

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESTAIN L. BURTON,

Defendant-Appellant.

UNPUBLISHED

March 30, 2001

No. 217127

Wayne Circuit Court

Criminal Division

LC No. 98-007932

Before: Smolenski, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

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

We reject defendant's claim that the pretrial lineup procedure was unduly suggestive because the other lineup participants differed from defendant in height, weight and age. The determination of whether an identification procedure constitutes a denial of due process is made in light of the totality of the circumstances surrounding the pretrial identification. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). A trial court's decision on a motion to suppress a pretrial identification will not be reversed unless it is clearly erroneous. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973). Physical differences between a suspect and other lineup participants generally go to the weight of the identification and not to its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997); *People v Lloyd*, 5 Mich App 717, 724-725; 147 NW2d 740 (1967). However, pretrial identification procedures that are so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification constitute a denial of due process of law. *Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968); *Anderson, supra*, 168. Because defendant was represented by counsel at the lineup, he bears the burden of showing that the lineup was impermissibly suggestive. *People v Barnes*, 107 Mich App 386, 389; 310 NW2d 5 (1981).

Here, the pretrial lineup occurred on the day after the robbery. Both witnesses immediately recognized defendant and were absolutely certain about their identifications. The police were not required to make endless efforts to attempt to arrange a lineup of participants

whose physical characteristics exactly match those of the defendant. See *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985); *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984). The differences between the lineup participants in this case did not render the lineup unduly suggestive. See, e.g., *Barnes, supra* (the defendant was among the two shortest persons in the lineup), *People v Gunter*, 76 Mich App 483; 257 NW2d 133 (1977) (the defendant was the lightest in complexion), *People v Hughes*, 24 Mich App 223; 180 NW2d 66 (1970) (the defendant was the only person with a goatee), and *People v Taylor*, 24 Mich App 321; 180 NW2d 195 (1970) (only two of the lineup participants roughly matched the defendant's physical characteristics and the defendant was darkest in complexion). We conclude that defendant has failed to sustain his burden of showing that the pretrial lineup was unduly suggestive. The trial court did not abuse its discretion in denying defendant's motion to suppress.

We also reject defendant's claim that he is entitled to resentencing because the court improperly scored offense variable one and offense variable five. Initially, we note that appellate relief is not available for claimed scoring errors that are based on an alleged misinterpretation or misapplication of the scoring guidelines. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). A claim of error involving application of the guidelines states a cognizable claim on appeal only where "(1) a factual predicate is wholly unsupported, or (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.*, 177; *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999). Scoring decisions for which there is any evidence in support will be upheld. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993).

Defendant challenges the assessment of twenty-five points for offense variable one (discharge of a firearm during the commission of the offense) because he did not personally shoot a firearm and because the actual shooter was never apprehended. However, the evidence that defendant's cohort fired a weapon during the commission of the armed robbery presents adequate evidence, under an aiding and abetting theory, to support the assessment of twenty-five points for offense variable one.¹ Moreover, the evidence that defendant approached one of the victims, pointed a gun at her head, pushed her onto the floor, and dragged her by the collar of her coat up a set of stairs into the cash office, where she had to unlock the door with her keys and assist defendant in removing the contents of the store's safe, was adequate to support a score of fifteen points for offense variable five. See, *People v Piotrowski*, 211 Mich App 527, 529-530; 536 NW2d 293 (1995); *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993).

Defendant's final claim is that his sentence is disproportionate. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's twelve-year minimum sentence is within the guidelines recommended range of five to fifteen years and, thus, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v*

¹ Pursuant to the instruction accompanying OV 1, in multiple offender cases, if one offender is assessed points for the use of a firearm, all the offenders must be assessed the same number of points.

Eberhardt, 205 Mich App 587, 591; 518 NW2d 511 (1994). Defendant has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality. *Piotrowski, supra*, 533; *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage