STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 20, 2002
v	No. 230296 Calhoun Circuit Court
LEON DOUGLAS THOMAS-BEY, Defendant-Appellant.	LC No. 00-001903-FH

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of unarmed robbery, MCL 750.530, assault with intent to rob while unarmed, MCL 750.88, and fleeing and eluding a police officer, fourth degree, MCL 479a2. The trial court sentenced defendant, as a third-offense habitual offender, to concurrent terms of fourteen to thirty years in prison for unarmed robbery, fourteen to thirty years in prison for assault with intent to rob while unarmed, and two to four years in prison for fleeing and eluding a police officer, fourth degree.

This case arises out of a purse-snatching in a Meijer Store parking lot in Battle Creek on January, 30, 2000. Defendant argues that the trial court erred by failing to suppress the in-court identifications of complainants Mandy Lynn Crooks and Brenda Howard.

"On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

On the day of defendant's preliminary examination, neither witness could positively identify defendant as the assailant in a photographic lineup. However, the fact that a witness does not identify an assailant at a pre-trial lineup does "not render [a] subsequent in-court identification inadmissible." *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). Rather, the issue is one of credibility to be determined by the jury. *Id*. Accordingly, though Crooks and Howard could not identify defendant with confidence, it was not error for the trial court to admit their identification testimony on this basis.[1]

[1] Defendant asserts that Crooks' preliminary examination identification was tainted because, before the lineup, Crooks mistakenly entered the courtroom when defendant was inside. Defense

(continued…)

Defendant further avers that Crooks and Howard's in-court identifications at defendant's preliminary examination were unduly suggestive and that their trial identifications lacked an independent basis.

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "If the trial court finds the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established 'that is untainted by the suggestive pretrial procedure.' " *Id*., quoting *Kurylczyk, supra* at 303.

However, it is well-established that "[n]ot all preliminary examination confrontations are impermissibly suggestive." *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984). Rather, "[t]he court must consider all relevant factors concerning a preliminary examination identification to determine if the identification violated due process." *People v Solomon*, 47 Mich App 208, 218-219; 209 NW2d 257 (1973) (dissent of Lesinski, C.J.), adopted 391 Mich 767 (1974). Such factors include:

> 1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification. See [*People v] Anderson*, 389 Mich 214, 205 NW2d 461 [(1973)], for analysis of the curve of forgetting.

(…continued)

counsel objected to Crooks' identification on this basis, but noted that Crooks' entrance was "inadvertent." The prosecutor stated that he asked Crooks to leave as soon as he saw her in the courtroom and Crooks confirmed that she left the courtroom within five or ten seconds and only saw the back of defendant's head. The trial court admonished the prosecutor for failing to prevent Crooks from entering but, because she walked in inadvertently, and because defense counsel could cross-examine her about the incident, the trial court ruled that Crooks could testify regarding her identification.

"It is well-settled that the decision to exclude the testimony of a witness who has violated a sequestration order is within the trial court's discretion." *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1984). Further, "[a] defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *Id*. Defense counsel chose not to cross-examine Crooks on the issue and made no attempt to establish that Crooks' identification was tainted by her brief entry. Moreover, on appeal, defendant has failed to show that he was prejudiced by the incident. Accordingly, the trial court did not abuse its discretion in allowing Crooks' identification after the incident and defendant is not entitled to a new trial on this basis.

4. Accuracy or discrepancies in the pre-lineup or show-up description and 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 defendant. [*People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), factors adopted in *People v Gray*, 457 Mich 107, 117 n 11; 577 NW2d 92 (1998).]

Other factors include whether the police "told the witness that they had the right person in custody," and whether the witness gives "identifying characteristics on cross-examination." *Solomon, supra* citing *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972).

Here, while both Crooks and Howard failed to definitively identify defendant by his photograph, they were both confident about their in-court identifications and that defendant matched their descriptions to police.

The incident took place at 1:00 p.m. on a clear and sunny day. Crooks had an opportunity to look at her assailant both before and during the attempted purse-snatching. At the preliminary examination, Crooks recalled that he had long hair, was tall and very dark-skinned. She further stated that she makes a point of looking people in the face and that she did so with defendant. Howard chased her assailant after he stole her purse and she testified that she remembered his face, his very dark skin and that he was "big." Both witnesses testified that the perpetrator either had long hair protruding from his hat or that defendant wore a hood or earmuffs that were visible at the back of his head. Moreover, evidence showed that defendant was picked up by police shortly after the attacks in the vicinity of the Meijer parking lot. Defendant was driving the Volvo Howard described as having a bent antenna and no license plate. Police officers also saw defendant throw something out of the car window which was later identified as Howard's purse.

Further, there was not an inordinately long time between the crime and the confrontation at the preliminary examination; the incident took place on January 30, 2000 and the preliminary examination was held on May 5, 2000, approximately four months later. See *Solomon, supra* at 219 (2 ½ years between incident and preliminary examination is significant).

Considering the totality of circumstances, the preliminary examination was not unduly suggestive and the trial court did not clearly err in admitting the witness' identification testimony at trial. Furthermore, given the significant additional evidence that defendant was the assailant, were we to find that the identification may have been tainted by an impermissibly suggestive procedure, any error was harmless beyond a reasonable doubt. *Hampton, supra* at 239.

Defendant also contends that the prosecutor improperly bolstered Howard's testimony by asking her "[h]ow important is it . . . that the right person be held accountable for this?" and "how certain are you that that person is here in the courtroom?"

This Court reviews allegations of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "Prosecutorial misconduct issues are decided case by case, . . . and the reviewing court must examine the pertinent portion of the record and

evaluate a prosecutor's remarks in context." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted). Here, defendant did not object to the prosecutor's conduct before the trial court. "Appellate review is therefore precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice." *People v Nantelle*, 215 Mich App 77, 86; 544 NW2d 667 (1996).

A review of the record indicates that the prosecutor's remarks were not improper vouching or bolstering of Howard's credibility, but a response to defense counsel's attack on Howard's credibility. See *People v Rodriguez*, __ Mich App __; __ NW2d __ (Docket No. 208845, issued April 26, 2002). During his cross-examination of Howard, defense counsel questioned her identification of defendant as the perpetrator of the purse-snatching and implied that Howard was merely relieved that *someone* was arrested for the crime. On redirect, the prosecutor merely questioned Howard regarding whether she was confident about her identification and about her interest in the correct person being punished. The prosecutor did not attempt to impermissibly bolster Howard's credibility or to imply that he has personal knowledge regarding her veracity. Rather, the questions address her level of confidence in her identification, in direct response to defense counsel's line of questioning. Accordingly, viewed in context, no manifest injustice would result in declining to review the issue further and defendant is not entitled to relief on this basis.

Also, defendant contends that, during closing arguments, the prosecutor denigrated defense counsel by explaining to the jury that he was using a technique called "isolation." Defendant contends that this amounted to "unfounded prejudicial innuendo" which distracted the jury from his theory that he was not the perpetrator of the crime. Again, however, defendant failed to object to the prosecutor's arguments. "Absent an objection during trial, appellate review of improper prosecutorial closing arguments is precluded unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to consider the issue would result in a miscarriage of justice." *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992).

Viewed in context, the prosecutor was merely advancing his position that defense counsel's theory did not comport with the evidence. Contrary to defendant's assertion, the remarks did not amount to a personal attack on defense counsel and did not shift "the jury's focus from the evidence to defense counsel's personality." *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). Further, in context, the remarks are permissible rebuttal to defense counsel's argument that defendant was not the perpetrator and that the police failed to inquire why, if defendant were guilty, he would have driven back toward Battle Creek where the incident occurred. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Accordingly, the prosecutor's argument was not improper. Further, were we to find the remarks were improper, any prejudice could have been cured by a timely instruction and, therefore, we need not review the issue further.

Finally, defendant contends that he is entitled to resentencing because the trial court improperly took into account the enhanced psychological trauma Crooks suffered as a result of various prior crimes against her.

Because this crime occurred after January 1, 1999, the legislative sentencing guidelines apply. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Further, contrary to

the judicial sentencing guidelines, the new legislative guidelines apply to habitual offenders. Here, by his own admission, defendant was sentenced within the statutory minimum guidelines range. Accordingly, and because defendant did not challenge his sentence on this basis below, this Court must affirm defendant's sentence. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2001).

Moreover, and contrary to defendant's assertions, the trial court judge clearly explained at sentencing that he was not punishing defendant for prior crimes against Crooks, but that he was taking into account the psychological trauma Crooks suffered as a result of this incident. Accordingly, the trial court did not take into account improper considerations in fashioning defendant's sentence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski