

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ERIC CARPENTER,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 184400

Ingham Circuit Court

LC No. 94-067884-FC

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of armed robbery, MCL 750.529; MSA 28.727, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to forty years' imprisonment for his armed robbery conviction and to a consecutive term of two years for his felony-firearm conviction. We affirm.

Defendant was convicted in connection with an armed robbery of a 7-Eleven store on July 29, 1994. Defendant was seen leaving the 7-Eleven store by Officer Larry Harrison. After hearing on his radio that the 7-Eleven store in question had been robbed, the officer followed defendant. Defendant got into a Ford Thunderbird and drove away and a police chase ensued that lasted forty-eight minutes. Defendant was caught the next day.

Defendant first argues that his conviction should be reversed because Officer Harrison's in-court identification of defendant was based on an unnecessarily suggestive news report. We disagree. Harrison's identification was based on his own perceptions from seeing defendant right after the crime occurred and while defendant was driving the Thunderbird. Thus, the trial court did not err in admitting the identification testimony because Harrison's identification was based on his observations, and not on the television broadcast. *People v Barnett*, 163 Mich App 331, 336; 414 NW2d 378 (1987).

Defendant next argues that his conviction should be reversed because the prosecutor improperly argued facts not in evidence during closing arguments, specifically, that defendant altered his appearance before his lineup and that, even though defendant was right-handed, he used his left hand to hold the gun because he did not have a right trigger finger. With regard to the prosecutor's argument that defendant

changed his appearance before the lineup, there was evidence that defendant had grown a beard prior to the lineup. Therefore, any argument with respect to defendant deliberately changing his appearance for the lineup was a reasonable inference from the evidence presented. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). With regard to the prosecutor's argument that, even though defendant is right-handed he held the gun in his left hand because he did not have a right index finger, the fact that defendant was right-handed was not in evidence, nevertheless we will not reverse on this ground because the error was not prejudicial. *People v Mateo*, 453 Mich 203, 210-212; 551 NW2d 891 (1996). The error was harmless because the main point of the prosecutor's argument was that defendant's missing right index finger explained why the gun was held in the robber's left hand. Both of these facts--that defendant did not have a right index finger and that the robber held the gun in his left hand--were in the record. The argument that defendant appeared to be right-handed was superfluous to the prosecutor's argument and, therefore, any error was not prejudicial.

Defendant next argues that the trial court improperly ruled that if he took the stand he could be impeached by his prior conviction of receiving and concealing stolen property because this crime does not involve an element of theft. This issue is unpreserved because defendant did not testify at trial. *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988).

Next, defendant argues that he is entitled to a new trial because the trial court erred in requiring him to be physically restrained with shackles during trial. We disagree. The trial court did not articulate on the record the specific reasons for restraining defendant other than referring to a previous trial involving defendant. However, the trial court indicated that every effort would be made to conceal the shackles and defense counsel never indicated that these efforts were unsuccessful. Thus, the error in failing to articulate on this record the reasons for restraint was not prejudicial. *Mateo, supra* at 210-212. We also note that defendant had a prison escape conviction.

Finally, defendant argues that the trial court abused its discretion by sentencing him to twenty-five to forty years for his armed robbery convictions because defendant was not assaultive or did not use any force more than necessary for the commission of the crime. We disagree. Defendant was sentenced at the top end of the sentencing guidelines and sentences within the guidelines are presumptively proportionate. Defendant's sentence was proportionate, given the fact that he had five prior felonies, including a prior armed robbery and prison escape. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor