STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2004
v	No. 245502 Wayne Circuit Court
JAJUAN DION COLLIER, Defendant-Appellant.	LC No. 02-001919

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to seventy months to twenty years for the carjacking conviction and two years for the felony-firearm conviction, to be served consecutive to and before the carjacking conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences but remand for correction of his Sentencing Information Report.

Defendant first argues that his carjacking conviction violates double jeopardy because he was already convicted of unauthorized use of the same vehicle in Ohio, Ohio Rev Code 2913.03. A double jeopardy claim presents a question of law that we review de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The Double Jeopardy Clauses of the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The prohibition against double jeopardy protects a defendant against successive prosecutions for the same offense and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004).

Defendant argues that his convictions violate the double jeopardy protections clause because the convictions violate the "same transactions" test set forth in *People v White*, 390 Mich 245; 212 NW2d 222 (1973). However, the Supreme Court recently overruled *White* and adopted the *Blockburger*[1] "same elements" test. *Nutt*, *supra* at 575, 591. Under *Blockburger*, if each offense requires proof of an element that the other does not, the test is satisfied.

[1] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 2d 306 (1932).

Defendant pleaded guilty in Ohio to violating Ohio Rev Code 2913.03, which provides:

> No person shall knowingly use or operate an aircraft, motor vehicle, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner or person authorized to give consent.

Therefore, a conviction under this statute requires proof that defendant (1) knowingly operated a motor vehicle (2) without the consent of the owner or someone authorized to give consent.

Defendant was also convicted in Michigan of violating MCL 750.529a, which provides:

> A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in section 412 from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Thus, for carjacking, the prosecution is required to prove that defendant (1) took a motor vehicle from another person (2) in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle (3) by force or violence, by threat of force or violence, or by putting the person in fear. *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998). Because both unauthorized use of a motor vehicle and carjacking contain elements not contained in the other, defendant's conviction for carjacking was not barred on double jeopardy grounds. *Nutt*, *supra*.

Defendant next argues that his lineup was impermissibly suggestive because his photograph was larger and more prominently featured than the others. We disagree. A photographic identification procedure can be so impermissibly suggestive as to deprive a defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306, 311-312; 505 NW2d 528 (Griffin, J.), 318 (Boyle, J.) (1993).

We conclude that the photographic lineup in this case was not so impermissibly suggestive as to lead to a substantial likelihood of misidentification. Where individuals depicted in a photographic lineup are "fairly representative" of defendant's features, differences in the "composition of the photographs" does not render a lineup impermissibly suggestive. *Kurylczyk*, *supra* at 304-305. See *People v Thornton*, 62 Mich App 763, 768-769; 233 NW2d 864 (1975) (photographic lineup not impermissibly suggestive where the defendant's photograph showed only his head and shoulders while the other photographs were full body shots); *People v Cantrell*, 27 Mich App 210, 211-212; 183 NW2d 401 (1970) (photographic lineup not impermissibly suggestive where the defendant's photograph was larger than the other photographs and had two holes in it).

Defendant also argues that the destruction of a handgun taken from the vehicle at the time of his arrest in Ohio constituted bad faith and deprived him of due process and his right to present a defense. "[U]nless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). Defendant has presented no evidence that the police intentionally destroyed the handgun at issue. In fact, the handgun was destroyed as a result of an Ohio court order. Accordingly, we also reject defendant's assertion that the trial court erred in not sua sponte giving an adverse inference instruction regarding destruction of the handgun. Defendant has failed to establish that any error, plain or otherwise, occurred. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, trial counsel was not ineffective in failing to request such an instruction because counsel is not obligated to bring a futile motion. See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Finally, defendant argues that the trial court erred in failing to make corrections to his Sentencing Information Report (SIR). At sentencing and resentencing, the trial court considered challenges to defendant's SIR. It ruled that Prior Record Variable (PRV) 7 and PRV 5 should both be scored zero, and defendant's guidelines range should be forty-two to seventy months. The SIR does not reflect these changes. Therefore, we remand for the ministerial task of correcting the SIR to reflect the court's rulings. In addition, we direct that a corrected version of the SIR be forwarded to the Department of Corrections.

We affirm defendant's convictions, but remand for correction of the Sentencing Information Report. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard Allen Griffin