

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON TERRELL HENRY,

Defendant-Appellant.

UNPUBLISHED

September 10, 2009

No. 286415

Macomb Circuit Court

LC No. 2008-000638-FC

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, second-degree fleeing or eluding a police officer, MCL 257.602a(4), resisting or obstructing a police officer, MCL 750.81d(1), and driving with a suspended license, MCL 257.904. He was sentenced to concurrent prison terms of 60 to 120 months for the convictions of assault with intent to do great bodily harm and second-degree fleeing or eluding a police officer. He was fined \$1,000 for the conviction of resisting or obstructing a police officer and \$100 for driving with a suspended license. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Officer Matt Hambright stopped a vehicle driven by defendant for speeding. Hambright approached the vehicle and asked defendant for license, registration, and proof of insurance. Defendant did not initially open the window, but eventually rolled it down four to six inches and handed the vehicle registration to Hambright. Hambright again requested defendant's license but instead defendant produced a certificate of insurance. Hambright again asked for defendant's license. Defendant stared at Hambright and then began rifling through a black jacket. Hambright repeated the request, and defendant removed his hand from the jacket, paused, and reached quickly toward the bottom of the passenger seat. Hambright reached into the vehicle and grabbed defendant's shirt and left shoulder to stop him from reaching under the seat. Defendant moved the gearshift and began driving while Hambright was still holding defendant's shirt. Hambright yelled for defendant to stop, but instead he moved the window upward trapping Hambright's arm in the accelerating vehicle. Hambright ran alongside the vehicle until the vehicle speed exceeded his ability to run alongside it. He was then dragged for sometime until he was able to pull his arm free and he fell to the ground. The vehicle drove off.

The vehicle was recovered, with the keys in the ignition and the engine running, and the driver's side window rolled down approximately four inches. A work schedule from defendant's

employer was recovered from the vehicle. The vehicle was registered to Shatana Robinson. When the police contacted her, she said that her boyfriend, defendant, was in possession of the vehicle. Hambright identified defendant's photograph when it was displayed by Detective Connor at the police station. When the police went to the home where defendant was staying and asked for him to come downstairs, he hid under a blanket and refused to comply with the officers' requests until they used a taser. A shirt matching the description that Hambright had given at the time of the incident was recovered from the upstairs area where defendant was discovered. It had grass stains and burrs on it. Hambright identified defendant in court and testified that he could recognize defendant because of his eyes, a birthmark to the right of his right eye, his facial structure, and the color of his skin.

Defendant first argues that the trial court abused its discretion by allowing into evidence Hambright's in-court identification of defendant. According to defendant, the pretrial identification of defendant, based on the display of a single photograph and in the absence of counsel, was improper, and there was not an independent basis for the in-court identification. Defendant frames the issue as an evidentiary matter, which this Court generally reviews for an abuse of discretion; however, because defendant did not object at trial, we review for plain error affecting substantial rights pursuant to *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Assuming *arguendo* that the pretrial identification was impermissibly suggestive,¹ the admissibility of Hambright's in-court identification depends on whether the officer had an independent basis for the identification. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). Ordinarily, this would entail an evidentiary hearing, where the trial court's assessment would include the eight factors identified in *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977). In this case, because defendant did not pursue this issue below, the record was not fully developed concerning these factors. However, our review of the trial testimony in light of those factors fails to show that the admission of the in-court identification was plain error.

Defendant contends that the prosecutor's assertion during opening statement, "In a nutshell, and again, this is not evidence, but these are the basic allegations as to what absolutely occurred that morning in question," was improper because it was unconditionally vouching for the credibility of the prosecution witnesses who had yet to testify. Because defendant did not object, we review for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Even if we were to agree that the use of the word "absolutely" conveyed the prosecutor's personal belief in the credibility of his witnesses, a curative instruction could have alleviated any prejudice. *Id.* Therefore, defendant is not entitled to relief.

Defendant argues that the court erred in requiring him to pay restitution, fines, costs, and attorney fees without first assessing his ability to pay. He relies on *People v Dunbar*, 264 Mich

¹ The presence of counsel was not required at the pre-trial identification because defendant was not in custody. *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001) (the right of counsel attaches with custody in the case of photographic identifications).

App 240; 690 NW2d 476 (2004). However, the rule enunciated in *Dunbar* was overruled in *People v Jackson*, 483 Mich 271; ___ NW2d ___ (2009). Thus, defendant's claim is without support.

Relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that he was deprived of his right to have a jury decide the facts and circumstances necessary for the scoring of the sentencing guidelines. However, the principles set forth in *Blakely* do not apply to Michigan's indeterminate sentencing system. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro