the presence of the jury, pursuant to *People v Kachar*, 400 Mich 78, 96-97; 252 NW2d 807 (1977), to determine whether Sorensen's lineup identification of defendant was tainted by the allegedly improper photographic lineup. A ruling of a trial court regarding whether identification procedures constituted a denial of due process is

* Circuit judge, sitting on the Court of Appeals by assignment.

reviewed by this Court under the totality of the circumstances surrounding the pretrial identification. *People v James*, 184 Mich App 457, 464-465; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988; 469 NW2d 294 (1991). For subsequent identifications to be valid, a prosecutor needs to show by clear and convincing evidence that the testimony had a basis independent of the pretrial identification. *Id.*

At the hearing held to determine whether Sorensen's identification of defendant was independent, evidence was presented that Sorensen was able to observe defendant during the robbery for a five- to ten- minute period. She was able to identify defendant at a police lineup based on her memory of the robbery, not based on the police photographs. Similarly, at a preliminary examination and again at the hearing, Sorensen identified defendant, stating that the identification was not based on the photographs she had seen of defendant but on what she witnessed during the robbery. Based on this evidence, the trial judge ruled that the prosecution met its burden of showing that Sorensen's identification of defendant was independent of the allegedly tainted photographic identification. We agree. The evidence was clear and convincing that Sorensen's lineup identification of defendant had a basis independent of the photographs she was shown by police. Thus, no error occurred. *Kachar, supra.*

Additionally, defendant claims that the trial court erred in failing to caution the jury regarding potential problems with eyewitness identification. We disagree. Defendant failed to request a cautionary instruction and presented no evidence that he was prejudiced by the out-of-court identification procedures. Thus, this claim must fail. *City of Westland v Okopski*, 208 Mich App 66, 73; 527 NW2d 780 (1994).

Defendant next claims that individuals in his age group were systematically excluded from the jury, thus denying him a right to a jury consisting of a representative cross-section of the community. This claim is also without merit. In order for defendant's claim to be successful, it must be shown (1) that the allegedly excluded group is a "distinctive" group in the community, (2) that the group is unfairly and unreasonably underrepresented in venires from which juries are drawn, and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process. *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982), citing *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979). This Court has refused to recognize an age group as a cognizable class against which discrimination in jury selection can be practiced. *People v Redwine*, 50 Mich App 593, 596; 213 NW2d 841 (1973). Several other jurisdictions have similarly refused to recognize age as a "distinctive" group in determining if a venire group constitutes a representative cross section of a community. See, e.g., *Aultman v State*, 621 So2d 353, 363 (Ala Crim App, 1992), cert den ___ US ___; 114 S Ct 407; 126 L Ed 2d 354 (1993); *State v Jacobs*, 813 SW2d 318, 321 (Mo App, 1991). See also Anno: *Age Group Underrepresentation in Grand Jury or Petit Jury*, 62 ALR 4th 859. Because age is not a cognizable class against which discrimination in jury selection could be committed, defendant's claim must fail. In addition, defendant provided no evidence that people in defendant's age group were "unfairly or unreasonably underrepresented" on defendant's jury. *Guy, supra*, 599.

Defendant also claims that the prosecutor committed error requiring reversal in questioning him about his attempted escape from the courtroom during trial. Defendant initially injected evidence regarding his attempted escape, however. He therefore “opened the door” to further exploration of the issue by the prosecutor and waived any claim of error. *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Furthermore, defendant failed to request a cautionary instruction regarding the evidence, and he showed no evidence of prejudice from the trial court’s failure to *sua sponte* give such instruction. Thus, defendant’s claim of error is without merit. *Okopski, supra*, 73.

Defendant next contends that the trial court’s jury instructions created manifest injustice. Specifically, defendant challenges the court’s instruction that the jury could convict defendant based on his previous statement, although defendant never made such a statement. We find no error on this record. Jury instructions must be reviewed in their entirety to determine whether an error requiring reversal occurred. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Even if the instructions were imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *Id.* Although defendant never made an out-of-court statement, the context of the jury instruction when read as a whole makes it clear that the trial court was referring to a statement made by defendant’s accomplice. Although the trial court misspoke, the instructions, when viewed as a whole, fairly presented the issues and sufficiently protected the rights of defendant. The trial court did not err so as to create manifest injustice. *Id.*; *People v Cross*, 202 Mich App 138, 148; 508 NW2d 144 (1993).

Finally, defendant contends that he had previously been convicted of habitual offender, third offense, and thus, his conviction of habitual offender, third offense in this case violated his protection against double jeopardy. The argument is without merit. *People v Anderson*, 210 Mich App 295, 298; 532 NW2d 918 (1995).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Kathleen Jansen

/s/ Terrence R. Thomas