STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 243080 Oakland Circuit Court
MICHAEL EDWARD LEE, Defendant-Appellant.	LC No. 2001-181089-FH

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

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of larceny over $1,000 but less than $20,000, in violation of MCL 750.356(3)(a). The trial court sentenced defendant to 2 to 15 years in prison. We affirm.

This case arises out of the theft of a computer from a United Parcel Service (UPS) loading dock in Clawson on September 4, 2001. The only eyewitness to the event, Terry Harris, a UPS clerk, testified that he saw defendant take a package with a Dell logo on it, put it in his vehicle, and then take off. Harris later identified defendant at a photographic lineup, an unintentional meeting at the jail where defendant was present for a parole revocation hearing, at the preliminary examination hearing, and at trial.

Defendant's sole argument on appeal is that the trial court clearly erred in denying a motion to suppress the eyewitness identification because the photographic lineup, identification in the hallway at the parole revocation hearing, and identification at the preliminary examination were unduly suggestive, and there was no independent basis for Terry Harris' in-court identification of defendant. Further, defendant argues that because the identification procedures were unnecessarily suggestive and conducive to irreparable misidentification, he was denied the due process right to a fair trial.

We review de novo the trial court's ultimate decision with regard to a motion to suppress evidence. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). However, we review the trial court's findings of fact in deciding the motion for clear error. *Id.* A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

The Michigan Supreme Court has held that a defendant is generally not entitled to counsel at a precustodial photographic lineup. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). "A defendant is entitled to 'counsel at a precustodial investigatory lineup' only when the 'circumstances underlying the investigation and the lineup are "unusual."'" *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000), quoting *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). Because there were no unusual circumstances in the instant case, i.e., defendant was not in custody and had not been contacted or questioned before the lineup, the trial court properly determined that defendant did not have the right to counsel at the precustodial photographic lineup.

Defendant argues that the photographic array shown to Harris was unduly suggestive, and violated his Fourteenth Amendment right to due process. US Const, Am XIV; Const 1963, art 1, § 17; *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). The Supreme Court has ruled that "in order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk, supra* at 302-303. "If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure." *Id.* at 303.

"Defendant [] argues that the pretrial photographic array used to identify him was impermissibly suggestive because various characteristics of his photograph caused him to be singled out from the other men." *Kurylczyk, supra* at 303. The Supreme Court has noted that "generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Kurylczyk, supra* at 304. This Court has commented that "physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Additionally, "physical differences generally relate only to the weight of an identification and not to its admissibility." *Id.*

It is evident from examining the photographic lineup that defendant's photograph was distinct. As defendant properly states, defendant is the only man in the photographic array with his eyes closed, and his photograph is the only one with a blue background. However, "a suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification." *Kurylczyk, supra* at 306. "The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *Id.*

"When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification." *Kurylczyk, supra* at 306. As noted in *Kurylczyk*, some of the relevant factors to be examined were outlined in *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972):

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

In the instant case, Harris testified that his attention was focused on defendant during the incident, which lasted approximately five minutes, and that he had a clear view of defendant for one or two minutes. Following the incident, Harris described defendant to the police as a black male, approximately 6'2", and wearing blue jeans. Within one week of the incident, Harris selected defendant's picture within 30 to 45 seconds of viewing the photographic lineup, and was seventy-five percent certain that the person he selected was the person who had stolen the computer. Harris explained that he was only seventy-five percent sure that the person he selected was correct because the picture was not up to date; the person who had stolen the computer had gray hair, and the photograph in the lineup was not recent.

The trial court found that Harris had "an opportunity to view the defendant at the time of the alleged [cr]ime because he engaged in a conversation with him during daylight hours. The photographic line up occurred within one week after the incident." Further, the court noted that while Harris said he was seventy-five percent positive of his identification of defendant, he also stated that he was "very positive that defendant was a man he encountered on the day of the incident." The trial court also found that "defendant's argument that the line up was unduly suggestive because of the color of the background and the photograph used is unpersuasive."

Despite any possible suggestiveness in defendant's lineup photograph, defendant has not demonstrated that the trial court erred in denying his motion to suppress Harris' identification. "Nothing in the record supports a conclusion that there was a substantial likelihood of misidentification at the photographic array as a result of any suggestive influences." *Kurylczyk, supra* at 310. Harris testified that there was no indication that defendant was in the photographic lineup and that the police did not point out a specific picture to him. Further, "no testimony was elicited from [Harris] indicating that [he] chose defendant's photograph because of the suggestive features of his photograph." *Kurylczyk, supra* at 310. The record reveals that Harris was initially seventy-five percent certain that defendant's lineup photograph was the person who had stolen the computer (because of the age of the photograph), and that when Harris saw defendant in the hallway at the parole revocation hearing and at the preliminary examination, he was one hundred percent certain of his identification and had no "doubt about whether or not this [] man was the person [he] saw take that package from UPS." The trial court's determination that the photographic lineup was not impermissibly suggestive was not clearly erroneous, because after a review of the record, we are not left with a definite and firm conviction that a mistake has been made. Thus, Harris' identification testimony concerning the photographic lineup was properly admitted into evidence at trial. Because the photographic lineup was not impermissibly suggestive, it did not taint Harris' subsequent in-court identification of defendant, and there is no need to establish an independent basis for Harris' in-court identification of defendant. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988).

Defendant next argues that Harris' identification of defendant in the hallway before the parole revocation hearing was improperly suggestive and violated defendant's right to counsel.

It is well settled that an accused is entitled to counsel at "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *People v Williams*, 244 Mich App 533, 541; 624 NW2d 575 (2001). "However, in *Moore v Illinois*, 434 US 220, 226-227, 231; 98 S Ct 458; 54 L Ed 2d 424 (1977), the [United States Supreme] Court clarified that the right to counsel at identification procedures only attached once adversarial proceedings were initiated." *Williams, supra* at 541.

The record reveals that adversarial proceedings against defendant in the instant case had not been initiated at the time of defendant's parole revocation hearing on October 25, 2001. Defendant was not charged in the instant case until October 30, 2001. Therefore, defendant was not entitled to counsel at the parole revocation hearing. Moreover, even if the parole revocation hearing occurred after the instant case had been initiated, it was not an *identification* procedure to which the right to counsel attaches. Rather, Harris inadvertently saw defendant in the hallway before the parole revocation hearing, and identified him without prompting.

In *People v Hampton*, 52 Mich App 71, 76-77; 216 NW2d 441 (1974), rev'd on other grounds 394 Mich 437; 231 NW2d 654 (1975), two witnesses were standing in the hallway with the assistant prosecutor before trial, and saw the defendant walk toward the courtroom. One witness spontaneously identified the defendant to the prosecutor, and the other witness did not identify the defendant at that time, nor was she able to identify the defendant in court. *Id*. at 77. This Court held that "the witnesses' viewing was mere happenstance," and that "the inadvertent pretrial confrontation" did not fall within *Wade's* ambit of "police-induced, arranged confrontations." *Id.;* see *United States v Wade,* 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), *Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967), and *Stovall*, *supra* at 293.

In *People v Metcalf*, 65 Mich App 37, 41, 50; 236 NW2d 573 (1975), a witness saw and identified the defendant, without prompting, at the courthouse where she was signing the complaint, and the defendant was in the magistrate's office being arraigned on other charges. This Court found the spontaneous identification similar to the identification in *Hampton, supra* at 76-77, commented that "the *Hampton* Court held that such happenstance confrontations do not bring into play the *Wade-Gilbert-Stovall* line of cases," and held that the trial court properly denied the defendant's motion to quash the witness' later in-court identification on that basis. *Metcalf, supra* at 50.

Similarly, in the instant case, Harris' identification of defendant in the hallway before the parole revocation hearing was precisely the type of inadvertent happenstance occurrence that does not bring into play the protections afforded to defendants in police-induced, arranged confrontations. *Metcalf, supra* at 50; *Hampton, supra* at 77. Harris testified that he did not go to the jail to identify defendant, was not looking for defendant, and just happened to be in the hallway when other people were looking for him. Harris' identification of defendant in the hallway before the parole revocation hearing was not suggestive, and therefore did not taint Harris' subsequent in-court identification of defendant.

Defendant next argues that Harris' identification of defendant at the preliminary examination was improperly suggestive and tainted Harris' subsequent in-court identification. However, this Court has held that there is no per se rule that courtroom identifications, whether at preliminary examinations or at trial, are inherently suggestive. *People v Fuqua*, 146 Mich

App 133, 142-143; 379 NW2d 396 (1985). This Court has held that the totality of the circumstances must be reviewed to determine whether an identification at a preliminary examination was suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996).

Harris positively identified defendant at the preliminary examination, approximately two months after the incident. Harris testified that he had previously identified defendant at the photographic lineup, and admitted that while he was seventy-five percent certain that defendant was the person who had stolen the computer at the time of the photographic lineup, because of the age of the photograph, he now had no doubt that defendant was the person who had stolen the computer. Harris had a clear view of defendant during the incident, and identified him at the preliminary examination two months after the incident. Under the totality of the circumstances, defendant's right to due process was not violated by Harris' identification of him at the preliminary examination. *McElhaney, supra* at 287.

"Because there was no impropriety in [Harris'] pretrial identifications of defendant [at the photographic lineup, in the hallway before the parole revocation hearing, and at the preliminary examination], there was no need to establish an independent basis for an identification." *McElhaney, supra* at 288. Accordingly, the trial court did not clearly err in its determination that the pretrial identification procedures were not impermissibly suggestive, and properly denied defendant's motion to suppress Harris' identification on that basis.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage