STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 12, 2000
v	No. 219452 Genesee Circuit Court
GERMAIN I. SKINNER, Defendant-Appellant.	LC No. 98-003756-FH

Before: Owens, P.J., and Jansen and Burns,[1] JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's decision to deny defendant's motions to quash the information and for severance. We affirm the trial court's denial of the motion to quash, but reverse the trial court's denial of defendant's motion for severance.

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) (during commission of another felony), first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), second-degree criminal sexual conduct, MCL 750.520c(1)(a) (under thirteen years of age); MSA 28.788(3)(1)(a), unlawfully driving away an automobile, MCL 750.413; MSA 28.645, receiving and concealing stolen property, MCL 750.535; MSA 28.803, indecent exposure, MCL 750.335; MSA 28.567, and disorderly person (window peeper), MCL 750.167(1)(c); MSA 28.364(1)(c), arising from three separate incidents occurring in the early morning hours of August 6, 1998. The victims of these alleged crimes testified at defendant's preliminary examination.

Larry D. Dedominces testified that he went to bed at 12:30 a.m. on August 6, 1998. At 4:00 a.m. he noticed that his 1986 Buick Park Avenue was no longer in his garage. Dedominces also testified that his wallet and car keys, which had been inside the house when he went to bed, were also missing. Dedominces lives in Mt. Morris on Alexandrine Street. Corinne Rene Thompson testified that she lives at 11617 Church Street in Mt. Morris. At 2:53 a.m. she observed someone standing outside her window as she and her daughters were getting ready for bed. She went to the door and observed

[1] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant masturbating outside her house. Defendant ran away and she subsequently saw a car which closely resembled a photograph of Dedominces' stolen Buick Park Avenue. The victim of the criminal sexual conduct charges, an eleven-year-old girl, testified that defendant woke her at approximately 3:30 a.m. in her home at 1090 Lucharles Street and sexually assaulted her.

Defendant first contends that the eleven-year-old victim's in-court identification of defendant at the preliminary examination was impermissibly suggestive, and therefore, the trial court erred in not quashing the information as to the criminal sexual conduct and home invasion counts. We disagree. In the instant case, the victim testified that defendant came into her bedroom, woke her up, and made her remove her underwear pants. Defendant rubbed his penis on and around the victim's vagina and then forced her to perform oral sex. The victim testified at the preliminary examination that the television in her room was on and that she had a night light beside her bed. The victim stated that defendant's face was very close to her own during parts of the assault and described defendant as a skinny black male with big arms and a narrow face. She also noted that defendant had very short hair with a short ponytail located at the base of his head. Defendant also had a noticeable gap between his two front teeth.

In a lineup shortly after the incident, the victim did not identify defendant as the man who attacked her. The victim testified that she was afraid that the men could see her through the glass. Defendant did not have the ponytail in the lineup and the participants were not asked to display their teeth. Immediately after the lineup, the victim told her mother that she wished she could have seen the teeth of lineup participant number three. Defendant was number three. The officer in charge of the lineup and the lineup attorney did not allow a second lineup. At the preliminary examination, the victim identified defendant prior to the court's decision to order defendant to display his teeth. On cross-examination, the victim stated that the prosecutor told her that the person that assaulted her would be in the courtroom. She did testify, however, that she identified defendant because he was the person that assaulted her not, because the prosecutor told her that that the person that assaulted her would be in court.

An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). We review the trial court's decision to admit an in-court identification under the clearly erroneous standard. *Id.* at 115; *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

In *Gray*, also a criminal sexual conduct case, after making a tentative identification of the defendant at the lineup, the victim was informed that the police had arrested a suspect, and was shown a photograph of the defendant. After seeing the photograph, the victim stated that she was sure that the defendant was the person that attacked her. *Gray, supra* at 109-110. The trial court denied a motion by the defendant to prohibit an in-court identification of the defendant by the victim, holding that although the use of the photograph by the deputy was improper, there was a sufficiently independent basis for the victim to identify the defendant at trial. This Court affirmed the decision of the trial court and the Michigan Supreme Court granted leave to appeal. *Gray, supra* at 110. In holding that the identification procedure was highly suggestive, the Supreme Court stated:

> Although the suggestive photographic identification procedure in this case occurred after a legitimate corporal lineup, this case still presents the danger that once the identify of the victim's assailant was suggested to her through the photographic identification procedure, she "may be likely to base later identifications of the suspect upon that photograph, rather than on [her] recollection of the crime." [*Gray, supra* at 112; citing *People v Kurylczyk*, 443 Mich 289, 321, 505 NW2d 528 (1993)(Brickley, J.).]

As in *Gray*, the problem in the instant case is that, although the victim appeared sure of her identification at the preliminary examination, it is difficult to determine whether her identification of defendant was based on her memory of the incident or based on the prosecutor's suggestion that the man that hurt her would be in the courtroom. In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), the Michigan Supreme Court noted that improper suggestion is often the result of the police or prosecution informing the witness that the police have apprehended the right person. Accordingly, we hold that the identification procedure was unduly suggestive. *Gray, supra* at 113-114.

This, however, does not end the inquiry. The second step of the analysis is to determine whether the victim had an independent basis to identify the defendant in court. *Gray, supra* at 114-115. "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the 'totality of the circumstances'." *Id.* at 115, citing *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972). The factors a court should consider are:

> (1) the witness' prior relationship with or knowledge of the defendant; (2) the witness' opportunity to observe the offense, including such factors as the length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the criminal act; (3) the length of time between the offense and the disputed identification; (4) the accuracy or discrepancies in the pre-lineup or showup description and the defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any identification prior to lineup or showup of another person as the defendant; (7) the nature of the offense and the physical and psychological state of the witness, including such factors as the witness' fatigue or nervousness, or the use of alcohol or drugs; and (8) any idiosyncratic or special features of the defendant. [*Gray, supra* at 116.]

In this case, there was no prior relationship between the victim and the assailant. Therefore, this factor does not support an independent basis for identification.

In *Gray*, the Court stated that an opportunity to observe the offense is significant in determining whether an independent basis for identification exists. "Generally, courts have found that the longer the crime, the better the witness' opportunity to observe." *Gray, supra* at 117. In addition, courts have often found that rape victims usually have a better opportunity to observe their attackers than the victims of other crimes. *Id.* Here, the victim testified that the assailant woke her up at approximately 3:30 a.m. After the assailant left her room it was 3:47 a.m. The victim testified that the television was on and there was a small night light next to her bed. The victim was able to describe a gap in the assailant's front teeth, his short ponytail, and the clothing that the assailant was wearing at the time of the attack. On the

basis of these facts, this Court concludes that the victim had a substantial opportunity to observe the assailant.

Regarding the length of time between the offense and the identification, we note that the assault occurred on August 6, 1998, and the in-court identification occurred on December 23, 1998, during the preliminary examination. The identification occurred after the victim failed to identify defendant in a lineup that occurred shortly after the assault. Even though the victim testified that she told her mother immediately after the lineup that she wished she had been able to see lineup participant number three's teeth (and number three was defendant), this factor weighs slightly against the finding of an independent basis for identification.

With regard to the accuracy of the victim's description of defendant in comparison to defendant's actual description, the victim described the assailant as having a gap between his front teeth, short hair with a ponytail, whiskers on his cheeks, and wearing blue running shorts and a white tank top. At the preliminary examination, the victim identified defendant prior to his displaying his teeth to the court. Later, the court made defendant display his teeth. The prosecutor had the record reflect that defendant had a gap between his two front teeth. Lamail Lashawn King testified that he was an acquaintance of defendant and stated that, around the time of the incident, defendant had very short hair with a ponytail. The victim clearly identified two specific characteristics of defendant: the gap between his two front teeth and the ponytail. Accordingly, we hold that the victim's description of defendant closely matched defendant's actual physical appearance, and thus, is a positive factor in finding an independent basis for identification.

The victim was unable to identify defendant at a corporal lineup shortly after the assault. Accordingly, the factor relating to any previous proper identification of defendant by the victim should weigh against an independent basis for identification.

With regard to the identification of another person, this factor is inapplicable in that the victim did not identify any other person as her assailant.

With respect to the physical and psychological state of the victim, the eleven-year-old victim must have clearly been terrified by her ordeal. However, there is nothing in the record that indicates that she would be unable to later identify her assailant. She had the presence of mind to note the time after her assailant left and she was able to give a consistent and coherent description of her assailant. Accordingly, we conclude that this factor favors the finding of an independent basis for the identification.

Finally, as noted above, the victim testified that defendant had a significant gap between his two front teeth and a noticeable ponytail. Although the ponytail had been removed by the time of the lineup and the preliminary examination, there was testimony from King that defendant had the ponytail at the time of the incident. In addition, the gap in defendant's front teeth was noted for the record and the victim identified defendant before defendant was forced to display his teeth to the court. We believe that defendant's special features and the victim's ability to recognize these features, weigh heavily toward a determination of an independent basis for identification.

In sum, we hold that, although the actions of the prosecutor may have resulted in an impermissibly suggestive lineup procedure, the victim had a sufficient independent basis for identifying defendant. The victim had ample opportunity to observe defendant and, specifically, his somewhat unique characteristics. Accordingly, we hold that the trial court did not err in admitting the victim's in-court identification and in denying defendant's motion to quash the information. *Gray, supra* at 124.

Defendant next contends that, because the seven counts against him stem from three different incidents that occurred in three different locations at three different times, the charges must be severed for trial. We review the trial court's decision to deny a defendant's motion for severance under the abuse of discretion standard. *People v Solak*, 146 Mich App 659, 666-667; 382 NW2d 495 (1985). We note, however, that a trial judge is without discretion to deny a timely motion for severance of unrelated charges. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977).

MCR 6.120 governs joinder and severance when there is only one defendant, and provides, in pertinent part:

> (A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
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> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

MCR 6.120 is a codification of our Supreme Court's decision in *Tobey, supra*. In that case, the Court held that the defendant was entitled to separate trials on two charges of selling heroin that occurred twelve days apart, albeit to the same undercover officer. *Id.* at 144. The Court explained what constitutes the same conduct or a series of connected acts that would permit joinder for trial:

> The commentary accompanying the Standards explains that "same conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts * * * constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank." [*Tobey, supra* at 151-152.]

In the instant case, we conclude that the evidence does not support the conclusion that the charged offenses were related within the meaning of MCR 6.120(B). While the crimes took place in a four-hour time window and occurred in an area that encompasses about one and one half miles, they do not appear to have been either the "same conduct" or "a series of connected acts or acts constituting part of a single scheme or plan." The theft of Dedominces' wallet, keys, automobile, and other items, and the alleged subsequent attempt to sell those items, were clearly not the "same conduct" as either the sexual assaults on the eleven-year-old victim or the "peeping Tom" and indecent exposure incident at Thompson's house. Furthermore, neither the theft of the vehicle and other items from Dedominces and their subsequent attempted sale, nor the sexual assaults at another location, nor the "peeping Tom" and indecent exposure incidents at yet another location, were connected with each other or were part of a single scheme or plan. Each incident appears to have had its own motive; the mere fact that these incidents occurred in a relatively close time sequence and locality during one night is insufficient to establish that they are related within the meaning of MCR 6.120(B) and *Tobey, supra*. Additionally, presentation of these unrelated charges in a joint trial would unfairly prejudice defendant because of both the number of the offenses, and the sensitive nature of some of the charges. *People v Daughenbaugh*, 193 Mich App 506, 511; 484 NW2d 690 (1992), mod 441 Mich 867 (1992). Finally, we note that the prosecutor has not advanced any theory that would allow him to obtain admission of the evidence of any of these unrelated charges under MRE 404(b) in separate trials of the other charges; he should not be permitted to do so by joining the offenses together in one trial. *Daughenbaugh, supra* at 511-515. Therefore, we hold that because the charges were not related under MCR 6.120(B), the trial court lacked discretion to deny defendant's motion for severance. *Tobey, supra*.

The denial of defendant's motion to quash is affirmed, but the denial of defendant's motion for severance is reversed. The case is remanded for separate trials on the three different incidents. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns