

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL HOWARD SULLIVAN,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 278747

St. Clair Circuit Court

LC No. 07-000084-FH

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of two counts of uttering and publishing, MCL 750.249. Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to concurrent prison terms of 2 to 14 years, to be served consecutively to a prior unrelated sentence from which he was on parole. We affirm defendant's convictions and sentence, but vacate the order requiring defendant to repay attorney fees. We remand to the trial court for a determination of defendant's current and future ability to pay the fees.

Defendant's convictions arose out of an incident in which two paychecks were fraudulently cashed at a party store. Two party store employees, both of whom were sons of the owner, knew defendant by sight because he was a frequent customer. After learning of the fraudulently cashed checks, a police officer interviewed the store employees. As one of the employees was providing a physical description of the perpetrator, the employee saw a small photograph of defendant among the police officer's paperwork. The employee immediately identified the person in the photograph as the perpetrator. The other party store employee identified defendant as the perpetrator as well.

Defendant first argues that the trial court violated his due process rights by allowing the party store employees to testify concerning their identification of defendant. We review this preserved issue for clear error. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Defendant correctly points out that a pretrial identification procedure can be so impermissibly suggestive as to constitute a due process violation. *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993). If a witness's pretrial identification was impermissibly suggestive, no testimony from that witness can be admitted at trial concerning the impermissible

identification. *Id.* at 303. However, the same witness may provide an in-court identification if the proffering party establishes an independent basis for the identification. *Id.*

Here, the party store employees' pretrial identification of defendant was arguably impermissible, because at least one of them had seen a photograph of defendant within the police officer's paperwork. See *People v Anderson*, 389 Mich 155, 177-178; 205 NW2d 461 (1973), overruled on other grounds *People v Hickman*, 470 Mich 602 (2004). However, we need not decide whether the pretrial identification was actually impermissible because the record contains ample evidence that the same witnesses had substantial independent means to identify defendant at trial. Both witnesses testified that they recognized defendant as a frequent customer, and both testified that they had previously cashed checks for defendant. The testimony also established that, although the store employees did not know defendant's name, they had often spoken with him and joked around with him in the past. The employee who saw the photograph had already begun providing a physical description of defendant to the police officer at the time he saw the photo. The other employee testified that he did not recall seeing any photographs. We find that there was an adequate independent basis for each witness's in-court identification of defendant. Accordingly, the trial court did not err by allowing the party store employees to identify defendant at trial.

Defendant next argues that the trial court erred by denying his motion for a mistrial after a police officer volunteered a remark concerning defendant's status as a parolee. We review the trial court's denial of the motion for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

A volunteered and unresponsive answer to a permissible question does not generally warrant a mistrial. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). But when a volunteered response has been given by a police officer, this Court scrutinizes the testimony to ascertain whether the response resulted in undue prejudice to the defendant. *Id.* Here, we perceive no undue prejudice. The response was a transitory reference in the midst of two days of testimony, and the prosecutor immediately prompted the officer for an unrelated, admissible response. Given the brevity of the officer's response, we find that the trial court acted within its discretion by denying defendant's motion for a mistrial. Moreover, in light of the other, independent evidence of defendant's guilt, we conclude that any error in this regard would have been harmless beyond a reasonable doubt. *Id.* at 416-417.

Defendant's last two arguments on appeal involve challenges to his sentence. The first challenge, concerning credit for jail time while on a parole detainer, presents a question of law that we recently decided in *People v Filip*, 278 Mich App 635, 642-643; 754 NW2d 660 (2008). Because defendant was on parole when he cashed the fraudulent paychecks at issue here, he was not entitled to credit against the sentences imposed for the instant offenses. *Id.*

Defendant's second challenge, concerning the order to reimburse attorney fees, is valid. Before a trial court may order an offender to reimburse the cost of a court-appointed attorney, the court must consider the offender's ability to pay. *People v Trapp (On Remand)*, ___ Mich App ___, ___ NW2d ___ (2008); *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). The record in this case simply does not demonstrate compliance with the *Dunbar* procedural safeguards. Accordingly, we vacate the order to repay attorney fees and remand to the trial court

for a determination of defendant's current and future ability to pay, consistent with our instructions in *Dunbar*.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens