

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORDNEY LASHUN SMITH,

Defendant-Appellant.

UNPUBLISHED

October 20, 2009

No. 285030

Wayne Circuit Court

LC No. 07-013823-FC

Before: Saad, C.J., and O’Connell, and Zahra, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of two counts of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth below, we affirm.

I. Identifications

Defendant argues that the in-court identifications by the male victim, Derrick Agee, and the female victim, Jovella Caradine, should have been suppressed because it was unduly suggestive for police to show each of them one photograph. Defendant contends that this denied him due process and that a he is entitled to a new trial.

This Court reviews for clear error the trial court’s determination of whether an in-court identification has an independent basis. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). Clear error exists when we are left with a firm conviction that a mistake was made. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

To establish that an identification procedure was unduly suggestive, a defendant must show that the procedure was so suggestive, under the totality of the circumstances, that it led to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If an identification is unduly suggestive, an in-court identification will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be based on a sufficiently independent basis to purge the taint of the prior identification. *Gray, supra* at 115. Generally, “[i]dentification by photograph should not be used ‘when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup.’” *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739; 740 (1995),

quoting *People v Kurylczuk*, 443 Mich 289, 298, n 8; 505 NW2d 528 (1993). Further, the display of a single photograph combined with an indication that the person has been arrested for the offense can be unduly suggestive. *Gray, supra* at 111.

Here, police interviewed Agee and Caradine five days after the incident, and an officer showed them each one booking photograph of defendant. Defendant was in custody at the time, and the prosecutor provided no legitimate reason for the failure to conduct a corporeal lineup. Under these circumstances, this photographic show up was improper. *Gray, supra* at 111; *Strand, supra* at 104. Accordingly, the prosecutor had to show by clear and convincing evidence that the in-court identifications would be based on a sufficiently independent basis to purge the taint of the illegal identification. *Id.* at 115. To determine whether an independent basis exists, the following factors are considered: (1) the witness's prior knowledge of the defendant, (2) the witness's opportunity to observe the criminal during the crime, (3) the length of time between the crime and the disputed identification, (4) the witness's level of certainty at the prior identification, (5) discrepancies between the pretrial identification description and the defendant's actual appearance, (6) any prior proper identification of the defendant or failure to identify the defendant, (7) any prior identification of another as the culprit, (8) the mental state of the witness at the time of the crime, and (9) any special features of the defendant. *Id.* at 116; *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

With regard to their prior knowledge of defendant, Agee had seen defendant outside of the apartment building every day for two months before the crime occurred. Although he did not know defendant personally, Agee spoke to defendant less than 24 hours before the incident and he saw defendant several times on the day of the crime. Caradine testified that, although she did not know defendant personally, she had seen defendant repeatedly around the apartment building over a period of a few months and had seen him earlier on the day of the incident.

Both victims also saw defendant while he was committing the crime. Agee testified that he saw defendant with a gun from a distance of ten feet as he opened the door to the hallway on the second floor. Caradine saw defendant outside of the apartment building, which was well lit by a streetlight, just before the incident occurred. She walked inside with defendant and then up to the second floor. When Agee opened the door on the second floor, she walked past him and then turned and saw defendant start shooting in the well-lit hallway.

About five days elapsed between the crime and the identification and both victims testified that they had no doubt defendant was the shooter. Caradine was unable to provide a description of the shooter, but she told the police officer that if she saw him again, she would know. Agee's description had some discrepancies, but there was no prior identification or failure to identify defendant on the part of either victim, nor was there any prior identification of someone other than defendant. Additionally, no evidence indicates that the victims' mental states at the time of the crime affected their identifications or that defendant had any special features.

The trial court ruled that there was an independent basis for the identifications because both victims had prior knowledge of defendant and they both had the opportunity to view him during the crime. We hold that the trial court did not clearly err when it ruled that there was an independent basis for both victims to identify defendant in court. It is undisputed that they both

saw defendant regularly before the crime and had ample opportunity to see defendant commit the crime. This provided an independent basis for their subsequent in-court identifications.

II. Statement

Defendant argues that his statement to police should have been suppressed because it was the fruit of an illegal detention. According to defendant, police officers did not have probable cause to arrest and detain him for the shooting at the time he made the statement.

Were we to agree with defendant that it was insufficient for police to arrest him based on an uncorroborated anonymous tip, this did not necessarily require exclusion of his statements. As this Court explained in *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998):

The mere fact of an illegal arrest does not per se require the suppression of a subsequent confession. It is only when an unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee that the evidence is suppressed under the exclusionary rule. Intervening circumstances can break the causal chain between the unlawful arrest and inculpatory statements, rendering the confession sufficiently an act of free will to purge the primary taint of the unlawful arrest. [Citations and internal quotations omitted.]

Here, Investigator Terrence Sims began to question defendant just after 1:00 p.m. on July 30, 2007. The interrogation took about an hour and a half. At about the same time, Sergeant David Hansberry was following up with Agee and Caradine. Hansberry testified that he was at the Caradine's home at 1:20 p.m. where she identified defendant as the shooter from the photograph. At 1:45 p.m., Hansberry was at Agee's home, where he also identified defendant as the shooter.

In *Kelly*, this Court held that the new evidence with which the defendant was confronted before he made the inculpatory statement was a sufficient intervening circumstance to sever any causal connection between the defendant's arrest and his subsequent confession. *Id.* at 636-637. However, this Court in *Kelly* also noted that:

“[A] custodial confession following an illegal arrest need not be suppressed if the police have uncovered evidence sufficient to establish probable cause to arrest the defendant before the challenged custodial statement was given. Under such circumstances, one could question the wisdom of requiring police to go through the formality of releasing [the defendant], only to rearrest him outside the jailhouse door.” [*Id.* at 635 (citations and internal quotations omitted).]

The identifications by two eyewitnesses were certainly enough to establish probable cause that defendant was the shooter. The issue is whether this evidence was collected in a timely enough fashion to constitute an intervening circumstance to break the causal chain between the alleged unlawful detention and defendant's inculpatory statements. We hold that it was reasonable for the trial court to rule that the identifications were collected before defendant's inculpatory statements. Therefore, this additional evidence constituted probable cause and was a sufficient intervening circumstance so that defendant's statement was properly admitted.

III. Charges Against Victim

Defendant argues that the prosecutor violated his due process rights when he failed to disclose pending drug charges against Agee. Because defendant failed to preserve this issue, he must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Were we to agree with defendant that the prosecutor should have disclosed the information, and that defendant arguably would have used this evidence to attack the male victim's credibility, defendant has not shown plain error affecting his substantial rights. In light of Caradine's identification and defendant's own inculpatory statements, defendant cannot show a reasonable probability that, had the prosecutor disclosed the charges, the outcome of the trial would have been different.

Defendant further claims that the charges against Agee constitute newly discovered evidence, which entitles him to a new trial.¹ A new trial is warranted if the defendant satisfies the four part test, showing that: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

Again, the pending charges against Agee could have been used to attack his credibility, but newly discovered evidence does not require a new trial if it would merely be used for impeachment purposes or if it relates only to a witness's credibility. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Further, given the above analysis, defendant has not shown that the newly discovered evidence would probably cause a different result on retrial. Therefore, defendant has failed to show plain error.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

¹ Because this issue is not preserved, we review for plain error affecting substantial rights. *Carines*, *supra* at 763-764.