STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2008
v	No. 277360 Ottawa Circuit Court
JOHN PAUL ROBINSON, Defendant-Appellant.	LC No. 06-030722-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of assault with intent to rob while unarmed, MCL 750.88. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

Defendant's conviction resulted from an assault on Anthony Ulman. Ulman testified that two men approached him and asked him for money for beer. When he told them that he did not have any money, they initially walked away, but then they returned and repeated their request. After Ulman again stated that he did not have any money, the two men punched and kicked him in the head and body. They also searched his pockets and took his cell phone and $9. The men fled when police arrived.

One assailant was immediately apprehended. Ulman identified defendant as the other assailant at trial. He testified that he did not know defendant before the assault, but that someone had told him that defendant might have participated in the assault. Ulman provided defendant's name to one of the investigating officers. The officer called Ulman to the police station, where he was shown a photographic lineup. He identified defendant as a perpetrator.

II. PHOTO IDENTIFICATION

Defendant argues that the photo showup was impermissibly suggestive because Ulman initially provided defendant's name to the police and because defendant was "singled out" as the only participant that was bald.[1] We disagree.

A. Standard of Review

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

B. Analysis

This Court has explained:

> If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification. [*People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).]

A lineup or showup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004). The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Kurylczyk*, 443 Mich 289, 306, 311-312; 505 NW2d 528 (1993). Physical differences among showup participants do not necessarily render the procedure defective, and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other participants. *Id*. at 304-305, 312. Physical differences generally affect only the weight of an identification and not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Defendant has not explained how the act of furnishing a name to the police as a possible assailant somehow renders an otherwise proper identification suspect. The fact that a complainant is told that the culprit would be in the lineup is not generally regarded as unduly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Moreover, Ulman was not told that defendant's photograph was actually present in the showup. He could have concluded that the police had eliminated defendant as a suspect.

[1] At trial, defense counsel acknowledged that others in the array had "pretty limited hair, not a lot of hair."

Nor has defendant presented support for his argument that the identification procedure was otherwise improperly suggestive. At the hearing on defendant's motion to exclude the showup, the investigating officer testified that the police used a computer program to enter criteria to assure that the photographs chosen for the lineups were of individuals with similar features, such as height. The officer also testified that all of the photographs had a grey background, and that nothing was done to defendant's photograph to cause it to stand out from the others. We have not been furnished with a copy of the photographic array. However, the trial court, which viewed the array, stated that defendant's photograph did not stand out and found that the individuals' facial characteristics were similar to each other. Under the circumstances, despite any minor differences in the likenesses presented in the array, we find that defendant has not established that the trial court's decision to admit the photograph identification evidence was clearly erroneous.

III. IMPEACHMENT EVIDENCE

Defendant next argues that the trial court erred when it admitted as impeachment evidence his prior conviction for larceny by conversion, MCL 750.362. Again, we disagree.

A. Standard of Review

We review the trial court's decision to allow the introduction of this evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Analysis

The prosecution may impeach the credibility of a witness with evidence of prior convictions if those convictions satisfy the criteria in MRE 609. Defendant maintains that his theft conviction for "larceny," which is punishable as a one-year misdemeanor, does not fit the requirements of MRE 609 and thus could not be used at trial. Viewed solely as a theft crime, defendant would be correct. *People v Parcha*, 227 Mich App 236, 242-243, 245; 575 NW2d 316 (1997). However, "[w]here a theft crime includes an element of dishonesty or false statement, e.g., larceny by false pretenses, it will be treated as an automatically admissible prior offense." *People v Allen*, 429 Mich 558, 596 n 17; 420 NW2d 499 (1988). See also *Parcha*, *supra* at 243-244. Unlike simple larceny, larceny by conversion contains such an element of dishonesty. Larceny by conversion requires: (1) the property at issue had some value; (2) the property belonged to someone other than the defendant; (3) someone delivered the property to the defendant; (4) the defendant embezzled, converted to his or her own use, or hid the property with the intent to embezzle or fraudulently use it; and (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of the property. *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001). As does larceny by false pretenses, this offense "not merely impl[ies] dishonesty on the part of the perpetrator, but incorporate[s] a dishonest act, such as active deceit or falsification, as an element of the offense itself." *Parcha*, *supra* at 243. We thus find that the trial court did not abuse its discretion in

permitting the prosecution to impeach defendant with his prior conviction for larceny by conversion.[2]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette

[2] But even if we did determine that the larceny by conversion conviction did not involve dishonesty or false statement, reversal is not required because defendant has failed to show that the alleged error was likely outcome determinative. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).