

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MAURICE JACKSON,

Defendant-Appellant.

UNPUBLISHED

July 11, 1997

No. 191863

Recorder's Court

LC No. 95-004539

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a; MSA 28.797a, armed robbery, MCL 750.529; MSA 28.797, and felony firearm, MCL 750.227b; MSA 28.424(2). He now appeals as of right and we affirm.

I

Defendant argues that the trial court abused its discretion by admitting a .38 caliber gun into evidence because a sufficient connection between the crimes charged and the weapon was not established. Defendant asserts that the evidence should have been excluded as irrelevant, MRE 401, and as more prejudicial than probative, MRE 403. 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). Although the complainant truthfully testified that he did not recognize the gun, he unequivocally testified that defendant took his car keys at gunpoint, then drove away in the vehicle in which the gun was found. This was sufficient to overcome any objection on the basis of lack of relevance. *People v Smith*, 106 Mich App 203, 209-210; 307 NW2d 441 (1981). We reiterate what we said in *Smith*:

[I]t is a well-established rule that where weapons or tools were used to commit a crime, weapons or tools that might have been used to commit the crime found in the accused's possession at the time of arrest may be introduced without proof that they were the very weapons or tools in fact so used. *Smith*, 106 Mich App 210-211 (citations omitted).

Accordingly, we find no abuse of discretion.

II

Defendant also contends that the trial court erred in admitting testimony regarding the complainant's out-of-court identification of defendant. Defendant is wrong. A trial court's decision to admit identification evidence will not be reversed absent clear error. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Defendant argues that the corporeal lineup was impermissibly suggestive because at twenty seconds into the lineup one of the presiding officers told defendant to raise his head and ten seconds later, defendant was identified by the complainant. However, the record reveals that the instruction was given in response to defendant's posture (defendant had his head down). Thus, the instruction was issued to facilitate the procedure and not to single out defendant. The identification testimony was properly admitted.¹

III

Defendant argues unpersuasively that the sentence imposed for his armed robbery conviction is disproportionate and that the court relied on erroneous reasons for departing from the sentencing guidelines.

Appellate review of sentences is limited to determining whether an abuse of discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). Here, the sentencing guidelines range was two to six years, and defendant was sentenced to eight to twenty years' imprisonment for the armed robbery conviction.

The sentencing court based its upward departure primarily upon the fact that defendant, in committing the crime, purposefully terrorized the victim. Defendant makes much of the fact that, at sentencing, the court reduced the OV-2 score (the variable recognizing terrorism) from twenty-five to zero points, yet later utilized primarily the rationale of terrorism to sentence above the guidelines. However, in light of the record here, and *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997), we see no abuse of discretion. The evidence supports a finding that defendant terrorized the elderly victim by placing a gun into the victim's ribs while the victim was washing his car at one o'clock in the afternoon. Defendant's sentence was neither disproportionate nor an abuse of discretion.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

¹ Factors relevant to the fairness of a lineup include: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of

the criminal, the level of certainty demonstrated by the witness at the identification, and the length of time between the crime and the identification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). Here, the complainant had ample opportunity to view the robber during the offense. The complainant testified that the encounter lasted from one to two minutes, that he had a well-illuminated, unobstructed view of the robber, and that he paid close attention to the robber's eyes and face. Also, the complainant provided a fairly detailed description of the robber to the police within ten minutes after the crime was committed. The complainant testified that he was ninety-five percent certain that defendant was the robber. Finally, the corporeal lineup was conducted only one day after the incident. The identification testimony was properly admitted