

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN LEE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 192067
Isabella Circuit Court
LC No. 95-007400-FH

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender-fourth, MCL 769.12; MSA 29.1084, to concurrent terms of 300 to 450 months and 160 to 240 months, and to a consecutive two-year term for felony-firearm. We affirm.

Defendant argues on appeal that the police lineup was so “extremely suggestive” that he was denied a fair trial and was denied effective assistance of counsel. There is no merit to this claim. Defendant did not object to the lineup procedure below and we find no miscarriage of justice. Counsel was present at the lineup, and there is no evidence the lineup was so impermissibly suggestive as to render the identification irreparably unreliable. *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). A deputy testified that the other men in the lineup were “within a certain physical resemblance” to defendant, and the procedure was not unduly suggestive merely because the complainant might have believed that the alleged perpetrator would be in the lineup. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Nor was counsel ineffective for failing to challenge admission of the identification evidence or to object to the deputy’s testimony that defense counsel approved the lineup. Defendant has not demonstrated that a challenge to admissibility of the lineup would have been successful, and defense counsel did, in fact, object to the challenged testimony although not on the grounds defendant suggests. This Court will not substitute its judgment for that of counsel concerning matters of trial strategy. *People v Peery*, 119 Mich App 207, 216; 326 NW2d

451 (1982). Moreover, in light of the overwhelming evidence against defendant in this matter, any error in regard to this issue would have been harmless.

Defendant also contends that the trial judge in this matter should have been automatically disqualified from sentencing defendant pursuant to MCR 2.003(B)(3), because the judge previously represented defendant. Defendant does not allege that disqualification was required for defendant's trial. We disagree.

Defendant did not raise this issue until after sentencing. The trial judge's prior representation, which occurred more than ten years before this trial, resulted in a conviction that was used to enhance defendant's sentence in this case. Existence of defendant's prior conviction was not in dispute, and the trial judge's involvement occurred long before the time period contemplated by the court rule. The trial judge noted at the motion hearing that he had not used any special knowledge of defendant's prior conviction in this case, and the record shows no hint of bias or prejudice. We find no error in the trial judge's failure to recuse himself sua sponte.

Finally, defendant argues that his sentence was disproportionate. There is no merit to this issue. Defendant had a lengthy prior record and was on parole at the time of this offense, which involved confrontation of complainant with a gun. In addition to the home invasion in this case, defendant confronted the complainant with a gun. We find the sentence here proportionate to the offender and the offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Richard Allen Griffin

/s/ Myron H. Wahls

/s/ Roman S. Gibbs