STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2006
v	No. 261851 Bay Circuit Court
MERRIT DEMON MCCRAY, Defendant-Appellant.	LC No. 04-010216-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 10 to 30 years. We affirm.

Defendant first argues that his constitutional right to a fair and impartial jury was violated when the trial court allegedly used the struck jury method for jury selection in this case. Because defendant failed to properly preserve this issue, it is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the time of trial, MCR 2.511(F)[1] provided as follows:

> After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

The struck jury method, which was denounced by our Supreme Court in *People v Miller*, 411 Mich 321, 323, 326; 307 NW2d 335 (1981), involves seating a large group of jurors at once for examination and alternately allowing the parties to excuse the potential jurors until only unexcused jurors are left, with the 12 to 14 jurors at the top of the seating order being sworn in as

[1] MCR 2.511 was amended in November 2005 and made effective January 1, 2006. Former subrule (F) was relettered as (G).

the jury. The *Miller* Court concluded that if the selection procedure was challenged before the process began, then any failure to comply with the court rules required automatic reversal, even if there was no showing of prejudice. *Id*. at 326. This Court followed the *Miller* decision in *People v Colon*, 233 Mich App 295, 303; 591 NW2d 692 (1998) (holding that a deviation from MCR 2.511[F] required reversal despite the absence of prejudice).

However, in *People v Green (On Remand)*, 241 Mich App 40; 613 NW2d 744 (2000), this Court took into consideration the effect that MCR 2.511(A)(4),which was added after *Miller* and not considered in *Colon*, had on MCR 2.511(F). MCR 2.511(A)(4) provides that "jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties." The *Green* panel noted that although *Miller* was still viable for its rejection of the struck jury method, MCR 2.511(A)(4) no longer required automatic reversal where courts deviated from the standard jury process. *Green, supra* at 46. However, the deviation must not implicate the struck jury method or affect the defendant's right to exercise peremptory challenges under MCR 2.511(F). *Id.* at 46-47.

Here, the trial court did not use a struck jury method to select the jury. Rather, the court seated 14 potential jurors, which is equal in size to the number of jurors that would hear the case. *Miller*, *supra* at 325-326. Further, as each potential juror was excused, for cause or peremptorily, another juror was seated and questioned before further challenges were exercised. *Id*. at 326. We conclude that the jury selection process was in compliance with the court rule and constituted a fair and impartial means of selecting a jury that did not deprive defendant of a fair trial.[2]

Next, defendant argues that his Sixth Amendment[3] right to confrontation was violated when the prosecution failed to call the victim as a witness at trial. However, the record makes clear that defendant agreed below that the victim need not participate in the trial. A party cannot agree to a trial procedure and then argue on appeal that there was error in that procedure. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). The issue was effectively waived. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). In any event, defendant's argument is without merit because the prosecutor did not present the victim's testimony or statements at trial. *People v Wilkens*, 267 Mich App 728, 744-745; 705 NW2d 728 (2005) (concluding that no violation of the defendant's right of confrontation occurred where the

[2] It appears that defendant's appellate argument is predicated on some initial comments made by the trial court with respect to how it intended to seat the jury, which manner may have been problematic. However, the prosecutor objected because he believed that there existed some case law that rejected the trial court's intended manner of jury selection. The trial court indicated that it would check the law regarding the matter. While there is no express statement in the record indicating a change in the trial court's position, the fact remains that when the selection process actually commenced, the procedure utilized complied with the court rule and differed from that initially suggested by the trial court. It is evident that the trial court changed its mind regarding the selection process.

[3] US Const, Am VI.

victim's statements were not offered against the defendant). The victim here was not a witness against defendant; therefore, no Confrontation Clause violation occurred.

Defendant also argues that his due process rights were violated when the trial court refused to suppress an eyewitness' in-court identification, which defendant asserts was influenced by an unduly suggestive pretrial photo lineup or array. Specifically, defendant asserts that the photo lineup shown to the eyewitness was unduly suggestive for two reasons: (1) the other men in the photo lineup did not have features similar to his and (2) the eyewitness was told that the suspect was in one of the photos in the array.

An identification procedure can be so unnecessarily suggestive and conducive to irreparable misidentification that it denies a defendant due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). 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. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). The relevant factors for evaluating the totality of the circumstances include "the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *Colon, supra* at 304-305.

With respect to defendant's first argument—that the photo lineup was not representative of him—our Supreme Court has noted that a photo lineup is generally not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features. *Kurylczyk, supra* at 304. "Thus, differences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others pictured in a photographic lineup have been found not to render a lineup impermissibly suggestive." *Id*. at 304-305. After reviewing the photo lineup, we conclude that defendant's argument is without merit because the other individuals in the lineup have characteristics similar to defendant's characteristics. There is nothing that makes defendant's photo stand out from the others. Further, even though defendant did not have facial hair at the time of the assault, his photo did, so showing the witness photos of others with facial hair was not unduly suggestive.

We also reject defendant's argument that the photo lineup was tainted by a suggestion by the police that the person who committed the crime was in the lineup. This Court has refused to find a lineup tainted under such circumstances. *People v Smith*, 108 Mich App 338, 344; 310 NW2d 235 (1981) ("Whenever a witness is called in for a lineup that witness may infer that the lineup will contain possible suspects. The fact that the police stated the obvious hardly can be seen as an inducement of the witness to pick someone out of the lineup."). Further, the witness in this case testified that she identified defendant before the officer even had a chance to display the photos, so it is unlikely that the cited police action had any effect on her identification. Accordingly, the trial court did not clearly err in admitting this identification evidence. See *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004) ("[A] trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous."). Moreover, considering that the witness had seen defendant on several occasions prior to the assault and was familiar with his face and that she had clearly observed defendant committing the assault, the in-court identification had a sufficient independent basis to purge the taint of any alleged improprieties relative to the photo array. See *Colon, supra* at 304-305.

We also reject defendant's argument that the trial court erred in denying his request for appointment of an expert witness on the issue of identification, or, at the very least, in failing to conduct a *Daubert*[4] hearing on the issue. A trial court is not required to provide funds for the appointment of an expert witness upon demand by defendant. MCL 775.15; *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). Rather, a defendant may be entitled to appointment of an expert witness if he "cannot safely proceed to a trial" without the expert's assistance. *People v Herndon*, 246 Mich App 371, 399; 633 NW2d 376 (2001). A mere possibility that the expert will be of assistance, however, is not enough. *Tanner*, *supra* at 443.

Here, defendant has failed to make the requisite showing that the expert would likely have benefited his defense. *Id*. This is not a case where the eyewitnesses were identifying defendant based solely on witnessing the assault. One eyewitness had seen defendant at the bar on several prior occasions, and another eyewitness regularly hung out with defendant at the bar. Defendant fails to show how expert testimony on the reliability of eyewitness testimony would apply in a case such as this, where the eyewitnesses already knew defendant, and thus no hearing on the matter was necessary.

Finally, defendant raises a *Blakely*[5] argument, asserting that his constitutional right to a jury trial was violated by impermissible judicial fact-finding at sentencing. However, our Supreme Court has determined that *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), do not apply to Michigan's indeterminate sentencing scheme as long as a defendant is not sentenced beyond the statutory maximum. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Resentencing is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis

[4] *Daubert v Merrell Dow Pharmaceauticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[5] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).