

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY ALLEN HYSELL,

Defendant-Appellant.

UNPUBLISHED

April 28, 2009

No. 283288

Wayne Circuit Court

LC No. 07-013696-FC

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit armed robbery, MCL 750.89, assault with intent to commit murder, MCL 750.83, assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve two years in prison for felony-firearm, consecutive to concurrent terms of 50 to 75 years each for assault with intent to rob and assault with intent to murder, and two to four years for felonious assault. The 50- to 75-year sentences reflect enhancement pursuant to defendant's status as a third habitual offender, MCL 769.11. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that, on the night of June 9, 2007, he went to visit a female companion and defendant was among several others present at the house that night. Complainant added that he was introduced to defendant that night, but had seen him once before. Complainant described defendant as African-American or "mixed," but of light complexion. According to complainant, he obliged his companion when she asked him to take her brother to a gas station and McDonald's, but when he returned and left his car, defendant appeared, pointed a gun, and demanded that he empty his pockets. Complainant described defendant as concealing the lower part of his face with a bandana at that time, but stated that tattoos under defendant's eyes helped complainant recognize him. Complainant continued that his companion came to the door and started yelling, causing defendant to point the gun at her momentarily. Defendant then absconded with complainant's wallet and glasses. Complainant gave chase, a struggle ensued, and defendant fired his weapon three times, one of the shots striking complainant in the right shoulder and piercing his lung.

In the days that followed, the police presented complainant with a photographic showup, from which complainant instantly identified defendant. At defense counsel's request, the trial

court held an evidentiary hearing to decide whether that photo array was so overly suggestive as to call into question its role in identifying defendant as the assailant. At that hearing, defense counsel emphasized that, of the six images presented, only that of defendant included a teardrop tattoo. The trial court concluded as follows:

I can't find that the array is suggestive in any sense. If there is a tattoo on [defendant's] face, I can't see it. I can't imagine that anybody else could see it. But, even if they could, that goes to weight not admissibility.

[T]he identification was proper. . . . [T]he defendant was not in custody None of the photos are unduly suggestive, nor do I see the complained of tattoo.

Defendant's sole argument on appeal is that the trial court erred in rejecting challenges to the photographic identification procedure used by the police, and it erred in allowing the in-court identification of defendant at trial that was allegedly tainted by that impropriety.

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 Kurylczyk*, 443 Mich 289, 303 (Griffin, J., joined by Mallett, J.), 318 (Boyle, J., joined by Riley, J., joining Griffin, J., in pertinent part); 505 NW2d 528 (1993); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). The fairness of an identification procedure is evaluated in light of all the circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Kurylczyk*, *supra* at 311-312, 318; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, that witness' in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the improper identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) (citations omitted).

In this Court, defendant repeats the assertion that his was the only image in the challenged photo array that included a teardrop tattoo. However, viewing the reproductions electronically filed with defendant's brief on appeal, we share the trial court's inability to detect the subject tattoo. Even if the image complainant actually viewed was somewhat clearer, it is apparent that the tattoo, if it was visible at all, was not a particularly prominent aspect of the photograph. Further, complainant testified that he had recognized defendant not only from his tattoo, but also from what he could see of his face and hear of his voice, and that he was in fact familiar with defendant's appearance from one occasion before the night in question.

Defendant, an African-American, also protests that his image was the only one in the array that featured his race. However, complainant described defendant as possibly of mixed race and otherwise light in complexion. Our review of the photographic array makes it far from obvious that defendant is of darker complexion than the others featured.

For these reasons, we conclude that the trial court did not err in ruling that the photographic array presented to complainant was not impermissibly suggestive.

Further, we note that complainant's companion also unhesitatingly identified defendant in court as the assailant in question. Complainant's companion testified that she knew defendant from his having been a regular visitor to her house for three months before the incident, and she otherwise showed great familiarity with defendant's appearance, which extended to what she described as defendant's distinctive voice and his nail-bitten hands.

Defendant points to evidence that the companion initially told the police that she could not identify the assailant, but the companion explained at trial that she feared defendant and so she initially denied being able to identify the assailant because she wished to minimize her involvement with the investigation.

Moreover, even where the witnesses' identification of the defendant is less than positive, the question remains one for the jury. *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972).

For these reasons, we conclude that the in-court identification of defendant as the assailant in question was not tainted by the alleged suggestive use of photographs during the investigation.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly