STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v	No. 250329 Oakland Circuit Court
SHEDRICK IGARLAND SMITH, Defendant-Appellant.	LC No. 2003-189170-FC

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Shedrick Igarland Smith appeals as of right his jury trial convictions of armed robbery,[1] assault with intent to rob while armed,[2] and two counts of possession of a firearm during the commission of a felony.[3] Defendant was sentenced as a second habitual offender[4] to concurrent sentences of fourteen to fifty years' imprisonment for his armed robbery and assault convictions to be served consecutive to his concurrent sentences of two years' imprisonment for his felony-firearm convictions. We affirm.

I. Factual Background

On the evening of August 24, 2002, a Burger King restaurant in Bloomfield Township was robbed at gunpoint. About thirty minutes before the robbery, employee Charmaine Threets insisted on taking out the garbage.[5] As the restaurant lobby was closed for the evening, Ms. Threets used the back door of the restaurant. Although this door was usually locked, Ms. Threets

[1] MCL 750.529.

[2] MCL 750.89.

[3] MCL 750.227b.

[4] MCL 769.10.

[5] As Ms. Threets and defendant were previously acquainted, she was a suspected participant in the robbery. However, charges were never brought against Ms. Threets.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

failed to relock the door upon her return. Between 9:00 and 9:30 p.m., a man wearing a dark gray hooded sweatshirt entered the back door and walked to the front counter of the restaurant where Ms. Threets, James Reed and assistant manager Marvin Jordan were standing. The robber pointed a gun at Mr. Reed's head and told him to open the safe. Mr. Reed indicated that he did not have the combination and directed the robber to Mr. Jordan. The robber then jabbed the gun at Mr. Jordan's chest and ordered him to open the safe. At some point, the robber instructed the employees to lay on the ground. Everyone did, including Stephanie Hamelin who was working outside of the robber's vision. Mr. Jordan placed the money from the safe and the registers into a Burger King bag, and then laid down on the floor. When the robber left, Mr. Jordan locked the door and called 911.

When the police arrived, each employee gave a written statement and described the robber.[6] At that time, Ms. Threets indicated that she did not get a clear view of the robber and was unable to identify him. When Ms. Threets arrived at her Pontiac home following the robbery, she saw defendant standing outside. Defendant often stayed with relatives who lived on Ms. Threets's street and the two had been introduced by defendant's cousin Tangernika Woods.[7] Defendant told Ms. Threets not to tell anyone about the robbery. The two then entered Ms. Woods's apartment. Ms. Threets testified that defendant threatened to shoot both women if they turned him in. Ms. Threets was arrested later that same night on a retail fraud warrant. At that time, she provided a written statement to the police identifying defendant as the robber.

Ms. Woods testified that she had spent the entire day alone with defendant in Pontiac running errands. Some time that evening, defendant took Ms. Woods's car keys. Ms. Woods testified that defendant returned with her car in the early morning hours,[8] had a bag of money and admitted to robbing the Burger King. Ms. Woods claimed that both defendant and Ms. Threets threatened her and told her not to tell anyone of the robbery, but that she had already called the police at that time.

The defense presented only the testimony of defendant's girlfriend, Lasanda Wallace. Ms. Wallace testified that defendant watched their children that evening while she was at school. She testified that defendant was at their Flint home at 5:45 p.m. when she left and at 11:15 p.m. when she returned. Ms. Wallace further testified that defendant could not have traveled to Pontiac that evening as she had the couple's only vehicle.[9] As defendant failed to provide notice of this alibi witness, the trial court struck this portion of Ms. Wallace's testimony and instructed the jury that they could not consider this evidence.

---

[6] The employees' descriptions of the robber will be discussed in greater detail later.

[7] Ms. Threets testified that she had known defendant for one week, but Ms. Woods testified that Ms. Threets and defendant had been romantically involved for a month.

[8] Ms. Woods actually called 911 to report the use of her car in an armed robbery at 11:05 p.m.

[9] Defendant told Detective Patrick Krease upon his arrest that he was working at an office supply store in Pontiac on the night of the robbery.

II. Motion to Suppress Photographic Line-Up

Defendant contends that the trial court improperly denied his pre-trial motion to suppress evidence regarding the photographic line-up as it was unduly suggestive. Defendant asserts that his picture is the only one in which the individual appears to be wearing a hooded shirt. Defendant also asserts that the location of his picture in the center of the top row was unduly suggestive.[10] Furthermore, defendant contends that he was entitled to the presence of counsel at the line-up as he was the only suspect in this case. Due to these errors, defendant alleges that the witnesses' in-court identifications were tainted. We review a trial court's factual findings on a motion to suppress for clear error[11] and underlying legal determinations de novo.[12] To the extent that defendant failed to properly preserve his challenge, our review is limited to plain error affecting defendant's substantial rights.[13]

We first note that defendant was not entitled to the presence of counsel at the photographic line-up. The right to counsel at a photographic line-up attaches when the suspect is in custody at the time of the line-up.[14] Although a defendant who is the *sole* focus of a police investigation previously enjoyed the right to counsel at a photographic line-up,[15] the Michigan Supreme Court has since made clear that the right to counsel only attaches to line-ups "conducted at or after the initiation of adversarial criminal proceedings."[16] The initiation of criminal proceedings is marked at the initiation of adverse judicial proceedings, or when a "'formal charge, preliminary hearing, indictment, information or arraignment'" has occurred.[17] The photographic line-up in this case was conducted on September 11, 2002. Although defendant was the sole suspect, he was not arrested until February 18, 2003. Accordingly, defendant was not entitled to the presence of counsel at the line-up.

---

[10] Defendant did not raise this argument in this original motion to suppress. Defendant questioned Detective Krease regarding the placement of the photo during cross-examination at trial. As defendant failed to challenge the evidence on this ground, it is not preserved for appellate review. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

[11] *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

[12] *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

[13] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[14] *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993).

[15] *Id.* at 298-302.

[16] *People v Hickman*, 470 Mich 602, 603; 684 NW2d 272 (2004). *Hickman* overrules *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), to the extent that *Anderson* extends a defendant's right to counsel at a line-up "to a time before the initiation of adversarial proceedings." *Hickman*, *supra* at 603.

[17] *Hickman*, *supra* at 607-609, quoting *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977).

Furthermore, we do not find that the photographic line-up was unduly suggestive. "A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."[18] Defendant contends that he is the only one in the line-up wearing a hooded shirt like the robber. However, from a review of the photographs presented to the witnesses, it does not readily appear that defendant is wearing a hood.[19] Also, defendant's picture was randomly placed by a computer in the center of the top row. Detective Krease testified that he left defendant's picture in that location to avoid "tinkering" with a wholly random process. Accordingly, we find that defendant's arguments are without merit. As the photographic identification procedure was proper, the witnesses' subsequent in-court identifications were not tainted.

III. Alibi Testimony

Defendant contends that the trial court improperly struck a portion of Ms. Wallace's testimony based on his failure to file a notice of intent to raise an alibi defense as her testimony did not provide an alibi. Defendant asserts that Ms. Wallace's testimony was limited. She only testified that he was at home at 5:45 p.m. and 11:15 p.m. with their children, but did not indicate where defendant was between 9:00 and 9:30 p.m. when the robbery actually took place. Defendant also contends that the prosecutor improperly referenced Ms. Wallace's testimony on this point during closing argument after defendant had been ordered to refrain from such argument.

A. Lack of Notice

We review defendant's assertion that the trial court improperly struck Ms. Wallace's testimony based on the lack of notice for an abuse of discretion.[20] The statutory notice requirement provides:

> If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall . . . file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain . . . the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.[21]

---

[18] *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (footnote omitted), citing *Kurylczyk*, *supra* at 304.

[19] On cross-examination, Mr. Reed testified that he did not recall defendant wearing a hood in the photographic line-up. Upon further questioning, Mr. Reed stated that it may look like defendant had a hood draped around the back of his shoulders. No other witness was asked similar questions.

[20] *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995).

[21] MCL 768.20(1). Defendant contends that the prosecution was given sufficient notice as Ms.
(continued…)

If the defendant fails to provide the required notice of intent to raise an alibi defense, the trial court may exclude that evidence.[22] In determining whether to exclude the proffered evidence, the court

> "[S]hould consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case."[23]

Defendant mischaracterizes Ms. Wallace's testimony by asserting that it does not present an alibi. Ms. Wallace specifically testified that she drove the couple's only vehicle to school and, therefore, that defendant could not have gone to Pontiac that evening. As Ms. Wallace specifically averred that defendant must have been at home when the robbery occurred, the trial court properly found that defendant had presented an alibi defense. Furthermore, we do not find that the trial court abused its discretion by striking this portion of the testimony. The prosecution was prejudiced by this surprise evidence of an alibi and was unable to investigate the claims and call witnesses to specifically rebut the defense.

B. Prosecutorial Misconduct

Defendant challenges the prosecution's references to Ms. Wallace's testimony and the defense's wrong-doing in failing to file the proper notice of intent during closing argument.[24]

(…continued)

Wallace was identified on the defense witness list provided thirteen days before the trial actually began. It is clear that providing the name of a witness without asserting the intent to raise an alibi defense or indicating the nature of the alibi is insufficient pursuant to the statute to notify the prosecution of a defendant's intent to raise an alibi defense.

[22] *McMillan*, *supra* at 140, citing *People v Travis*, 443 Mich 668, 677-680; 505 NW2d 563 (1993).

[23] *Travis*, *supra* at 682, quoting *United States v Meyers*, 550 F2d 1036, 1043 (CA 5, 1977).

[24] The prosecution specifically argued:

> All right. Let's talk now about Lasanda Wallace.
>
> The first and most important question I want to ask you is, why in the world would Lasanda Wallace wait until today to tell someone, or tell anyone, Defendant didn't do it? There are rules for attorneys under the law about how these cases are to be conducted, and there are reasons for those rules. . . .
>
> * * *
>
> MR. WILLIAMS: Why didn't she tell earlier? Because it's a lie. And if she told it earlier, Detective Krease would have gone out, found the people who say, no, that's not true, they could come in and testify. If she told it earlier, you could disprove it. See, you got to hold it if it's a lie. If it's the truth, you come

(continued…)

Defendant claims that this argument denied him the right to a fair trial as defense counsel had been ordered not to reference this testimony in closing. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[25]

It is proper to attack the credibility of witnesses based on the evidence presented at trial and the reasonable inferences drawn from that evidence.[26] One proper method of attacking Ms. Wallace's credibility as a witness was to question her failure to come forward with alibi evidence before trial.[27] Therefore, the prosecution properly referenced Ms. Wallace's testimony in closing argument. Furthermore, the prosecution did not denigrate defense counsel. Read in context, the prosecution's remarks referencing defense counsel's failure to file a notice of intent to raise an alibi defense were not inflammatory[28] and merely spoke to the trial court's jury instruction striking the testimony. Accordingly, we do not find that the prosecution's remarks in closing argument deprived defendant of a fair and impartial trial.

IV. Sufficiency of the Evidence

Defendant argues that the prosecution failed to present legally sufficient evidence to establish his guilt beyond a reasonable doubt, as the eyewitness identifications were uncertain and as Ms. Threets and Ms. Woods presented incredible testimony. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime

---

(…continued)

> out with that right away. That's to exonerate someone, to get them out. If it's a lie, you got to hold on to it, because otherwise we'll have a chance to disprove it.
>
> Well, how do we disprove it? Now, we didn't get that chance, we didn't that far. Fortunately—fortunately, she didn't have time to coordinate her story with the Defendant, she didn't get that chance, and so he didn't get the chance to tell her, "I said I was working at Office Depot, not babysitting." And, "I said to the detective I was in Pontiac in August, not in Flint." So, his own statements to the detective proved that she's lying, because she didn't get that coordinated. So, fortunately you get to know that she was lying without us having to bring everybody in to say, huh-uh, she wasn't in nursing school, he didn't have the kids. We didn't get to show you that, but we did get to show you that she's lying.
>
> Why would she lie? Why would she lie to help the Defendant? Because he's her boyfriend, the father of two of her children, and she is dependent on him. She lied.

[25] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[26] *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

[27] See generally *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002).

[28] *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003) (the prosecution may not personally attack defense counsel).

were proven beyond a reasonable doubt.[29] "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[30]

Three eyewitnesses gave the police descriptions of the robber and selected defendant in the photographic line-up. All the witnesses testified that the robber was an African-American male of average height with a mustache and a beard wearing dark gray and black clothing, including a hooded sweatshirt. Mr. Jordan additionally described the robber as muscular, a term which did not match defendant's appearance. At trial, nearly a year after the robbery, Mr. Reed was "not a hundred percent" sure that defendant was the robber and Mr. Jordan testified that defendant could be the robber, but that he was uncertain. However, the three witnesses were separately shown the photographic line-up seventeen days after the robbery, and all three identified defendant.

Although two of the eyewitnesses were uncertain of defendant's role in the robbery nearly a year later, Ms. Threets and Ms. Woods positively identified defendant as the robber. Ms. Threets had known defendant for some time before the robbery and recognized him at the time of the crime. Ms. Woods testified that defendant returned her car that evening carrying a bag of money and admitted to robbing the Burger King. Although defendant asserts that Ms. Threets and Ms. Woods were incredible witnesses, such a determination is left for the trier of fact.[31] Based on the evidence presented, the jury could find beyond a reasonable doubt that defendant was at the scene of the crime. Accordingly, we will not disturb defendant's convictions.

V. Cruel and Unusual Punishment

Defendant contends that his sentence is disproportionate and, therefore, amounts to cruel and unusual punishment. Defendant argues that he should have been sentenced at the lower end of the minimum sentencing guidelines range rather than the higher. Although defendant challenged the scoring of certain offense variables at his sentencing hearing, defendant fails to raise these issues on appeal. As defendant's sentence is within the minimum sentencing guidelines range and he has not raised any scoring errors or claimed that the trial court relied on

[29] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

[30] *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

[31] *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

inaccurate information in determining his minimum sentence, we are required to affirm his sentence.[32]

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs

[32] MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Defendant also asserts that his sentence violates the recent United States Supreme Court decision in *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, the Michigan Supreme Court has already determined that Blakely is inapplicable to our statutory sentencing guidelines. *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004).