

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELVIN DENEIL CHESTNUT,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 190129

Recorder's Court

LC No. 95-002291-FC

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of armed robbery, MCL 750.529; MSA 28.797, one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent terms of six to twenty years' imprisonment for each of his armed robbery convictions, as well as for his home invasion conviction, to be served consecutively to concurrent terms of two years' imprisonment for each of his felony-firearm convictions. Defendant now appeals as of right, and we affirm.

As a threshold matter, we agree that the pretrial lineup at which Annie Walker identified defendant was rendered improper by the illegality of defendant's arrest. However, because the trial court granted defendant's motion to suppress evidence of the pretrial identification, there was no error requiring reversal.

Next, defendant argues that the trial court erred in denying defendant's motion to suppress the in-court identifications of defendant by McKinley Walker, Annie Walker, and Caroline Mallory. We disagree. A trial court's decision to admit identification evidence will not be reversed absent clear error. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993); *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Kurylczyk*, *supra*, p 303; *McElhaney*, *supra*, p 273. Erroneously admitted identification testimony warrants

reversal only when the error is not harmless beyond a reasonable doubt. *People v Winans*, 187 Mich App 294, 299; 466 NW2d 731 (1991).

Defendant contends that the trial court should have suppressed the in-court identifications because the witnesses were exposed to an impermissibly suggestive identification procedure. In fact, the trial court found that the pretrial lineup procedure was rendered improper by the illegality of defendant's arrest. However, the record reveals that only McKinley and Annie Walker viewed the improper lineup. Mallory did not view or, for that matter, even attend the lineup. In fact, Mallory's first and only identification of defendant occurred at trial. Consequently, this Court will limit its review to determining whether the trial court clearly erred in finding that the prosecution established by clear and convincing evidence an independent basis for the in-court identifications of defendant by McKinley and Annie Walker. See *Kurylczuk, supra*, p 303 (if a witness is exposed to an impermissibly suggestive pretrial lineup or showup, his in-court identification of the defendant 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 illegal identification).

To determine whether the in-court identification would result from a sufficiently independent basis, the trial court must hold a hearing and consider all relevant factors. *People v Kachar*, 400 Mich 78, 96-97; 252 NW2d 807 (1977); *People v Steiner*, 136 Mich App 187, 194; 355 NW2d 884 (1984). Appropriate factors include: (1) the witness's prior knowledge of the defendant; (2) the witness's opportunity to observe the crime; (3) the length of time between the crime and the disputed identification; (4) discrepancies between the pretrial identification description and the defendant's actual appearance; (5) any prior proper identification of the defendant or failure to identify the defendant; (6) any prior identification of another as the culprit; (7) the mental state of the witness at the time of the crime; and (8) any special features of the defendant. *Kachar, supra*, pp 95-96.

At the evidentiary hearing, McKinley Walker testified that, during the course of the fifteen-minute episode, he stood face-to-face with defendant, that he observed defendant within the well-illuminated confines of his home, and that he knew defendant from the neighborhood. Annie Walker similarly testified that she calmly observed defendant and even studied his mannerisms. In light of these factors, we are satisfied that McKinley and Annie Walker were able to make in-court identifications of defendant independent of the pretrial confrontation.

Defendant also argues that the trial court erred in denying defense counsel's request to introduce suppressed evidence for impeachment purposes. We disagree. A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Likewise, this Court reviews a trial court's decision to limit the scope of cross-examination for an abuse of discretion. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992); *People v Williams*, 191 Mich App 269, 275; 477 NW2d 877 (1991).

At trial, defense counsel, in an attempt to undermine the credibility of McKinley Walker's testimony, sought to introduce evidence of Walker's misidentification of defendant at the pretrial lineup. Defense counsel argued:

The Court has put me in the untenable position of depriving my client the right to fully cross examine the witnesses against him and basically to prevent me from putting on a full defense. As the Court knows, the only evidence they have against my client is the identification, and in suppressing the line up, you are preventing me from cross examining [McKinley] with respect to the prior witnesses' identification. . . .

Clearly, a primary interest secured by the Confrontation Clause is the right of cross-examination. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Here, however, defendant's contention is wholly unfounded. The record reveals that, while the trial court initially denied defendant's request to introduce the suppressed evidence, the court ultimately permitted defendant to challenge Walker's in-court testimony with prior inconsistent statements from the pretrial lineup. Thus, defendant's claim is without merit.

Lastly, defendant argues that the sentences imposed for his armed robbery convictions are disproportionate. We disagree. We review a claim that a sentence is disproportionate for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id.*, citing *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Defendant contends that the sentences for his armed robbery convictions were disproportionate because his clean record, strong familial relations, and volunteerism in the community warranted a lesser sentence. Here, defendant's six-year minimum sentences fell within the recommended guidelines' range of two to six years and, therefore, are presumptively proportionate. *McElhaney, supra*, pp 285-286. Because the factors presented by defendant at sentencing were not sufficiently unusual to overcome the presumption of proportionality, we find no abuse of discretion. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Janet T. Neff

/s/ Jane E. Markey