STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT DONALD WESNER, JR.,

Defendant-Appellant.

UNPUBLISHED
December 19, 2006

No. 264172
Calhoun Circuit Court
LC No. 04-001304-FC

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), possession of a firearm by a felon, MCL 750.224f, felony telephone tapping or cutting, MCL 750.540, and five counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Initially, defendant challenges the trial court's decision to deny funds for an expert in eyewitness reliability. Defendant does not expressly argue that the trial court abused its discretion when it determined that, although the case depended entirely on an eyewitness, the expert would only state what jurors already understood. See *In re Attorney Fees of Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). Rather, defendant claims specifically that the decision violated the law of the case doctrine because an earlier judge stated that the request was appropriate and justified.[1] We disagree.

We initially note that the first judge assigned to the case expressly declined to make a commitment until defendant's attorney provided an estimate of the cost of securing the witness.

[1] To the extent that defendant is arguing that the trial court erred in denying the request outside the context of the law of the case doctrine, we find no abuse of discretion in the court's ruling. See *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996), reinstating previously vacated opinion with respect to certain issues, including rejection of appointment of expert in eyewitness identification, 217 Mich App 801; 553 NW2d 1 (1996).

Furthermore, the law of the case doctrine applies when an *appellate* court has decided an issue in the same case, thereby binding courts of equal or subordinate jurisdiction, but not when the trial court itself previously decided the issue. See *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001); *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). Defendant cites no relevant or supporting authority for the assertion that the trial court was prevented from reconsidering the issue under these circumstances; therefore, the issue is abandoned. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Next, defendant argues that the trial court improperly denied his motion to suppress lineup identifications, where he was not represented by an attorney at the photographic lineup and, unbeknownst to the detective, was in custody on unrelated charges. We disagree.

In *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004), our Supreme Court held:

> We adopt the analysis of *Moore v Illinois*, 434 US 220; 98 S Ct 458; 54 L Ed 2d 424 (1977), and hold that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. To the extent that *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), goes beyond the constitutional text and extends the right to counsel to a time before the initiation of adversarial criminal proceedings, it is overruled.

Adversarial judicial criminal proceedings can include formal charges, preliminary hearings, indictments, informations, or arraignments. *Hickman, supra* at 607. With respect to photographic lineups, the *Hickman* Court simply stated that it was not addressing "whether a defendant has a right to an attorney *after* the initiation of adversarial judicial proceedings during a photographic showup." *Hickman, supra* at 609 n 4 (emphasis in original). This language strongly suggests that there is no right to an attorney before the initiation of adversarial judicial criminal proceedings relative to photographic lineups. Defendant agrees that no adversarial judicial criminal proceedings in regard to the charges here had been initiated before the photographic lineup took place. We note that *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993), upon which defendant relies, ruled, "In the case of photographic identifications, the right of counsel attaches with custody." It is not entirely clear what impact *Hickman* has on *Kurylczyk* regarding photographic lineups as the *Hickman* majority never mentioned the case. However, we need not resolve the matter because, assuming that *Kurylczyk* applies, defendant was not in "custody" for purposes of the analysis, despite the fact that he was in jail, where defendant was locked up on unrelated charges. See *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986) ("In this case the defendant, although in custody, was not in custody on the charge to which the photo lineup was related."). Defendant's right to counsel was not infringed. Defendant does not argue that there was anything else improper about the photograph lineup; therefore, the trial court did not err when it admitted the evidence.

Defendant also argues on appeal that the corporeal lineup identification should have been suppressed because he was the only person who appeared in that lineup and the photographic lineup. Defendant does not clarify whether this was improper in and of itself or whether he claims only that both lineups were tainted by the lack of counsel at the first lineup. An unduly

suggestive lineup violates a defendant's due process rights. *Kurylczyk*, *supra* at 302. A lineup is unduly suggestive and violates due process if, under the totality of the circumstances, the procedure was so suggestive that it created a substantial likelihood of misidentification. *Id.* at 302-303. We conclude that merely having defendant be the only man who appeared in both lineups was not unduly suggestive under the circumstances. The photographic and corporeal lineup identifications were properly admitted. Therefore, we need not decide whether there was an independent basis for the in-court identification.

Finally, defendant challenges the trial court's scoring on Offense Variables (OV) 8, 10, and 12. The trial court has discretion to determine the proper score under each variable, provided there was adequate evidence to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If there is any evidence to support the score, the scoring decision will be upheld. *Id.*

Offense Variable 8 is scored at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a); *People v Spanke*, 254 Mich App 642, 646-647; 658 NW2d 504 (2003). The trial court found that defendant held the victim captive longer than necessary when he told her, at gunpoint, to remain in the bedroom indefinitely and disabled the telephone. The trial court did not abuse its discretion because the evidence adequately supported that finding.

Under OV 10, the trial court scored 15 points for predatory conduct, which is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(1)(a) and (2)(a). The statute does not require that the conduct be extensive or occur over a significant period of time. See *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), aff 470 Mich 305 (2004) (the defendant followed victim home and watched victim pull into driveway before shooting him). The trial court did not abuse its discretion when it found that ringing the doorbell and requesting water for an overheated car was preoffense conduct directed at the victim to make her open the door so defendant and his companions could commit home invasion and armed robbery.

The trial court scored 10 points under OV 12 for "two contemporaneous felonious criminal acts involving crimes against a person." See MCL 777.42(1). The trial court did not clarify what acts it applied. A felonious criminal act is considered contemporaneous if it occurred within 24 hours of the sentencing offense and has not and will not result in a separate conviction. MCL 777.42(2)(a). The prosecutor primarily argued that the contemporaneous acts were the assaults against two people in the home, quashed as a component of the armed robbery charge, and the kidnapping charge, of which the jury acquitted defendant.

The express purpose of MCL 777.42(1) is to score for offenses for which the defendant was not convicted. Scoring for offenses under this category does not constitute making an improper independent finding of guilt. Defendant was convicted of only one count of armed robbery, and there were two victims of his assault. It is unclear why the jury acquitted defendant of kidnapping, but there was evidence to support the charge. It was within the trial court's

discretion to find two contemporaneous felonious criminal acts that did not result in separate convictions.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly