

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 19, 2012

v

TAVA JERMAINE JACOBS,  
  
Defendant-Appellant.

No. 304660  
Ingham Circuit Court  
LC No. 10-000812-FC

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Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant Tava Jermaine Jacobs appeals as of right from his convictions following a jury trial of felonious assault, MCL 750.82; carrying a concealed weapon (CCW), MCL 750.227; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.<sup>1</sup> The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 24 to 72 months for felonious assault, 36 to 90 months each for the CCW and possession-of-a-firearm convictions, and a consecutive two-year sentence for felony-firearm. Because we disagree with defendant's argument that he was entitled to counsel during precustodial photographic lineups, we affirm.

**I. BASIC FACTS**

On May 30, 2010, Jarnell Perkins and his wife Sheena were hosting a barbeque at their home that was attended by the following people: Jarnell and Sheena's two young children, Cedric Perkins, Anthony Dilworth, Kendra Cosey, and Cosey's daughter. At about 10:00 p.m., all of the adults were outside when a person later identified as defendant approached on the sidewalk and looked at them as he walked past. Jarnell asked defendant what he was looking at, and defendant stopped, pulled out a gun from his pants, and fired a shot toward Jarnell. Sheena ran into the house while the others ended up in the garage. After the shooting, Jarnell had a cut on his leg that was bleeding, which he believed "was from the shooting."

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<sup>1</sup> The jury acquitted defendant of the charge of assault with intent to murder.

When the police arrived, they interviewed the witnesses and were able to develop a description of the shooter. Sheena recalled having seen the same person walking around the neighborhood in the past. The shooter was described, in part, as being a tall, darker-skinned black male with dreadlocks and a “tannish reddish” Rastafarian knit hat. The police canvassed the neighborhood, and a resident identified defendant as matching the description of the shooter. The police visited defendant’s home and spoke with his mother. They saw defendant inside, but he refused to cooperate. At one point, defendant “took off down towards the basement” and then reappeared “totally nude.” The police took a photograph of defendant but left without arresting him or searching his residence.

A few days later, a Lansing Police Department detective conducted photographic lineups where Sheena, Cosey, Jarnell, and Cedric each saw six photographs, one of which depicted defendant. Sheena identified defendant and said that she was 70 percent sure of her identification but that it would have helped if she could see the height of the individuals. Cosey also identified defendant in the lineup, stating that she was 70 percent sure of her choice and that she would have preferred an in-person lineup. Jarnell and Cedric did not identify anyone from the photographs. A felony warrant was issued, and defendant was later arrested and taken into custody.

At trial, Sheena testified that she had no doubt that defendant was the one who shot at her husband. Jarnell, Cedric, and Cosey also identified defendant as the man who shot at Jarnell. Several other witnesses identified defendant as someone who walked up and down the street in the neighborhood.

## II. ANALYSIS

On appeal, defendant argues that the photographic lineups violated his due-process right to counsel because they were conducted under “unusual circumstances” that mandated appointment of counsel even though defendant was not in custody. We disagree. Because the issue was not preserved below, we review it for plain error affecting defendant’s substantial rights. See *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009).

As defendant admits, a defendant is generally not entitled to counsel at a precustodial photographic lineup. *People v McKenzie*, 205 Mich App 466, 471-472; 517 NW2d 791 (1994). Where the underlying circumstances are “unusual,” however, a defendant is entitled to have counsel present. *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000). Unusual circumstances may be found “where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant,” *McKenzie*, 205 Mich App at 472, as opposed to an ongoing investigation where the police are simply attempting to tie all the information together and determine who the perpetrator was, *Lee*, 243 Mich App at 183-184.

Defendant cites *People v Johnson (On Remand)*, 180 Mich App 423; 447 NW2d 800 (1989) and *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977), in support of the proposition that the presence of counsel is required at a precustodial photographic lineup where defendant is already the focus of the investigation. However, our Supreme Court subsequently discredited the “focus test.” See *People v Kurylczyk*, 443 Mich 289, 300-302; 505 NW2d 528 (1993). While

acknowledging the cases cited by defendant, among others, the *Kurylczyk* Court noted that it had never applied the focus test except in *Kachar*, a nonbinding opinion signed by two justices. *Id.* at 298-300. The Supreme Court noted that:

At the early stage of an investigation of an unsolved crime, investigators cannot predict whether a witness will recognize a particular suspect as the perpetrator of that crime. Thus, it is impossible to know whether a photographic array will help to “build a case against the defendant” or will “extinguish a case against an innocent bystander.” Often, the distinction between those two courses of action is apparent only after an eyewitness has made, or failed to make, an identification. For this reason, we agree with the unanimous decision in *Lee* that counsel is not required at precustodial, investigatory photographic lineups like the one that was used in this case . . . . [*Id.* at 302 (citations omitted).]

Here, defendant was not in custody, and there were no “unusual circumstances” underlying the photographic lineups. Jarnell and the other witnesses gave the police a general description of the perpetrator the night of the shooting, and another neighbor subsequently matched defendant to the description the police had developed of the suspect. None of the witnesses had identified defendant as the perpetrator before the photographic lineups. See *Lee*, 243 Mich App at 182-183 (no “unusual circumstances” where the defendant was not identified as the perpetrator before the lineup). Defendant was not considered a suspect when the police arrived at his residence shortly after the shooting; he simply matched the description of the shooter that was developed by police investigation in the immediate aftermath of the incident. Thus, because no witness had positively identified defendant as the shooter before the photographic lineups, it cannot be said that the clear intent of the lineups was to build a case against defendant. See *McKenzie*, 205 Mich App at 472. Rather, given the status of the investigation, it is clear that the police were simply trying to identify the perpetrator and establish probable cause to make an arrest. In this case, the “photographic identification tied all the information together.” *Lee*, 243 Mich App at 183. Because the photographic lineups were proper, defendant’s additional argument that the in-court witness identifications should have been suppressed lacks merit.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Henry William Saad

/s/ Jane M. Beckering