

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH BARNETT,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 204916
Recorder's Court
LC No. 96-000245

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and fifteen to thirty years' imprisonment for the armed robbery conviction, the armed robbery sentence to run consecutively to the felony-firearm sentence. We affirm.

Defendant contends that the trial court erred in failing to suppress the lineup identification of defendant. Defendant alleges the disparity in height and weight of the nine participants created an impermissibly suggestive lineup which violated his due process rights. This Court will not reverse the trial court's decision to admit identification evidence unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Defendant bears the burden of demonstrating that the lineup was impermissibly suggestive as he was represented by counsel. *Id.*

Defendant's contention that the lineup was unfair based on a disparity in physical traits between the participants is without merit. Differences in physical characteristics between the defendant and other members of a lineup goes to the weight of the identification, not admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). In *People v Barnes*, 107 Mich App 386, 388; 310 NW2d 5 (1981), the defendant was twenty-seven years old, five feet four inches, and 119 pounds. He was placed in a lineup consisting of eight men. Six of the men were over five feet seven inches, with four over five feet eleven inches. There was one other participant in

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

the lineup who was the same height as the defendant, but this person was ten years younger and twenty pounds heavier. On appeal, the defendant contended the physical differences between himself and the other members of the lineup caused the procedure to be unduly suggestive, thereby requiring exclusion of the lineup at trial. This Court rejected the attack, stating:

Physical differences between a suspect and other lineup participants do not in and of themselves constitute impermissible suggestiveness. . . .

“Lineups are conducted in police stations, and the persons who participate in the lineup are taken from those who are being held in custody. It would be unusual indeed if the police had five persons with similar physical characteristics locked up in the same jail. Moreover, the purpose of a lineup is identification. If the defendant is the tallest man in the lineup, and if he believes that this impairs the validity of the identification, he should see that the jury is apprised of that fact. This is a question of the weight to be given the lineup identification, not its admissibility. It presents no basis for a new trial.” *People v Lloyd*, 5 Mich app 717, 724-725; 147 NW2d 740 (19967).

Here, the fact that defendant was among the two shortest persons in the lineup was not so unduly suggestive as to have prejudiced defendant. [*Id.* at 389-390.]

In the instant case, the trial court’s decision to admit the identification evidence was not clearly erroneous.

Defendant also takes issue with the fact that the witnesses were all advised by police that the suspects were in custody prior to attending the lineup. Advising a victim that the perpetrator of the crime is in the lineup does not alone render a lineup unduly suggestive. *Sawyer, supra*. When called to observe a lineup procedure, the obvious inference for the witness to draw is that the suspects are detained by police. *Barnes, supra*. While the witnesses testified that they were advised that the suspects had been caught, all three asserted that defendant was the individual who robbed and beat the victim. This identification was made despite the fact that an identifying characteristic, defendant’s braided hair, was covered. Accordingly, the witnesses’ knowledge that the suspects were in custody did not render the lineup unduly suggestive.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Robert J. Danhof