

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 29, 1999

Plaintiff-Appellee,

v

No. 200599

Recorder's Court

LC No. 96-001562

DAVID L. STREETY, a/k/a DAVID PORTER, a/k/a  
MARK SCHLUETER,

Defendant-Appellant.

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Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to a term of forty to eighty years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. He now appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting Officer Glaza's identification testimony because Glaza's identification was the result of unduly suggestive pretrial identification procedures and violated defendant's due process rights. We disagree. A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993)(Griffin, J).

Several weeks after the incident, Officer Glaza was shown a single photograph of defendant and identified defendant as the driver of the car. An identification arising from the display of a single photograph may be viewed with suspicion, but is not per se unduly suggestive. *Manson v Braithwaite*, 432 US 98, 116; 97 S Ct 2243; 53 L Ed 2d 140 (1977). To sustain a due process challenge, defendant must show that, in light of the totality of the circumstances, the pretrial identification procedure was so suggestive that it led to a substantial likelihood of misidentification. *Kurylczyk, supra*, 443 Mich 302. The factors to be considered when evaluating the totality of the circumstances 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 confrontation, and the length of time between the crime and the confrontation. *Id.* at 306.

Here, Glaza, a trained police officer, had an opportunity to observe defendant both before and during the commission of the crime, gave a sufficiently accurate description of defendant, and indicated that he was certain of his identification. Although Glaza's identification took place between three and seven weeks after the incident, in light of the other factors, the passage of time does not render the identification unreliable. *Kurylczyk, supra*, 443 Mich 307-308. Considering the totality of the circumstances, we conclude that the pretrial identification procedures were not unduly suggestive. *Id.* at 306. Furthermore, even if we were to determine that the pretrial identification procedures were unduly suggestive, after reviewing the record, we conclude that Glaza had an independent basis for his in-court identification of defendant. *People v Kachar*, 400 Mich 78, 91, 95-97; 252 NW2d 807 (1977).

Defendant next argues that he was denied his right to counsel at the photographic lineup, and that the error warrants reversal. We disagree. We review constitutional issues de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997).

It is not required that defense counsel be present at a precustodial, investigatory photographic showup. *Kurylczyk, supra*, 443 Mich 302. Officer Davenport's testimony indicated that, although he believed that Glaza was shown the photograph before defendant was in custody, he could not be sure. Therefore, there is insufficient evidence in the record for us to determine with certainty whether defendant was in custody when Glaza was shown the photograph. However, the alleged violation of defendant's right to counsel at the photographic lineup involves a trial, rather than a structural, error because it relates to the propriety of the admission of Glaza's testimony regarding his pretrial identification of defendant. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994); *People v Johnson*, 215 Mich App 658, 666-667; 547 NW2d 65 (1996). Therefore, the alleged error is subject to harmless error analysis. *Id.* In light of Williams' corroborating identification evidence and our conclusion that there was an independent basis for Glaza's in-court identification of defendant, as well as our finding that the photographic showup was not unduly suggestive, we find the error, if any, to be harmless.

Defendant next argues that the trial court erred in failing to strike Officer Glaza's identification testimony or, in the alternative, to declare a mistrial, because the prosecution violated the court's discovery order by failing to disclose before trial the fact that Officer Glaza intended to identify defendant at trial. We disagree. Whether the discovery order required the disclosure of the identification is a question of law, which we review de novo. *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997).

The trial court entered an order requiring disclosure of "[a]ll statements known to the police and prosecutor of all endorsed witnesses." The parties dispute whether the term "statement" in the discovery order referred to oral, as well as written, statements. However, even assuming that the discovery order included oral statements of endorsed witnesses and that the prosecution violated the discovery order by failing to disclose Officer Glaza's identification of defendant, any error was harmless. Defendant claims that, because the prosecution failed to disclose Glaza's identification before trial, defense counsel indicated during his opening statement that Williams was the only witness who would give identification testimony. Defendant contends that Glaza's subsequent identification was prejudicial because it harmed defense counsel's credibility. However, defense counsel minimized any prejudice through his effective cross-examination of Officer Glaza. During defense counsel's cross-examination of Officer Glaza, he pointed to several discrepancies between Glaza's testimony and that of other

witnesses, as well as discrepancies between Glaza's testimony and the information contained in the police report. Defense counsel also emphasized the short amount of time during which Glaza observed the perpetrator, and the distance from which he observed the perpetrator. In addition, defense counsel questioned the prosecution's failure to conduct a live or photographic lineup to test Glaza's identification. Defense counsel further emphasized the problems with Glaza's identification testimony during his closing argument. Under these circumstances, the prosecutor's failure to disclose before trial Officer Glaza's identification of defendant did not amount to error requiring reversal.

Defendant next argues that the trial court abused its discretion in refusing the jury's request to reread Selina Williams' testimony, and that the court's refusal is error requiring reversal. We disagree. We review a trial court's decision to deny a jury's request for a rereading of testimony for an abuse of discretion. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974).

Approximately fifty minutes after the jury first retired to deliberate, the jury requested Williams' testimony. The trial court engaged in the following colloquy with counsel regarding the jury's request:

*Court:* [T]he court received a note at 11:52 which reads as follows: "Can we see the testimony of Selina Williams?" Um, obviously they cannot. "Can we have the testimony?" I'm simply – it's my intention to call them out and tell them they're to rely on their collective memories. Anything from either counsel?

*Prosecutor:* Nothing from the People, Your Honor.

*Court:* Of course, I told them that in the beginning but that's all right.

*Defense Counsel:* No.

*Court:* All right. Ready for the jury.

The court then instructed the jury as follows:

All right, ladies and gentlemen. The court received a note at 11:52 which reads as follows: "Can we have the testimony of Selina Williams?" I'm assuming obviously that you would like to – well, strike that. One of the things the court indicated to you in the beginning is that even though Ms. Cavanagh's taking down what's being said, there are no transcripts that are available for you to see. And so my – in response to your request for the testimony of Selina Williams, you must rely on your collective memories.

Having said that, you may now return to the jury room and resume your deliberations.

Defendant argues that the trial court erred in denying the jury's request for a rereading of Williams' testimony because MCR 6.414(H) specifies that the court may not refuse a reasonable request and that the court may order the jury to deliberate further without the requested review only if "the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." However, this Court generally will not review issues not properly raised before the trial court absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Here, defense counsel did not object to the trial court's denial of the jury's request, but

expressly acquiesced to the court's decision. *People v Fetterley*, 229 Mich App 511, 518-520; 583 NW2d 199 (1998). Therefore, this issue was not preserved for appellate review. *People v Watroba*, 450 Mich 971; 547 NW2d 649 (1996); *Grant, supra*, 445 Mich 552, n 31. "A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. To hold otherwise would allow defendant to harbor error as an appellate parachute." *Fetterley, supra*, 229 Mich App 520 (citations omitted). Furthermore, no compelling or extraordinary circumstances exist to warrant review of the trial court's decision despite defense counsel's acquiescence to the court's handling of the jury's request.

Defendant next argues that the trial court erred in refusing to allow defense counsel to obtain Williams' medical records after the completion of her testimony. It appears from the record that the trial court denied defense counsel's request on the ground that the medical records would have been inadmissible on the basis of the rule prohibiting the use of extrinsic evidence to impeach on a collateral matter. *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Assuming the trial court erred, we conclude that the error was harmless. During his cross-examination of Williams', defense counsel elicited testimony that Williams had been drinking beer and smoking crack cocaine, and that she had purchased marijuana, in the early morning hours before the accident. Thus, defense counsel was able to impeach the credibility of Williams' identification with Williams' drug and alcohol use. Under these circumstances, the trial court's decision was not error requiring reversal.

Finally, defendant argues that the trial court erred in denying his motion for a directed verdict on the second-degree murder charge because the prosecution failed to present sufficient evidence that defendant acted with malice. We disagree. We review a trial court's decision on a motion for a directed verdict by the same standard used by the trial court. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). Therefore, we consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Circumstantial evidence and the reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

A death caused by a defendant with malice and without justification or excuse is second-degree murder. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm. *Id.* at 464. Here, the evidence showed that, in an attempt to elude the police, defendant drove at a high rate of speed through a residential neighborhood, ignored at least two stop signs, and "cut off" at least one other vehicle in his path before colliding with Turner. Such evidence supports a finding that defendant acted in wanton and wilful disregard of the likelihood that the natural tendency of his acts was to cause death or great bodily harm. *People v Vasquez*, 129 Mich App 691, 694-695; 341 NW2d 873 (1983); *People v Goodchild*, 68 Mich App 226, 236; 242 NW2d 465 (1976). Accordingly, the trial court properly denied defendant's motion for a directed verdict on the second-degree murder charge.

Affirmed.

/s/ Maura D. Corrigan  
/s/ Martin M. Doctoroff  
/s/ E. Thomas Fitzgerald