STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY HOLMES,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 187094
Macomb Circuit Court
LC No. 94-002595-FH

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 759.529; MSA 28.797, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and possession of a firearm during the commission of a felony, 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of ten to twenty years' imprisonment for the armed robbery and home invasion convictions to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial by the prosecutor's misconduct. Because defendant failed to object to any of the alleged instances of prosecutorial misconduct, appellate review of improper prosecutorial remarks is precluded, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After a thorough review of the record, we find that the comments were not improper. Instead, the prosecutor properly stated the evidence as it related to his theory of the case. Contrary to defendant's claim, the prosecutor did not improperly vouch for the credibility of his witnesses, did not appeal to the sympathies of the jury and did not improperly express any personal belief in defendant's guilt. *People v Bahoda*, 448 Mich 261-262, 276, 282-282; 531 NW2d 659, reh den 448 Mich 1225 (1995). Moreover, even if any of the comments were improper, we believe that a curative instruction could have eliminated any risk of

prejudice. Accordingly, a miscarriage of justice will not result from this Court's failure to fully review defendant's claim of prosecutorial misconduct.

II

Defendant next argues that the trial court abused its discretion in denying the jury's request for transcripts. There was no objection in the trial court. Because, on the record before us, defendant has failed to establish prejudice, reversal on this issue is improper. *People v Watroba*, 450 Mich 971; 547 NW2d 649 (1996).

III

Defendant next argues that the trial court clearly erred in admitting evidence that the Hartwigs identified him "on-the-scene" as the person who broke into their home because the identification was unduly suggestive and conducive to misidentification. A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

An on-the-scene identification procedure allows the police to know whom to arrest and assures the expeditious release of innocent suspects. *People v Wilki*, 132 Mich App 140, 142; 347 NW 2d 735 (1984). It also allows the victim to confirm or deny the identification while his or her memory is fresh and accurate. *Id*. These advantages are balanced against the inherent suggestiveness of the one-on-one identification itself. *People v Petrella*, 124 Mich App 745, 754; 336 NW 2d 761 (1983), aff'd en banc 424 Mich 221 (1985).

In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification.

> [T]he 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. [*Id.* at 306, quoting *Neal v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).]

If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. *Id*. at 303.

The on-the-scene identification occurred approximately twenty minutes after the offense. Although Edith Hartwig only saw the side of defendant's face at the time of the offense and was not one

hundred percent certain that defendant was the intruder at the pretrial identification, Warren Hartwig testified that he saw the defendant "very well," face-to face and he was "positive" at the pretrial identification that defendant was the intruder. Moreover, Officer Guswiler stated that when the Hartwigs saw defendant, they both almost "blurted out" that he was the intruder. Although defendant was the only civilian at the on-the-scene identification, that does not establish that the procedure was unduly suggestive. Officer Guswiler specifically testified that he explained to the Hartwigs not to feel any pressure to pick someone out and that the purpose of the procedure was to identify or exclude the person being held. He also told them to indicate whether defendant "resembled" the intruder. Given these factors, we find that the pretrial identification was not so impermissibly suggestive that it led to a substantial likelihood of misidentification. Accordingly, the trial court's decision to admit evidence regarding the pretrial identification of defendant was not clearly erroneous.

IV

Defendant next argues that the trial court improperly denied his motion for a directed verdict because there was insufficient evidence from which the jury could conclude that he was the person who broke into the Hartwigs' house and took Warren Hartwig's gun and Rolex watch. When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor, up to the time the motion was made, and determine whether any rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. This Court applies the same standard on review of a ruling on such a motion. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

Edith Hartwig testified that she saw the left side of defendant's face over her right shoulder while he was holding her from behind. She described the man who broke into her house to the police as a thirty- to forty-year-old male with a dark complexion, approximately 5'8" tall, medium to heavy build with short dark hair wearing dark clothing.[1] Warren Hartwig stated that he got a very good face-to-face view of defendant and described him to the police as a medium complected male, possibly of some ethnic background, in his late thirties to forties with a medium build. Officer Glandon testified that, during the on-the-scene identification, both Edith and Warren identified defendant as the person who broke into their home.[2] Edith testified during trial that she had the opportunity to view defendant's profile from seeing him in court and she stated that his profile "seemed very much like" the profile of the intruder. Although she acknowledged that she could not "positively" state that defendant was the same person who broke into her house, Warren stated that he did not have a "shadow of a doubt" that defendant was the person who broke into their home.

Defendant contends that a reasonable jury could not have determined that he was the intruder because there were inconsistencies in the testimony regarding the length of the intruder's sleeves and whether the intruder had Warren's blood on him. However, we believe that these "inconsistencies" were so minor that the jury was entitled to weigh them against the Hartwigs' credibility and determine whether they correctly identified defendant. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Moreover, defendant was seen approximately one-quarter of a mile from the Hartwig home at around 5:20 a.m. Officer Reichenbach believed that his physical characteristics matched those

indicated by the police radio announcement. Furthermore, defendant lied to the police regarding his whereabouts that evening. Accordingly, we find that there was sufficient evidence from which a rational jury could determine beyond a reasonable doubt that defendant was the person who broke into the Hartwigs' house and took Warren Hartwig's gun and watch.

V

Finally, defendant argues that the trial court erred in scoring the sentencing guidelines. We consider defendant's claims to be directed not to the accuracy of the factual basis for the sentence, but, rather, to the trial court's calculation of the sentencing variables on the basis of his discretionary interpretation of the unchallenged facts. Relief for such claims is unavailable. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] Although defendant's actual description at trial is not indicated on the record, the basic information report completed for the instant offense indicates that defendant was a forty-five-year-old white male, 5'6" tall, weighing 175 pounds, with black hair and brown eyes.

[2] Defendant claims that the on-the-scene identification was unreliable because the police told the Hartwigs that they wanted them to view a suspect. However, as discussed previously, the police did nothing improper in conducting the pretrial identification.