STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2011
v	No. 297745 Wayne Circuit Court
JOHN TAYLOR, Defendant-Appellant.	LC No. 09-025890-FC

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial conviction of armed robbery, MCL 750.529, for which he was sentenced to 7 to 20 years in prison. We affirm.

I

The complainant and two of his friends stopped at a gas station on Detroit's west side in the early morning hours of May 31, 2009. The complainant parked at one of the gas pumps and got out of his vehicle. His friends remained in the car. The complainant went into the gas station and then came back outside to start pumping gas. As he came out of the gas station, he noticed two men walking around the corner. Then, as the complainant started pumping gas, he heard a voice. He turned and saw that the two men had reappeared from behind the gas station. One of the men, later identified as defendant, pointed a gun at the complainant's face. The man with the gun did not say anything to the complainant, but the complainant testified that he "knew what [the man] was there for." The complainant reached into his pocket and took out approximately $200 in cash. The man with the gun reached for the money, and the complainant gave it to him. The complainant testified that he had a good opportunity to look at the man's face for about one or two seconds during the incident, at a distance of only three or four feet. The other man remained near the passenger side of the complainant's car during the incident. After the robbery, both men ran back around the gas station and disappeared from the complainant's sight.

The complainant and his friends called 911. The police met them about 15 minutes later at a nearby restaurant. The complainant gave a description of the man who had robbed him. The complainant told the police that the robber was shorter than he was, "looked younger," "had a short haircut," and appeared to have weighed "[o]ver 200 pounds." About seven days later, the complainant went to the police station to provide a written statement. In his written statement,

the complainant described the robber as an African-American male, approximately 16 years old. The complainant was then asked to view six different photo arrays. Before having viewed all six, the complainant positively identified defendant as the man who had robbed him at the gas station. The complainant testified that he had remembered the shape of defendant's eyes and the structure of defendant's face, and that he had relied on these characteristics to identify defendant's photograph. Indeed, although defendant had more facial hair and appeared to be older than 16 in the photograph,[1] the complainant testified that he had identified defendant's photo on the basis of facial structure rather than age or the presence of facial hair. The complainant also positively identified defendant in court.

Detroit Police Officer Paul Pesmark testified that he had prepared the six photographic arrays that the complainant viewed. Pesmark testified that defendant had become a person of interest because of his involvement in other robberies in the area, and that defendant's photograph was therefore included in one of the six arrays. Pesmark was present while the complainant viewed the six arrays, and testified that the photographs were not presented in a suggestive manner. The six arrays were presented to defendant one-by-one, and defendant's photograph was only included in one of the six arrays. Pesmark testified that the complainant positively identified defendant's photograph "right away." Although defendant's photo was included in the second or third array that the complainant viewed, Pesmark asked the complainant to view the remaining arrays as well. After having finished looking at all six arrays, the complainant once again confirmed his identification of defendant as the man who had robbed him.

The police obtained video footage that was taken by the gas station's surveillance cameras on the date of the robbery. The video footage was admitted into evidence and was viewed by the court. The video footage showed the complainant's car parking near one of the gas pumps at approximately 1:20 a.m., and also showed the robbery as it transpired. Detroit Police Sergeant Ron Gibson testified that he was a forensic video technician and that he had reviewed the surveillance video footage. The footage showed that one of the two men approached the complainant and pointed what appeared to be a handgun at the complainant. As a result of the poor video quality, Gibson could not confirm that the man who approached the complainant with what appeared to be a handgun was defendant. However, Gibson opined that the images of the man were consistent with defendant's general size and build.

Following trial, the court found defendant not guilty of one count of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Specifically, the trial court observed that while defendant brandished an object that looked like a firearm, the evidence was insufficient to establish beyond a reasonable doubt that the object was in fact a real

[1] The complainant agreed with defense counsel that defendant appeared to be in his mid-20s and had a "full beard" at the time of trial.

gun. However, as noted earlier, the trial court found defendant guilty of armed robbery, MCL 750.529,[2] and sentenced him to 7 to 20 years in prison.

II

Defendant first argues that his conviction should be reversed because counsel was not present at the time the complainant viewed the photographic array and identified his photo. Relying on *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), defendant asserts that he had a constitutional right to counsel during this process. We disagree.

As an initial matter, we note that "the right to counsel announced in *Wade* . . . attaches only to *corporeal* identifications[.]" *Moore v Illinois*, 434 US 220, 226; 98 S Ct 458; 54 L Ed 2d 424 (1977) (emphasis added). As explained previously, the procedure used in this case was a photographic array—*not* a corporeal lineup. "[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." *United States v Ash*, 413 US 300, 321; 93 S Ct 2568; 37 L Ed 2d 619 (1973).

The general rule in Michigan is that "a defendant is not entitled to counsel at a precustodial investigatory photographic lineup unless the circumstances underlying the investigation and lineup are 'unusual.'" *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). We have defined "unusual" in this context as either (1) "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant," or (2) circumstances such as those presented in *People v Cotton*, 38 Mich App 763, 770; 197 NW2d 90 (1972), wherein the defendant had previously been in police custody, had previously been arrested and released, and had counsel present for previous lineups. *McKenzie*, 205 Mich App at 472.

"'In the case of photographic identifications, the right of counsel attaches with custody.'" *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001) (citation omitted). Here, defendant was not in custody at the time of the photographic lineup and the complainant had not made any previous identifications of defendant. Nor were any of the unusual circumstances at issue in *Cotton* present in this case. Instead, it strikes us that the investigation in this case was routine and that the police took every precaution to prevent undue suggestiveness in the photographic array procedure. We perceive no "unusual" circumstances that would have necessitated counsel's presence at the photographic lineup. See *McKenzie*, 205 Mich App at 472-473.

[2] To convict defendant of armed robbery, it was not necessary for the prosecution to prove that defendant possessed a real firearm. The armed robbery statute requires only that the perpetrator possess "a dangerous weapon *or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon* . . . ." MCL 750.529 (emphasis added).

III

Defendant next argues that the prosecution presented insufficient evidence to support his conviction of armed robbery. Specifically, he contends that there was insufficient evidence to establish his identity as the perpetrator of the crime. We disagree.

The identity of the defendant is an essential element in every criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). "[W]e review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). We defer to the trial court's special opportunity to judge the credibility of the witnesses during a bench trial. *People v Cyr*, 113 Mich App 213, 222; 317 NW2d 857 (1982). The credibility of identification testimony is a question for the trier of fact, which we will not resolve anew on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The testimony of only one witness may be sufficient to prove the defendant's identity as the perpetrator of a crime beyond a reasonable doubt. *People v Thomas*, 7 Mich App 103, 104; 151 NW2d 186 (1967).

Defendant asserts that the complainant's identification testimony was unreliable given that the complainant observed the perpetrator of the robbery for only "one or two seconds." But it does not strike us that this fact alone should have led the trial court to discredit the complainant's identification testimony. Although the complainant's opportunity to observe the robber was relatively short in duration, the evidence established that he had a clear, unobstructed view of his assailant. *Id*. The complainant testified that he looked directly at the robber's face from a distance of only three or four feet. Moreover, although the incident occurred at night, defendant described the scene of the robbery as "well-lit," and testified that there was sufficient light illuminating the area from inside the gas station. See *People v Gray*, 457 Mich 107, 119; 577 NW2d 92 (1998). We conclude that the trial court properly determined that the complainant had adequate time and opportunity to observe the robber.

Defendant also asserts that the complainant's identification testimony was not worthy of belief because the complainant initially described his assailant as someone taller than defendant, younger than defendant, and with much less facial hair than defendant. We fully acknowledge that whereas the complainant initially told the police that he had been robbed by someone approximately 5'10" or 5'11", defendant's arrest report, which was admitted into evidence, indicated that defendant is only 5'7". We further acknowledge that while the complainant initially told the police that he had been robbed by someone who was approximately 16 years old, defendant was actually in his mid to late 20s at the time of the robbery. Lastly, we acknowledge that while the complainant told the police that his assailant had only a small amount of facial hair on his chin at the time of the robbery, defendant had a full beard at the time of trial. However, we are not convinced that any of these discrepancies between the complainant's original description of the robber and defendant's actual physical appearance were sufficient to invalidate the otherwise-unwavering identification testimony in this case. The complainant specifically testified that he had not relied on his memory of the assailant's height, age, or facial hair when identifying defendant at the photographic array or in open court. Instead, the complainant testified that he had remembered the shape of defendant's eyes and the

structure of defendant's face, and that he had relied on these particular characteristics to identify defendant as his assailant. The trial court found the complainant's testimony in this regard to be "exquisitely credible," and was not troubled by the inconsistencies between the complainant's initial description of the robber and defendant's actual appearance.

With regard to defendant's height, we note that although the complainant's initial description of the robber's height may have differed from defendant's actual height by three or four inches, the complainant maintained throughout the pendency of this case that the robber was noticeably shorter than he was. The critical feature of the complainant's statement was that the robber was noticeably shorter than he is (the complainant is 6'4"). The exact number of inches was merely secondary, and not nearly as important. With respect to defendant's age, the trial court observed that the complainant's original description of the robber as approximately 16 years old "frankly doesn't shake my confidence in the [complainant's] testimony because I see the defendant as having a kind of baby face, if you will." The court noted that it could "readily see how the crime victim under the circumstances might think that the defendant was 16." Like the trial court, we are not troubled by the complainant's initial description of the robber as a teenager. The record amply establishes that defendant has a youthful appearance, and we conclude that the trial court properly credited the complainant's testimony despite this minor discrepancy. Lastly, with regard to the matter of facial hair, it is patently obvious that defendant's facial hair could have grown between the date of the robbery and the date of trial. In sum, any discrepancies between the complainant's initial description of the robber and defendant's actual appearance went only to the weight of the complainant's identification testimony. It was for the court, sitting as the trier of fact, to assess the weight of the evidence and determine the credibility of the witnesses who appeared before it. *People v Kanaan*, 278 Mich App 594, 621; 751 NW2d 57 (2008); see also *Davis*, 241 Mich App at 700.

As explained previously, we defer to the trial court's special opportunity to judge the credibility of the witnesses. *Cyr*, 113 Mich App at 222. The court found the complainant's identification testimony credible, and we perceive no error in this regard. As the trial court noted, the complainant was confident and unwavering in his identification of defendant as the perpetrator of the robbery. We conclude that there was sufficient identification testimony from which the trial court could have determined beyond a reasonable doubt that defendant was the perpetrator of the armed robbery at issue in this case.

IV

Defendant also argues that his trial attorney rendered ineffective assistance of counsel by "trick[ing]" him into waiving his right to a jury trial. We cannot agree.

Because the trial court did not conduct a *Ginther*[3] hearing, our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

An affidavit submitted by defendant strongly indicates that defense counsel suggested proceeding with a bench trial rather than a jury trial for strategic reasons. In that affidavit, defendant averred that his trial attorney "stated that it would be in my best interest to take a bench trial because the judge [would] have to go off of facts and by the law." Defendant further averred that his attorney "stated that it would not be in my best interest to take a jury trial because the jury will go off of emotions." Before the beginning of trial, defendant confirmed on the record that he had "freely and voluntarily" waived his right to a trial by jury.

On the record before us, we perceive no evidence that defendant was in any way "tricked" into waiving his right to a jury trial. Defendant's trial attorney was apparently concerned that a jury might be swayed by emotion and convict defendant notwithstanding what he perceived as weaknesses in the complainant's identification testimony. Counsel believed that the trial court, sitting without a jury, would better appreciate any such weaknesses in the identification testimony and would understand that it was legally required to take those weaknesses into account when reaching its verdict. Consequently, counsel recommended that defendant proceed with a bench trial rather than a jury trial. Defense counsel's tactics in this regard were clearly strategic in nature, and were not ineffective merely because they did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

V

Defendant next argues that his sentence of 7 to 20 years in prison is invalid because it violates the principle of proportionality. Again, we disagree.

We review for an abuse of discretion whether the sentence imposed by the trial court is proportionate. See *People v Milbourn*, 435 Mich 630, 653-654; 461 NW2d 1 (1990).

The principle of proportionality "'requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *People v Babcock*, 469 Mich 247, 254; 666 NW2d 231 (2003), quoting *Milbourn*, 435 Mich at 636. A minimum sentence falling within the guidelines is presumed to be proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant's minimum sentence of 7 years falls within the guidelines range of 51 to 85 months,[4] albeit near the high end of that range. See MCL 777.62.

Defendant correctly points out that even a minimum sentence falling within the guidelines range could conceivably be disproportionate "in unusual circumstances." *Milbourn*, 435 Mich at 661. The problem with defendant's argument, however, is that he simply has not established the existence of any such unusual circumstances in this case. See, e.g., *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996); *People v Sharp*, 192 Mich App 501,

[4] If the trial court had chosen to sentence defendant as a second habitual offender under MCL 769.10, as it was entitled to do, defendant's minimum guidelines range would have been 51 to 106 months. See MCL 777.21(3)(a); MCL 777.62.

505; 481 NW2d 773 (1992). We cannot conclude that the sentence imposed in this case is disproportionate. Accordingly, we find no abuse of discretion.

VI

Lastly, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant argues that the trial court erred to the extent that it calculated his minimum sentence on the basis of certain facts that were not proven to a jury beyond a reasonable doubt. Our Supreme Court has roundly rejected this very argument. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). And although defendant insists that *Drohan* was wrongly decided, this Court is without authority to reverse decisions of the Michigan Supreme Court. *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad