

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JORGE ANTONIO IBARRA PEREZ,

Defendant-Appellant.

UNPUBLISHED

November 16, 2004

No. 248738

Wayne Circuit Court

LC No. 02-011705-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520(b). He was sentenced to concurrent ten- to twenty-year terms. He appeals as of right, and we affirm.

Defendant first argues that the trial court erred when it failed to suppress the victim's on-the-scene identification on grounds that it violated defendant's constitutional rights to counsel and to due process. We disagree.

This Court reviews the trial court's decision to allow identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

"The right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 611; 684 NW2d 267 (2004) (overruling *People v Anderson*, 389 Mich 155; 205 NW2d 461 [1973], to the extent it extended the right to counsel to a time before initiation of adversarial criminal proceedings.) *Hickman*, *supra*, was decided during the pendency of this appeal. Before *Hickman*, this Court had held that prompt on-the-scene identifications were proper notwithstanding the absence of counsel. *People v Winters*, 225 Mich App 718, 727; 571 NW2d 764 (1997). Here, police conducted the challenged on-the-scene identification promptly. Thus, under either *Hickman* or *Winters*, defendant's challenge fails.

With regard to defendant's second assertion, in order to sustain a due process challenge in connection with a pretrial identification procedure, a defendant must show that the 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. 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 to the confrontation, and the length of time between the crime and the confrontation. *Id.*

In the present case, there is nothing in the record to suggest that the on-the-scene identification procedure presented a substantial likelihood of misidentification. Further, there is nothing in the record to suggest that the police made any improper suggestion to the victim that they had apprehended the right person. Rather, it appears that police brought defendant, who apparently spoke only Spanish, to the victim's location to determine if he was the perpetrator because they were unable to communicate with him, and that police said nothing to the victim before she became upset and spontaneously identified defendant.

Defendant next argues that the prosecution presented insufficient evidence to prove beyond a reasonable doubt that he was the person who committed the charged crimes. Again, we disagree.

In reviewing the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400.

Here, defendant challenges the sufficiency of the evidence only as to his identity as the perpetrator. Defendant stresses that the DNA evidence established that the scrapings from the victim's fingernails were not from the victim or defendant, and that a witness testified that the man following the victim was dressed in light, rather than dark, clothing. We conclude, however, that it was for the jury to determine whether these facts created a reasonable doubt in light of the substantial evidence of defendant's guilt. The victim identified defendant as her assailant, and witnesses testified that she described him in a manner consistent with his actual appearance before the on-the-scene identification. Further, defendant's appearance was consistent with his having fought with the victim in the grass, and defendant had the victim's bracelet in his possession. Thus, the prosecution presented sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant committed the crimes of which he was convicted.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot