STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN ALVAN LEWIS, JR.,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 230887
Kalamazoo Circuit Court
LC No. 00-000171-FH

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree murder, MCL 750.316. the trial court sentenced him as a fourth habitual offender, MCL 769.12, to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant was convicted of the 1980 beating death of Cornell Smith. The incident occurred at about 10:30 p.m. on July 31, 1980 on the grounds of the Woodward School in Kalamazoo County. Witnesses saw two cars pull up to the school. The assailant got out of one car and approached the other car. An argument ensued, during which the assailant returned to his car and retrieved a baseball bat. The driver of the second car subsequently drove off, leaving the victim, who had been his passenger. The assailant chased the victim, and, according to witnesses, inflicted a fatal blow to the victim's head with a full swing of the bat.

I

Defendant first challenges his identification by two witnesses, arguing that their identification of him as the assailant was influenced by impermissibly suggestive identification procedures. Because defendant did not challenge the identification procedures in the trial court, or object to the identification testimony at trial, this issue is not preserved. *People v Carroll*, 396 Mich 408, 412; 240 NW2d 722 (1976). Accordingly, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that his identification by Carl Dixon was unduly suggestive because Dixon was first shown a series of photographs and later attended a live lineup, and defendant was the only person who was in both the photo array and the lineup. He further argues that he was singled-out in the photo array because he was the only person who was not wearing a shirt.

Finally, he contends that he was singled-out in the live lineup because the police ordered him to button his shirt to the top and stand in a casual manner while the other participants were told to stand at attention and to leave their top buttons unbuttoned.

Considering the totality of the circumstances, we conclude that the photo array and lineup were not "unnecessarily suggestive and conducive to irreparable misidentification." *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). A review of both the photo array and a photograph of the live lineup reveals that defendant's appearance was similar to the other participants' appearances. Although defendant was the only participant in the live line-up with his shirt buttoned at the top, this did not have the effect of improperly singling him out. Additionally, defendant's contention that the police deliberately instructed him to make himself stand out from the other participants is supported only by defendant's self-serving affidavit, which is not part of the lower court record. Because this Court's review is limited to the record, we may not consider this affidavit. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).

Further, even if the pretrial identification procedures involving Dixon could be considered suggestive, his in-court identification of defendant would not be precluded if there is an independent basis for the identification. *People v Gray*, 457 Mich 107, 114 n 8; 577 NW2d 92 (1998). 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). In this case, the record amply demonstrates an independent basis for Dixon's in-court identification of defendant. Dixon testified that he had a "vivid memory" of defendant because he and defendant had a personal confrontation that involved pushing and shoving each other. He stated that over the years he has thought about the events of that night numerous times. On the basis of the record before us, defendant has not shown that the admission of Dixon's in-court identification constituted plain error.

We also reject defendant's claim that Gail Johnson's in-court identification was improper. Contrary to defendant's argument, Johnson did not identify defendant in court. Rather, she merely testified that she had picked defendant from a photographic lineup. Thus, there is no merit to this issue.

II

Next, defendant argues that he was denied his right to counsel in 1999 and 2000, when witnesses were presented with a photographic lineup and asked if they could identify the victim's assailant. Again, because defendant did not raise this issue in the trial court, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra*. The fundamental right to counsel attaches at all critical stages of the proceedings. *United States v Wade*, 388 US 218, 224; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). However, counsel is not required at precustodial, investigatory photographic lineups. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Defendant argues that this case falls within an exception to this general rule, as recognized in *Kurylczyk*, in which a suspect had previously been in custody and is now the only suspect, and the police are in the evidence-building phase of the case, rather than the mere suspicion phase.

In *People v Cotton*, 38 Mich App 763; 197 NW2d 90 (1972), the case upon which the exception has been built, this Court stated that "under unusual circumstances a suspect may have a right to counsel during a pretrial photographic identification though at the time he is not in custody." *Id*. at 769. The court found that the following unusual circumstances entitled the defendant to counsel in "this particular situation": (1) the purpose of this identification was to build a case against the defendant; (2) the defendant had been arrested; (3) the defendant had been provided with counsel at the previous lineups; (4) although he was not in custody at the time, his car had been retained; (5) the photographic identification took place shortly after he was released, and (6) although the defendant had been released, the police "apparently still felt he was their man." *Id*. at 770. More recently, in *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000), this Court held that "unusual circumstances," under which a defendant would be entitled to counsel, would have to be similar to the circumstances in *Cotton*, *supra*, or "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant."

We are not persuaded that this case falls within the exception recognized in *Cotton*. Significantly, the challenged photographic procedures in this case were conducted approximately twenty years after defendant was released from custody. In *Cotton*, the photographic procedure was conducted within a week after the defendant was released from custody, and the police were still holding the defendant's car. In this case, although some of the factors listed in *Cotton* are present, where the photographic procedure was conducted approximately twenty years after defendant was released from custody, we cannot conclude that the absence of counsel constituted plain error.

III

Defendant also argues that the police did not have probable cause to arrest him without a warrant and, therefore, any identification testimony based on the live lineup is inadmissible as the "fruit of the poisonous tree." Because defendant did not challenge the validity of his arrest in the trial court, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra*.

A peace officer may arrest a person without a warrant where a felony has been committed and the officer has reasonable cause to believe the person committed the felony. MCL 764.15(1)(c); *People v Melvin Davis*, 146 Mich App 537, 542; 381 NW2d 759 (1985). Probable cause has been defined as "the existence of any facts which would induce a fair-minded person of average intelligence and judgment to believe that the suspected person had committed a felony." *People v Cumbus*, 143 Mich App 115, 117; 371 NW2d 493 (1985), citing *Michigan v Summers*, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981). As this Court stated in *Melvin Davis*, *supra* at 542-543:

> A court reviews the officer's determination of probable cause by asking whether a man of reasonable prudence and caution (not a legal scholar) would determine whether the person arrested had committed a felony. *People v Harper*, 365 Mich 494, 501; 112 NW2d 808 (1962). The reviewing court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. *People v Oliver*, 417 Mich 366, 374; 388 NW2d 167 (1983).

> A reviewing court will not isolate facts or beliefs from their surrounding circumstances in determining the existence of probable cause. *Harper, supra,* p 500.

According to the record, before defendant was arrested, the victim's friend had tentatively identified defendant as the assailant. Although the witness stated that he was not positive about his identification, he did single out defendant's photograph in the array. The officer also had information that defendant had told his nephew that he thought he killed someone in a fight. The nephew gave a statement to the police. In addition, defendant's sister-in-law had overheard this conversation and told her brother, a police officer, who relayed that information to the arresting officer. On this record, the information possessed by the arresting officer was sufficient to "induce a fair-minded person of average intelligence and judgment to believe that" defendant had committed the felony. *Cumbus, supra*; *Melvin Davis, supra*. Accordingly, we find no merit to defendant's claim that his arrest was invalid.

Based on the above, we also conclude that defendant's claim of ineffective assistance of counsel predicated on the foregoing issues must fail. Defendant has not established that counsel's failure to raise the above issues was objectively unreasonable, or that he was prejudiced by any alleged deficiency. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

IV

We find no merit to defendant's claim that the trial court's factual findings were clearly erroneous. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); MCR 2.613(C).

Although defendant refers to inconsistencies in eyewitness testimony, a review of the trial court's findings of fact reveals that the court clearly acknowledged that there were inconsistencies, but found that the testimony was consistent about the "essential elements of what happened." Further, this Court will defer to the trial court in matters of credibility. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Jabez Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998); MCR 2.613(C). We are not left with a definite and firm conviction that a mistake was made. *Jabez Parker*, *supra* at 339.

V

Next, the trial court did not abuse its discretion when it held that defendant's failure to comply with a pretrial order precluded the admission of a witness' prior convictions for impeachment purposes under MRE 609. The court issued a pretrial order that clearly required motions for impeachment evidence to be filed prior to, or no later than, the first day of trial. Thus, we cannot accept defendant's claim that trial counsel did not understand the order. Although defendant's trial counsel was appointed after the order was entered, he was responsible for familiarizing himself with the court file and there is no suggestion that he was not aware of the order. We likewise reject defendant's contention that the impeachment evidence should have been allowed in light of the court's order directing the production of the witnesses' criminal histories. The latter order merely directed that the pertinent information be made available; it did not authorize its admission. Under Local Rule 6.001(E)(2) of the Ninth Judicial Circuit, failure

to timely file a motion may result in a waiver of claims and defenses or the imposition of sanctions. Accordingly, we find no error.

VI

Next, defendant argues that the trial court abused its discretion by failing to authorize sufficient fees to enable him to retain an expert witness in eyewitness identification. Generally, we review a trial court's decision to award expert witness fees for an abuse of discretion. *Novi v Woodson*, 251 Mich App 614, 617; 651 NW2d 448 (2002). In this case, defendant did not have the name of an expert and did not know the amount of the fee required when he initially sought authorization for expert witness fees. The court took the matter under advisement to allow defendant to produce this information. Defendant subsequently submitted a document identifying his expert and the expert's rate for services. The court granted defendant's motion, subject to the Kalamazoo County Expert Witness Fee Schedule, with a limit of $900. Although defendant now contends that he was unable to retain his proposed expert because the amount of funds authorized was insufficient, defendant never notified the court of this alleged situation, never made a request for additional funds, and never asserted that he was unable to retain another expert for the authorized amount. Under these circumstances, we conclude that this issue is not preserved. As such, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra*. Considering that the court granted defendant's motion, that it authorized witness fees in accordance with the county's fee schedule subject to a limit of $900, and that defendant never represented that the amount authorized was insufficient, we conclude that plain error has not been shown.

VII

Defendant argues that the prosecutor knowingly presented false testimony when the victim's friend testified that he saw a bat in defendant's hand, which was inconsistent with the witness' statement in the police report that he did not know whether the assailant was holding anything. The witness was questioned about this discrepancy at trial and insisted that he told the police officer that the assailant reached under the front seat and got a "miniature bat." Defendant also contends that the prosecutor knowingly presented false testimony concerning the description of the vehicle driven by the assailant, which was inconsistent with other accounts.

A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Reversal is not warranted, however, unless there is evidence that the prosecutor knew that the testimony was false. *People v Knight*, 122 Mich App 584, 592-593; 333 NW2d 94 (1983). Where the testimony of some of the witnesses conflicts with statements they gave to the police immediately after the crime, there must be evidence that the prosecutor attempted to keep the contents of those previous statements from the defendant. Where defense counsel is afforded ample opportunity to impeach the witnesses' credibility at trial with their prior statements, it cannot be concluded that the prosecutor knowingly presented false testimony. *People v Wade Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

Here, there is no indication that the prosecutor attempted to conceal the witness' previous statements from defendant. On the contrary, the record indicates that defense counsel had access

to all of the police reports and other documentation, and had ample opportunity to use them in cross-examining the witnesses. Accordingly, there is no merit to this issue.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot