

**STATE OF MICHIGAN**

**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

December 13, 2002

Plaintiff-Appellee,

V

No. 232527

Monroe Circuit Court

DAROL WAYNE HOLBROOK,

LC No. 99-030150

Defendant-Appellant.

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Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for kidnapping, MCL 750.349, two counts of first-degree criminal sexual conduct committed during the course of a felony, MCL 750.520b(1)(c), and two counts of first-degree criminal sexual conduct resulting in personal injury, MCL 750.520b(1)(f). Defendant was sentenced to life imprisonment for the kidnapping conviction, as well as to a concurrent sentence<sup>1</sup> of 46 to 69 years imprisonment for the criminal sexual conduct convictions. Defendant's sentences were enhanced to reflect his status as a habitual offender (third conviction), pursuant to MCL 769.11. We affirm.

**I. Facts**

Late in the evening on November 15, 1998, the victim was driving to her father's home when defendant swerved in front of her with his car, causing an accident. When the victim got out of the car to investigate the damage, defendant knocked her to the ground and began choking her. She attempted to hit him with her flashlight, but he took the flashlight away from her and hit her with it approximately six times. Defendant continued to hold onto her throat and began punching her stomach. Finally, defendant picked her up, put her in his truck, drove to a wooded area and then forced her to have sex with him. The victim testified that she was afraid that defendant would kill her since he was repeating "I know what I got to do," and so she pleaded with him to let her see her baby. Defendant drove her out of the woods and let her out of the

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<sup>1</sup> All parties agreed that two of the counts for criminal sexual conduct merged with the other two counts of criminal sexual conduct for the purpose of sentencing.

vehicle at an apartment complex, where she was able to get help contacting the police, her husband, and her father.

The victim was taken to the hospital where some of her articles of clothing were collected as evidence. In addition, a rape examination was performed which included the drawing of a blood sample. The victim was interviewed at the hospital to obtain a description of the attacker. Based on the description she provided, a composite drawing was prepared. Several days later at the sheriff's department, the victim provided additional information to the detective in charge of the case and another composite drawing was prepared.

On April 20, 1999, the victim was shown a photographic array by the detective in charge that contained pictures of individuals resembling the composite drawing. Defendant's photo was included in the array, however, the victim was unable to identify an assailant. On April 24, 1999, pursuant to a court order, defendant provided a blood sample to the police. Subsequently, the DNA profiles of defendant and the victim were compiled from their respective blood samples, and state police crime lab scientists concluded that the DNA profiles obtained from the victim's clothing and her rape examination matched the DNA profiles of both the victim and defendant.

Subsequently defendant was arrested and charged as noted above. After defendant's arrest, the victim was advised by the police that a suspect was in custody who was a "positive match." The victim asked what this meant and was told that defendant had been identified and arrested because his DNA profile matched the DNA evidence obtained from the victim during the rape examination.

At the preliminary examination in September 1999, defendant, who was wearing jail clothing and shackles, was identified by the victim as her assailant. On cross examination, the victim stated that she had been unable to identify defendant in the photo array because she had felt rushed when examining the photos. Defense counsel moved that the identification testimony be suppressed or, in the alternative, that the trial court conduct an evidentiary hearing to determine the admissibility of the identification evidence. The trial court conducted an evidentiary hearing on the admissibility of the identification, during which the victim testified that knowledge of the DNA evidence did not influence her identification of the defendant. The victim asserted that she saw her assailant's face throughout the attack, which lasted a considerable time, and that she was sure that defendant was her assailant. She also testified that she believed that an identification in person was different from an identification by photograph, and that there were things she could notice in person that she could not detect in a picture. At the conclusion of the evidentiary hearing, the trial court found that under the totality of the circumstances, the in-court identification of defendant was a "separate identification" and that the identification would not be suppressed.

## II. Analysis

### A. Victim's In-Court Identification of Defendant

Defendant first challenges the trial court's decision to admit the victim's in-court identification of him as her assailant. The trial court's decision to admit identification evidence

is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when a reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* The credibility of identification testimony is a question for the trier of fact that this Court will not resolve anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). “Moreover, this Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime.” *Id.*

If a witness is exposed to an impermissibly suggestive identification procedure, “the witness’ in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification.” *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). “[A]n improper suggestion often arises when ‘the witness when called by police or prosecution either is told or believes that the police have apprehended the right person.’” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), quoting *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973). If the identification procedure was invalid, the next step in the analysis is to determine whether the victim had an independent basis to identify the defendant. *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 circumstances.’” *Id.* at 115, quoting *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972).

The following eight factors are pertinent in determining whether an independent basis for the identification exists:

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[s] affecting sensory perception and the proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification. . . .
4. Accuracy or discrepancies in the pre-lineup or showup 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.
7. . . . [T]he nature of the alleged offense and the physical and psychological state of the victim. . . .
8. Any idiosyncratic or special features of defendant. [*Gray, supra*, at 115-116, quoting *People v Kacher*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).]

Here, the trial court concluded that the victim’s in-court identification of defendant under the totality of the circumstances was not impermissibly suggestive and declined to suppress the identification at trial. We find no clear error in this determination.

When the victim was shown a photo array containing defendant's picture five months after the assault, she was unable to identify defendant as her assailant. She was not asked again to attempt to identify the defendant until ten months after the assault at defendant's preliminary examination, while he was wearing jail clothing and shackles, and with the knowledge that the police believed defendant was a positive DNA match for the perpetrator.

We agree that the detective's disclosure to the victim linking defendant with the DNA evidence renders the identification procedure unduly suggestive. *Gray, supra*, at 113-114. Nevertheless, the trial court did not clearly err in finding that the victim had an independent basis to identify the defendant in court. 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.* As the trial court noted in denying the motion to suppress the identification, the victim in this case had considerable time to observe her assailant during the attack, and was certain about her in-court identification of defendant. The victim testified that she found a difference between trying to identify a person from a photograph as opposed to an in-person identification, and she denied that the suggestive pretrial identification procedure had any influence on her in-court identification. On the record before us, we cannot conclude that the trial court clearly erred in finding that under the totality of the circumstances, the victim's in-court identification of defendant was a valid "separate identification."

Even if the identification evidence was erroneously admitted, reversal of defendant's conviction would not be warranted because, considering the weight of the scientific evidence against defendant, defendant would be unable to demonstrate that it is more probable than not that the introduction of the identification evidence caused a miscarriage of justice to occur. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant's theory was not that the attack did not occur, but that defendant was not the perpetrator. Therefore, identification was the central issue. Even excluding the victim's identification testimony, the DNA evidence recovered from the victim's clothing matched defendant's DNA profile and established that the probability that someone other than defendant had the same DNA profile was 1 in 4.79 billion. This testimony was not meaningfully challenged by the defendant.

Thus, any error in admitting the identification evidence did not result in a miscarriage of justice, and is not grounds for reversal of defendant's conviction.

## B. Victim's Presence in the Courtroom

Defendant next contends that the trial court erred in denying his motion for a mistrial. This Court reviews a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374

(1999). “The trial court’s ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice.” *Id.*

Defendant’s motion for a mistrial challenged the victim’s presence in the courtroom with her newborn child after she testified. The victim sat with her child in the courtroom for the remainder of the trial. Defendant does not claim that either the victim or her child in any way disrupted the proceedings, but nevertheless, contends that the mere presence of the victim and her child in the courtroom evoked such sympathy as to be prejudicial. We disagree.

“A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial . . . .” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Here, the victim’s presence in the courtroom is not an irregularity, but a commonplace occurrence authorized and protected by statute. MCL 780.761 provides that the victim has the right to be present throughout the entire trial of the defendant. As the trial court acknowledged, a crime victim has an important interest in participating fully in the trial of the defendant.

Moreover, we do not find that the child’s presence warranted a mistrial. The jury was aware from the testimony that the victim had a child and that she had pleaded for her life so that she could see her child again. While any number of circumstances might evoke feelings of sympathy for a crime victim, here the jury was specifically instructed to decide the case based on the evidence and the law rather than sympathy. The trial court did not abuse its discretion by denying the motion for mistrial.

### C. Length of Sentence

Finally, defendant argues that his sentence of forty-six to sixty-nine years incarceration is excessive because there is no way that he can be expected to outlive his sentence. Defendant acknowledges that the case he relies on to argue this position, *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), has been superceded by *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), and *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997). Nevertheless, defendant asks us to apply *Moore* in this case. We decline defendant’s invitation to ignore the more recent Michigan Supreme Court precedent on this question.

Affirmed.

/s/ Hilda R. Gage  
/s/ Mark J. Cavanagh  
/s/ Kurtis T. Wilder