

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL EDWARD EDGERTON,

Defendant-Appellant.

UNPUBLISHED

February 10, 1998

No. 198850

Allegan Circuit Court

LC No. 96-10061 FC

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by jury of armed robbery, MCL 750.529; MSA 28.797, assault with a dangerous weapon, MCL 750.82; MSA 28.277, home invasion in the first degree, MCL 750.110a(2); MSA 28.305(a)(2), and three corresponding counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The charges against defendant arose out of an incident that occurred on March 18, 1996, in which Rosario Jose Gonzales was beaten and robbed by two men in his home. At trial, defendant presented an alibi defense, asserting that defendant could not possibly have committed the armed robbery. A jury found defendant guilty on each charge. Defendant was sentenced as an habitual offender to forty-five to seventy-five years' incarceration for the armed robbery, to be served concurrently with thirty-two to forty-eight months' incarceration for assault with a dangerous weapon, also to be served concurrently with eight to twenty years' incarceration for first-degree home invasion. Those sentences are to be served consecutively to a mandatory period of two years' incarceration for each of the three concurrent sentences for felony-firearm. Defendant appeals his convictions and sentence as of right. We affirm.

Defendant's first argument on appeal is that the trial court erred in denying his motion to suppress the victim's in-court identification of defendant, arguing that it was based upon a tainted pretrial lineup identification. Defendant's challenge to the propriety of the in-court identification rests on four separate arguments: (1) that a police trooper provided defendant's identification to the victim; (2) that the lineup itself was unduly suggestive; (3) that the victim's mental and physical condition at the time of the incident was insufficient to provide him with a valid identification of the assailants; and (4) that the victim allegedly saw defendant in a courtroom prior to trial. We review the trial court's decision to deny defendant's motion to suppress the in-court identification under a clearly erroneous standard, *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995), and affirm.

Defendant first argues that the identification was tainted because, before the lineup, a state police trooper allegedly provided defendant's identification as a suspect to Gonzales. A corporal lineup is not tainted by the fact that a witness is told by the police that it contains several suspects. *People v*

Smith, 108 Mich App 338, 344; 310 NW2d 235 (1981). In any case, the record indicates that the trooper told Gonzales that he had three suspects and identified them as Scott Edgerton and his two brothers without identifying the brothers by name. Given these facts, it can not be said that the comments made to the victim gave rise to a substantial likelihood of irreparable misidentification. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974).

Next, defendant argues that the lineup itself was unduly suggestive because he was the only individual in the lineup with tattoos. Differences in physical characteristics among lineup participants may taint the lineup to the extent that the identification must be suppressed. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993). However, if defense counsel was present at the lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Defendant has failed to meet this burden. There is no indication in the record that defendant was the only person in the lineup with tattoos. Further, the police apparently did not know before the lineup was conducted that Gonzales had seen tattoos on one of the robbers; tattoos were not listed in the original eyewitness description of defendant. Accordingly, given the evidence in the record, we do not conclude that reversal is required.

Finally, defendant argues that the identification was tainted because the victim's mental and physical condition at the time of the incident was impaired to the extent that he could not make a valid identification of the assailants. It is true that the physical and psychological state of the victim may be a relevant factor in judging the reliability of the witness' perceptions. *People v Kachar*, 400 Mich 78, 96; 252 NW2d 807 (1977). However, the facts do not indicate that Gonzales' mental state was impaired when he initially recognized defendant or when he later identified him in the lineup. Furthermore, there is no indication that Gonzales' perceptions were influenced by a weakened state when the suspects initially entered his home. Gonzales' subsequent state of mind, after the beating, does not preclude the possibility that he recognized defendant initially and was later able to recall his identification upon seeing him in the lineup.

In any event, even if the identification procedure was improper, the victim's in-court identification was proper because there was an independent basis for the identification. *Kachar, supra* at 91. In this case, the victim had prior knowledge of defendant, as defendant's brother had worked in the victim's store and defendant had come into the store to visit his brother. Furthermore, the victim also had an opportunity to observe defendant during the robbery; defendant was in close proximity of the victim for approximately fifteen minutes during the offense. These factors, when combined with the fact that there were no discrepancies between the pre-lineup description and defendant's actual description, and that the victim never mistakenly identified anyone else as the perpetrator, lead this Court to conclude that defendant failed to show that the lineup had a substantial likelihood of misidentification. *Kurylczyk, supra* at 306.¹

Next, defendant argues that the trial court erred in admitting the prior statement of William Chamberlain, a co-defendant. Chamberlain testified for the prosecution regarding a written statement that he gave to the police on the day the crime was committed. Defendant argues that Chamberlain's statement should not have been admitted because he invoked the Fifth Amendment privilege against self-incrimination and chose not to testify. Whether the admission of Chamberlain's statement as

substantive evidence violated defendant's right of confrontation depends first on whether he was available for cross-examination at trial. It has long been held that the admission of a declarant's out-of-court statement does not violate the Confrontation Clause if the declarant testifies at trial and is subject to cross-examination. *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489, 497-499 (1970); *People v Malone*, 445 Mich 369, 382-383; 518 NW2d 418 (1994).

After reviewing the record, we conclude that defendant's right of confrontation was not violated. Despite the fact that Chamberlain was informed that he could remain silent regarding the statement and despite his declaration that he wished to exercise that right, Chamberlain was nevertheless subjected to cross-examination regarding the statement and he continued to testify in that regard. Defendant was able to cross-examine Chamberlain and elicit testimony that Chamberlain could not remember defendant being involved in the crime and that he could not remember his statements to the police because he was under the influence of drugs. Since we conclude that defendant had the opportunity to convince the jury that Chamberlain's prior statement was incorrect, according to *Green*, *supra*, Chamberlain's prior out-of-court statement was admitted without compromising defendant's right of confrontation.²

Even if we were to agree with defendant that Chamberlain's statements were inadmissible, we would find that the error was harmless. In *People v Spinks*, 206 Mich App 488, 492; 522 NW2d 875 (1994), this Court explained that whether the admission of a co-defendant's statement would violate a defendant's right of confrontation "depends on whether it bears 'adequate indicia of reliability'." *Id.* In that case, the Court found that the statement should not have been admitted, but concluded that the erroneous admission constituted harmless error. *Id.* at 493-494. An error is harmless where the appellate court is confident beyond a reasonable doubt that the jury's verdict was unaffected by the error. *Id.* at 493. The erroneous admission of a codefendant's prior statement constitutes harmless error where another witness' testimony is sufficient by itself to prove the crime beyond a reasonable doubt. *Id.* at 494. In the present case, the victim gave a detailed description of the robbery and confidently identified defendant as someone he had previously met. In light of this independent evidence, it is not likely that the jury's verdict was affected by the admission of Chamberlain's prior statement. Therefore, we decline to reverse.

Defendant next argues that he was denied his right of confrontation because a co-defendant's prior statement was excluded. This argument focuses on the admissibility of a letter written by co-defendant Scott Edgerton, while he was incarcerated, to defendant, implying that defendant was not involved in the crime. The trial court ruled that the letter was inadmissible because it had not been disclosed the prosecution and because the statement did not contradict Edgerton's testimony.

In criminal cases tried after January 1, 1995, discovery is governed by MCR 6.201. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). MCR 6.201(I) permits a trial court in its discretion to exclude evidence for failure to comply with a discovery order. Since we conclude that the evidence sought to be admitted provided marginal value to the case and was cumulative to the witness' testimony, it was not an abuse of discretion to exclude the evidence as a remedy for defendant's failure to comply with the court's discovery order.³

Next, defendant argues that the trial court abused its discretion by allowing defendant to be impeached by a prior conviction. However, since defendant did not testify and did not indicate an intention to testify, nor did he indicate the intended nature of such testimony, this issue is waived on appeal. *People v Finley*, 431 Mich 506, 509; 431 NW2d 19 (1988); *People v Gaines*, 198 Mich App 130, 131; 497 NW2d 210 (1993).

Defendant also argues that the prosecutor erred in eliciting testimony regarding defendant's post-arrest silence during the following exchange:

Q [Prosecutor]: Had you had the opportunity to ever personally interview Michael Edgerton?

A [Detective Averill]: No, Mr. Edgerton did not wish to be interviewed.

It is well settled that it is erroneous for the prosecutor to elicit, and the witness to offer, testimony regarding a defendant's exercise of his right to remain silent at the time of his arrest. *People v Swan*, 56 Mich App 22, 31; 223 NW2d 346 (1974). However, such an error can be harmless and does not require reversal if it did not prejudice the defendant. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990); *Swan*, *supra* at 31. Two inquiries must be made to determine whether an error was harmless: (1) whether the error was so offensive to the maintenance of a sound judicial system that it can never be regarded as harmless, and (2) whether it was harmless beyond a reasonable doubt. *Gilbert*, *supra* at 747; *Swan*, *supra* at 31.

Applying the analysis in *Swan*, we conclude that although the prosecutor erred in eliciting testimony regarding defendant's silence, it was not done so deliberately and defendant was not deprived of a fundamental element of the adversary process. Therefore, it did not so interfere with the integrity of the trial process as to require reversal. *Id.* at 32. Furthermore, since the improper comment was fleeting and substantial evidence of defendant's guilt was presented, we find no reasonable probability that the testimony contributed to defendant's conviction and, therefore, reversal is not required on that basis. *People v Dixon*, 84 Mich App 675, 684; 270 NW2d 488 (1978); *Swan*, *supra* at 33-34.

Finally, defendant claims that the trial court abused its discretion in imposing sentence, arguing that the sentence far exceeded the guidelines and violated the principle of proportionality. We disagree.

Appellate review of habitual offender sentences is limited to a review of proportionality, without any consideration of, or reference to, the guidelines. *People v Hansford (On Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The trial court's discretion in imposing sentence is broad, to tailor each sentence to the circumstances of the case and the offender. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). Appellate review is limited to whether the sentencing court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality: a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Defendant argues that his sentence was disproportionately harsh in comparison to the codefendants' in this case. However, sentences are to be individualized and the court need not consider the sentences of codefendants. *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). Considering defendant's status as an habitual offender, the extent of his criminal record, the severity of the present crimes, and the fact that the present crimes mark an escalation from property crimes to crimes against persons, there is no indication that the trial court abused its discretion in imposing a 45-year minimum sentence for defendant's conviction of armed robbery. *Hansford*, *supra* at 324-326.

Affirmed.

/s/ Peter D. O'Connell

/s/ Richard A. Bandstra

¹ Defendant also claims that the trial court erred in failing to grant defendant's pre-trial motion on the basis that the victim allegedly viewed defendant in the courtroom prior to trial. However, the victim testified that he had not been in the courtroom and that he had not seen defendant. The trial court found

that the victim's testimony was more credible and denied defendant's motion. We defer to the trial court's special opportunity to judge the credibility of witnesses appearing before it, MCR 2.613(C), *People v Thomas*, 387 Mich 368; 197 NW2d 51 (1972), and decline to reverse on this basis.

² We recognize that the trial court held that Chamberlain's statement was admissible on the basis of its finding that he was "unavailable" for cross-examination. The trial court allowed the statement under the exception to the hearsay rule provided in MRE 804(b)(3) (statements against penal interest). Since we conclude that defendant's right to confrontation was not violated by the court's decision to allow Chamberlain's testimony, we find no need to discuss this hearsay exception.

³ Our conclusion that the statement was cumulative to the witness' testimony provides an independent basis for our determination that exclusion of the statement was not erroneous. Edgerton testified at trial that he did not believe that defendant was involved with the crime, but that he could not clearly remember the incident or the statement that he gave to the police because he was under the influence of drugs at the time. Since the letter did not contradict Edgerton's testimony and because it was, at most, cumulative, it was inadmissible under MRE 403. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).