STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE DEWAYNE BATTLE,

Defendant-Appellant.

UNPUBLISHED
July 10, 1998

No. 188817
Recorder's Court
LC No. 95-000640 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK ORLANDO COX,

Defendant-Appellant.

No. 188818
Recorder's Court
LC No. 95-000640 FC

Before: Sawyer, P.J., and Bandstra and J.B. Sullivan*, JJ.

PER CURIAM.

Defendant Jesse Dewayne Battle appeals as of right from his jury trial convictions for carjacking, MCL 750.529a; MSA 28.797(a), and armed robbery, MCL 750.529; MSA 28.797. Defendant Battle was sentenced to ten-to-twenty years in prison for the carjacking conviction and ten-to-twenty years for the armed robbery conviction, the sentences to run concurrently with each other and consecutively to a sentence defendant was currently serving.

Defendant Derrick Orlando Cox appeals as of right from his jury trial convictions for carjacking, MCL 750.529a; MSA 28.797(a), armed robbery, MCL 750.529; MSA 28.797, and possession of a

---

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

firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Cox was sentenced to eleven-to-twenty-five years for the carjacking conviction, twelve-to-twenty-five years for the armed robbery conviction, and two years for the felony-firearm conviction. Defendant Cox's carjacking and armed robbery sentences were to run concurrently with each other, and consecutively to the felony-firearm sentence.

Defendants were tried together below, and their appeals have been consolidated. We affirm.

Defendant Battle's first issue on appeal is that his pretrial lineup was impermissibly suggestive. We disagree. We review a trial court's decision to admit identification evidence for clear error. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

The suggestiveness of a lineup must be examined in light of the totality of the circumstances. *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). Generally, the existence of physical differences between the suspect and other lineup participants does not, by itself, constitute impermissible suggestiveness. *Id.* at 312. The test is not whether the lineup was suggestive; instead, it is whether the totality of the circumstances show the identification to be reliable. *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). Also, because defendant Battle was represented by counsel at the lineup, he bears the burden of showing that it was impermissibly suggestive. *McElhaney*, *supra*.

Our review of the record reveals that the identification of defendant Battle in the lineup was reliable. Although defendant Battle was the shortest participant by three inches, and the lightest participant by twenty-five pounds, this does not automatically render the identification unreliable. The identification of defendant Battle was greatly strengthened by the speed with which the complainant identified him, by the length of time the complainant observed him during the offense, and by the fact that the lineup was held soon after the offense. Because we find that the pretrial lineup identification procedure was reliable and not impermissibly suggestive, we need not review defendant Battle's claim that the in-court identification did not have an independent basis. *Kurylczyk*, *supra* at 303.

Defendant Battle's other claim of error on appeal is that the trial court abused its discretion in admitting his aunt's statement under the excited utterance exception to the hearsay rule. We disagree. This Court reviews a trial court's admission of evidence under an abuse of discretion standard. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

Michigan Rule of Evidence 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In order to admit evidence as an excited utterance, three criteria must be satisfied: "First, the statement must arise out of a startling event; second, it must be made before there has been time for contrivance or misrepresentation by the declarant; and third, it must relate to the circumstances of the startling event." *People v Kowalak (On Remand)*, 215 Mich App 554, 557; 546 NW2d 681

(1996). In addition to these criteria, the Michigan Supreme Court in *People v Burton*, 433 Mich 268, 294-295; 445 NW2d 133 (1989), required that the underlying event be proven by a preponderance of the evidence, apart from the excited utterance itself.

Our review of the record shows that the criteria for admitting a statement as an excited utterance were satisfied. The declarant made the statements after her door had been "kicked in" by defendant Battle, both statements were made within a few minutes of the door being "kicked in," and both statements related to the fact that the declarant's door had been "kicked in." Additionally, two police officers testified that the declarant's door had been "kicked in," and that the declarant was "hyper" and screaming. This Court accepts testimony regarding a person's emotional state for purposes of satisfying the *Burton* requirement. See *Kowalak*, *supra* at 559-560. The trial court did not abuse its discretion when it admitted the statements as excited utterances.

Defendant Cox's first issue on appeal is that the trial court erred in refusing to give a jury instruction regarding prior inconsistent statements made by the complaining witness. We disagree. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* at 412-413.

Our review of the lower court record reveals that the instructions given at trial fairly presented the issues to be tried and sufficiently protected defendant Cox's rights. The instructions informed the jury that they were permitted to weigh the credibility of the complaining witness' trial testimony against his prior statements to determine whether he was telling the truth when he testified.

Defendant Cox also argues that his convictions should be reversed because of improper remarks made by the prosecution during her closing and rebuttal arguments. We disagree. Defendant Cox did not object below and therefore has failed to fully preserve this issue for appellate review. *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996). Although unpreserved, this Court will still reverse if a curative instruction could not have eliminated the prejudicial effect of the remarks or if failure to review the issue would result in a miscarriage of justice. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Defendant Cox argues that the prosecutor improperly argued that the jury had a civic duty to convict, that she vouched for the evidence, and that she stated her personal belief in defendant Cox's guilt. Our review of the record shows that the prosecutor's remarks at trial cannot be characterized as defendant Cox has argued, and were instead permissible comments on the evidence. Further, a curative instruction could have eliminated any prejudicial effect caused by the prosecutor's remarks.

Finally, defendant Cox argues that he was denied effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* A defendant must also overcome the presumption that the challenged action or inaction may be considered sound trial strategy. *Id*. Counsel's failure to call a witness is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court defers to the trial court's superior ability to assess the credibility of witnesses. MCR 2.613(C); *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997).

At the *Ginther*[1] hearing, defendant Cox testified that he informed his trial counsel that his brother and his former attorney could serve as alibi witnesses for him. Defendant Cox argues that his trial counsel "simply overlooked or forgot about the other Alibi Witnesses." Defendant Cox's trial counsel testified that he did not recall defendant Cox mentioning an alibi witness other than his former attorney, and that the former attorney was not called as an alibi witness because she had no recollection of speaking with defendant on the telephone at the time of the carjacking. The trial court stated that it believed counsel's testimony. Therefore, because this Court defers to the trial court's superior ability to assess witness credibility, and because the failure to call a witness is a matter of trial strategy, defendant Cox has failed to carry the burden of showing that he was denied effective assistance of counsel.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).