

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON D. BELL,

Defendant-Appellant.

UNPUBLISHED

February 17, 1998

No. 196030

Recorder's Court

LC No. 95-011036

Before: Michael J. Kelly, P.J., and Fitzgerald and M.G. Harrison*, JJ.

MEMORANDUM.

At a bench trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, two counts of assault with intent to rob while armed, MCL 750.89; MSA 28.284, one count each of felonious assault, MCL 750.82; MSA 28.277, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was then sentenced to ten to twenty years on each of the capital charges, two to four years for felonious assault, and the statutory mandated two years for felony-firearm. He now appeals as of right. We affirm.

Defendant first contends that, because one of the victims identified him by name to the others shortly after the robbery, and that all victims then reviewed defendant's photograph, their subsequent lineup and in-court identifications were tainted. However, the security guard, who identified defendant by name after struggling with him over the stolen money, in no way used the photograph to identify defendant, and it was his testimony and that of the taxi driver on whom the trial court relied for identification. Accordingly, error in admitting the identification testimony of the other victims was harmless since the trier of fact did not rely on that testimony in rendering its verdict. *People v Jones*, 134 Mich App 371, 373; 350 NW2d 885 (1984). However, it should be noted that the trier of fact concluded that this civilian-engendered photographic lineup actually benefited defendant, because the victims other than the security guard concluded, after seeing the photograph, that defendant was not the person who had perpetrated the robbery. This procedure, therefore, was in no way conducive to irreparable misidentification to defendant's detriment.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant's remaining contention is that his ten to twenty year sentences are disproportionate to the offenses and the offender. As the sentence guideline range was 5 to 25 years on the minimum, defendant's sentence is near the lower end of the guideline range, and given the nature of the offenses, what the trier of fact determined was defendant's false testimony at trial, and his prior criminal record, defendant has failed to overcome that presumption. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

Affirmed.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald

/s/ Michael G. Harrison