STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
December 9, 2003

No. 237812
Saginaw Circuit Court
LC No. 00-018489-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, carrying a concealed weapon ("CCW"), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b, all in connection with the robbery of a 7-11 store during the early morning hours of February 3, 2000. He was sentenced to concurrent prison terms of thirty-five to sixty years for the robbery conviction and two to four years for the CCW conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. On appeal, defendant assigns a multitude of errors including: illegal arrest for lack of probable cause; errant admission of evidence; denial of his right to a speedy trial; the exclusion of minorities from the jury; denial of his right to present a defense; perjured testimony introduced at trial; and, ineffective assistance of counsel. Because we find none of defendant's arguments persuasive, we affirm.

I

Defendant argues that his arrest was illegal for want of probable cause, and that any evidence that the police obtained as a result is therefore inadmissible. This issue was not raised or decided below, and thus comes to this Court unpreserved. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A police officer may arrest a suspect without a warrant if the officer has reasonable, or probable cause to believe that a felony has been committed and that the suspect committed the felony. MCL 764.15; *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). "Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony." *Id.*

Defendant was arrested on February 9, 2000 in connection with the robbery underlying this case, and also another robbery that took place two days afterward.[1] Defendant asserts that the only information the police had at the time was that the police followed foot and tire tracks from the 7-11 immediately after the robbery to defendant's apartment building. Our review of the record shows otherwise. The police executed a search warrant at defendant's apartment six days before the arrest. The assertions in the affidavit supporting the warrant include that a victim of the other robbery generated a composite drawing of the robber, that the result bore a clear resemblance to a photograph of defendant, and that this victim subsequently identified defendant from a photographic lineup. The affiant additionally stated that this victim reported that the robber wore a brown cloth coat with the name "HEINZ" embroidered on the front, that the police discovered tire tracks from a pickup truck in the snow in a parking lot near the scene of that robbery, and that the police found a truck abandoned in Saginaw Township the next day in which they discovered a brown cloth coat with "HEINZ" embroidered on the front, and which was registered to Vance Heinz, who admitted that he had lent the truck to defendant and gave defendant's address. Moreover, the affiant attested that images captured by the 7-11 surveillance camera in connection with the instant robbery resembled defendant's picture.

We conclude the information the police had in hand when arresting defendant well established probable cause justifying the arrest. Because the arrest was proper, it constituted no "poisonous tree," and therefore its fruits bore no such taint. See *People v Hill*, 192 Mich App 54, 56; 480 NW2d 594 (1991).

II

Defendant argues that his state identification card, seized in the search of his apartment, should not have been admitted into evidence on the ground that the card was not listed in the warrant. Defendant points out that this item was admitted "to establish his guilt in that it allegedly proved that he lived at the Court Street address." This issue was not raised below.

It is not in dispute that defendant resided at the apartment identified in the search warrant. To identify the items to be seized, the warrant includes the following paragraph:

> The PROPERTY to be searched for and seized, if found, is specifically described as: U.S. currency, a handgun and ammunition, a dark-colored stocking cap, a man's brown cloth jacket with an embroidered logo reading "HEINZ", a multi-colored Starter's-style jacket, a Michigan Lottery ticket, a man's leather

[1] Defendant prevailed on a motion for separate trials.

> jacket, a yellow Nextell cell phone, proof of ownership/possession and/or ownership of said items and said apartment.

Bearing on this issue are the words, "proof of ownership/possession and/or ownership of said items and said apartment." This can readily be reduced to "proof of . . . possession and/or ownership of . . . said apartment." Because defendant's identification card tended to prove he resided at the apartment, and thus possessed it or otherwise held some ownership interest in it, that item fell neatly among the particulars listed in the search warrant. The police properly seized the card.

III

Defendant argues that the trial court erred by denying his motion to suppress the identification testimony of the complainant, the store clerk at the 7-11 store. We disagree. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

The fairness of an identification procedure is evaluated in light of the totality of circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Kurylczyk*, *supra* at 311-312, 318; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, her in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) (citations omitted).

Defendant argues that a substantial likelihood of misidentification existed at the corporeal lineup. Because defendant was represented by counsel at the lineup, he has the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Defendant first challenges the complainant's identification of him at the corporeal lineup on the ground that the complainant was not able to identify the perpetrator at an earlier photographic showup.[2] However, the complainant's inability to identify defendant in the earlier photographic array did not create a likelihood of misidentification at the subsequent corporeal lineup; it simply affected the weight of the identification evidence. *Barclay*, *supra* at 675-676. Likewise, the complainant's apparent belief that the photo array was an assembly of black and white photos, rather than color photos, affected only the weight of her identification

[2] Defendant does not argue on appeal that the circumstances or procedure used during the photographic showup were improper.

testimony; it is not evidence of a suggestive pretrial procedure. See *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972).

Defendant also insinuates that the lineup was impermissibly suggestive because the complainant had previously stated that she wanted to see the perpetrator in person. According to defendant, it was therefore "obvious" that she attended the lineup with the idea that the person who robbed her would be present. However, defendant does not identify any evidence, nor does the record indicate, that the police told the complainant the actual perpetrator would be at the lineup. Indeed, the record discloses the corporeal lineup was initiated at defendant's request. The procedure was not rendered unduly suggestive merely because the complainant might have believed the perpetrator would be at the lineup. *McElhaney*, *supra* at 287.

Defendant also argues that the corporeal lineup was tainted because the complainant was shown a single photograph of defendant by the investigating officer. Defendant suggests that this occurred after an adjourned preliminary examination hearing on February 23, 2000 before the complainant identified defendant at the lineup. The record discloses, however, that the complainant consistently stated that she identified defendant at the corporeal lineup on March 13, 2000, and then subsequently attended a court proceeding where she saw the single photograph of defendant. The complainant's accounts of the timing of the events were corroborated by the investigating officer and a number of other witnesses, including two assistant prosecuting attorneys who testified that the complainant was not present at the proceeding on February 23, 2000, but was present for a second proceeding on March 14, 2000. Given this testimony, we find no clear error in the trial court's determination that the complainant did not view the photograph before participating in the corporeal lineup. Additionally, both the complainant and the investigating officer testified that the officer did not deliberately show the complainant the photo, but rather, she viewed it inadvertently while the officer was flipping through his case file. Therefore, the complainant's observation of defendant's picture did not affect the corporeal lineup procedure.

We likewise reject defendant's claim that the lineup was rendered unduly suggestive because the complainant observed a person dressed in orange during a court proceeding. As we noted above, the record indicates the complainant was not present at the February 23, 2000, proceeding. Her later observation of a portion of an individual's face occurred on March 14, 2000, after the lineup had already been conducted. In sum, defendant has not shown that the corporeal lineup was tainted by improper procedure or was otherwise unduly suggestive. Therefore, the trial court did not err in allowing the complainant's identification testimony at trial.

IV

Defendant next argues that he was denied his right to a speedy trial. We disagree. To determine whether a defendant has been denied his right to a speedy trial, this Court must balance the following considerations: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

Here, the delay of seventeen months is not presumptively prejudicial. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Second, the record indicates that a large portion of the delay was attributable to defendant and defense counsel. Specifically, some of the delay was caused by defendant's decision to change trial attorneys, and the record also reflects repeated requests for, or stipulations to, adjournment of trial by defense counsel. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002); *People v Gilmore*, 222 Mich App 442, 461; 564 NW2d 158 (1997). Third, although defendant asserted his right to a speedy trial below, he waited approximately thirteen months before doing so, which weighs against his claim that his right to a speedy trial was violated. *Barker supra* at 529, 531-532; see also *People v Ovegian*, 106 Mich App 279, 284; 307 NW2d 472 (1981). Finally, defendant does not claim any prejudice to his defense as a result of the delay. *Id*. Defendant has not demonstrated that his right to a speedy trial was violated.

V

Defendant next argues the prosecutor improperly used peremptory challenges to excuse two African-American jurors in an attempt to systematically exclud minorities from the jury. We disagree. The burden of showing a violation of the Equal Protection Clause rests initially on the defendant to make out a prima facie case of purposeful discrimination. *Batson v Kentucky*, 476 US 79, 93-94; 106 S Ct 1712; 90 L Ed 2d 69 (1986). In deciding whether a defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of removal against minority jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Id*. at 97. If a defendant makes a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor to articulate a racially neutral explanation for the challenges. *Id*. at 97-98. The trial court must then determine if the defendant has established "purposeful discrimination." *Id*. We review the trial court's decision for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). However, the trial court is afforded a great deal of latitude with respect to this issue and we review its finding of facts for clear error. MCR 2.613(C); *Batson, supra* at 98 n 21; *People v Barker*, 179 Mich App 702, 706; 446 NW2d 549 (1989).

Defendant failed to establish a prima facie case of purposeful discrimination. Defendant essentially argues that, because two of the prosecutor's peremptory challenges were used to remove minority jurors, this reflects a pattern of discrimination. However, the mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from a jury venire is insufficient to establish a prima facie case of discrimination. *Batson, supra* at 97; *People v Williams (After Remand)*, 174 Mich App 132, 137; 435 NW2d 469 (1989). The record discloses that three African-American jurors remained on the jury panel, and that the prosecutor exercised only four peremptory challenges altogether, which militates against a finding of purposeful discrimination. *Howard, supra* at 536 n 3, citing *Williams (After Remand), supra* at 136-137. Because defendant failed to make a prima facie showing of purposeful discrimination, the prosecutor was not required to provide a neutral explanation for exercising the peremptory challenges. *Id*.

Furthermore, we are satisfied that the prosecutor properly provided race-neutral reasons for challenging the two jurors. The prosecutor stated that he excused one juror because she had been a character witness for a defendant who was convicted in another armed robbery case and the prosecutor believed this experience may have biased the juror against the police or the prosecution. The other juror was excused because he repeatedly attempted to avoid jury duty, which the prosecutor believed showed that he was reluctant to participate in the judicial process. While defendant argues the prosecutor's reasons were not legitimate, a party's reasons for dismissing a juror do not have to be persuasive or even plausible, so long as they are race-neutral on their face. *Clarke v K-Mart Corp*, 220 Mich App 381, 384; 559 NW2d 377 (1996). The prosecutor's reasons were race-neutral and the trial court did not abuse its discretion in denying defendant's *Batson* challenge.

VI

Defendant next argues the trial court erred by allowing the prosecution to present police testimony concerning statements made by defendant's sister-in-law when she arrived at defendant's apartment during the execution of a search warrant. When asked why she was at the apartment, defendant's sister-in-law replied she was there because defendant had called her approximately ten minutes earlier and wanted her to take him to visit his mother at a hospital in Pontiac. Even if we were to credit defendant's claim that the statements were inadmissible hearsay, defendant cannot show he is entitled to relief. An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000). Here, the same officer who related the challenged statements also testified that defendant admitted during questioning that he failed to meet his sister-in-law at the apartment because he had already gone to Pontiac with his brother. Thus, the challenged testimony was cumulative and any error in its admission was harmless.

VII

Defendant next argues reversal is required because the trial court excluded evidence that a known armed robber resided at his apartment building. Defendant asserts this evidence was relevant, and thus its exclusion denied him his right to present a defense. We disagree.

A criminal defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), citing US Const, Ams VI and XIV, and Const 1963, art 1, §§ 13, 17, 20. Defendant insists the evidence in question bore on the defense's theory that someone other than defendant committed the robbery. However, the record discloses defense counsel admitted this other alleged robber did not possess the physical characteristics of either defendant or the perpetrator of the charged robbery as depicted in the store videotapes, and expressly disclaimed any suggestion that this neighbor of defendant was the person on the tape. Because there was no suggestion below that this other alleged robber was involved in the instant crime, defendant's implication that the evidence concerning this other person was exculpatory of himself, or otherwise relevant, are inapt. The trial court did not err in excluding that evidence as irrelevant. MRE 401 and 402. See also *Taylor v Illinois*, 484 US 400, 410; 108 S Ct 646; 98 L Ed 2d 798 (1988) ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

Further militating against reversal is that defense counsel did not disclose this line of inquiry until trial was well in progress, in violation of discovery orders. If the remedy of exclusion is not lightly to be resorted to, see *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987), it nonetheless remains within a trial court's discretion, MCR 6.201(J). See also *Taylor v Illinois, supra* at 412-415 (a criminal defendant may be prevented from presenting even relevant evidence if offered in violation of discovery orders).

In light of its negligible relevance in the instant case, and defense counsel's belated attempt to make capital of it, the trial court did not abuse its discretion by limiting the extent defense counsel could make issue of the existence of another person in defendant's building who had been implicated in an armed robbery.

VIII

Defendant next argues his right to a fair trial was violated because the police failed to subject the tire-track and footprint evidence used to link him to the robbery to forensic analysis. We disagree. Because defendant did not object to the challenged evidence at trial, our review is for plain error affecting defendant's substantial rights. *Carines*, *supra*. It is well settled that due process does not require the police to seek and find exculpatory evidence. See *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975). Moreover, the jury was able to compare photographs of the footprints and tire tracks and defendant was able to cross-examine the police witnesses about their observations. Defendant has failed to demonstrate a plain error affecting his substantial rights.

IX

Defendant also maintains he is entitled to a new trial on the ground that the complainant and a police witness provided perjured testimony when they testified that, the complainant asked the police to have the participants move to allow her to obtain a better view of their eyes at the corporeal lineup. We disagree. The discovery that testimony introduced at trial was perjured may be grounds for a new trial. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). However, in order to warrant a new trial on the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

Although defendant has submitted a recent affidavit by former trial counsel that the complainant did not make such a request at the lineup, it is apparent this evidence is not newly discovered. Defendant was present at both the lineup and during the challenged testimony at trial. The appendices attached to defendant's supplemental brief, consisting of affidavits from himself and one of the other lineup participants,[3] both asserting that they were not asked to adjust their facial positions for the observer's benefit do not strengthen defendant's position.

[3] This affiant is currently an inmate confined at the Saginaw Correctional Facility, serving a (continued…)

Defendant states that the complainant "did not testify at the motion hearing regarding the alleged instructions to the lineup participants," and thus her trial testimony concerning obtaining a better view at the lineup came as a surprise. However, defendant nowhere suggests the complainant was not available before trial had the defense wished to inquire of the matter. Defendant cites no authority for the proposition that whenever a prosecution witness offers testimony not fully anticipated by the defense the door is therefore opened to challenge the result through the device of bringing "new evidence" to impeach that testimony. Quite the contrary, "[n]ewly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *Davis*, *supra*, 199 Mich App at 516.

In any event, differing recollections concerning whether the lineup subjects were asked to adjust their postures so the complainant might obtain a better look at their eyes presents only a minor evidentiary conflict—one that does little to throw the complainant's identification of defendant into doubt. For these reasons, defendant has failed to show that he is entitled to relief on this issue.

X

Defendant additionally argues trial counsel was ineffective. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In addition, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant first argues counsel was ineffective for failing to move to suppress the complainant's identification testimony on the ground that counsel was not present during the photographic showup conducted by the police. We disagree. Defendant has not demonstrated this case falls within an exception to the general rule that counsel is not required at a precustodial, investigatory photographic showup. *Kurylczyk*, *supra* at 302. The facts do not fit the "unusual circumstance" exception found in *People v Cotton*, 38 Mich App 763; 197 NW2d 90 (1972), because defendant had not been arrested and released before his identification. This was also not a case "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant." *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994); see also *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000). Although defendant had been identified in a similar robbery that took place a few days earlier, and the police had reason to suspect defendant's involvement in the instant robbery, the complainant had not yet identified defendant before reviewing the photographic array.

(…continued)

sentence for armed robbery.

Moreover, we note that, before trial, defense counsel successfully moved to sever this case from the case involving the other robbery, and to also preclude the admission of evidence concerning the other robbery. Defendant's position on appeal that the two robberies were so inextricably linked as to constitute unusual circumstances directly contradicts counsel's pretrial position that led to the severance of the cases and the exclusion of evidence. Defendant has failed to show that counsel acted unreasonably.

We also reject defendant's claim that counsel was ineffective for not objecting to the absence of counsel when the complainant observed a single photograph of defendant. As discussed previously, by the time this occurred, the complainant had already identified defendant at a proper corporeal lineup. Thus, defendant cannot demonstrate that any error attendant to this later viewing affected the outcome of trial.

Defendant also challenges the effectiveness of defense counsel on the ground that the latter failed to object to identification evidence insofar as it was the result of defendant's arrest. Because we conclude in part I *supra*, that the arrest was proper, no argument predicated on the contrary will support a claim of ineffective assistance of counsel. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). We likewise reject defendant's assertion that counsel was ineffective for failing to move to suppress defendant's identification card. Because we conclude in part II *supra*, that the identification card was among the items particularly identified as objects of the search, we conclude here that defense counsel had nothing to gain from raising any such challenge. *Id.*

Finally, defendant argues that counsel was ineffective because she failed to object to the prosecutor's arguments concerning defendant's alleged flight, or the court's jury instruction on this issue. Contrary to what defendant argues, it was not improper for the prosecutor to argue the issue of flight based on defendant's hasty trip to Pontiac, when he left his identification card behind. The prosecutor was free to argue the evidence and reasonable inferences arising therefrom. Similarly, the court's jury instruction was warranted because it related to an issue supported by the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000); see also *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). As such, counsel was not ineffective for failing to object to the prosecutor's arguments or the court's instruction. *Snider*, *supra*.

For these reasons, we conclude defendant has failed to show that his claims of ineffective assistance of counsel warrant either reversal or remand for further evidentiary development. See *People v Dawkins*, 450 Mich 954; 549 NW2d 560 (1995); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio