

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WHAAJAAHAT UL'HANIF,

Defendant-Appellant.

UNPUBLISHED

June 10, 2003

No. 236551

Wayne Circuit Court

LC No. 98-001410-01

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission or attempted commission of a felony, MCL 750.227b. Defendant was sentenced to twelve to twenty-five years' imprisonment for the second-degree murder conviction and three terms of ten to seventeen years' imprisonment for the assault with intent to commit murder convictions, with the above sentences to run concurrently and consecutive to the mandatory two years' imprisonment for the felony-firearm conviction.¹ We affirm.

Defendant argues that the trial court erred in denying his motion to suppress the lineup identification evidence because it was the result of an unduly suggestive pretrial identification procedure, i.e., the witnesses viewed a composite sketch before identifying defendant in the lineup. Defendant further argues that the in-court identifications of defendant by the witnesses did not have an independent basis and should not have been admitted. We disagree.

The trial court's decision to admit identification evidence is reviewed for clear error. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* In order to sustain a due process challenge,

¹ Defendant's sentencing was delayed because the trial court granted defendant's motion for a new trial based on prosecutorial misconduct in withholding information. The prosecutor appealed to this Court, which reversed the trial court's order granting a new trial and remanded for reinstatement of the verdict in an unpublished per curiam opinion. *People v Ul'hanif*, unpublished opinion per curiam of the Court of Appeals, issued August 18, 2000 (Docket No. 220764).

a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*Kurylczyk, supra* at 302-303 (citations omitted).]

The victim in this case died when a car pulled alongside him while he was driving and shot into his car. One of the eyewitnesses assisted the police in the making of a composite sketch of the shooter. At the *Wade*² hearing, the victim's father testified that the eyewitnesses viewed the composite sketch at his house about four days after the shooting. The lineup identifications occurred about three weeks later. A police officer testified that he and the other officers present at the lineups did not coach the witnesses and that, to his knowledge, the witnesses did not have access to the composite sketch during the lineup procedure. This pretrial identification procedure was not unduly suggestive to give rise to a substantial likelihood of misidentification. *Kurylczyk, supra*. This conclusion is bolstered by the fact that one witness made no identification in the first lineup but identified defendant in the second lineup.³ Another witness, who collaborated with the police on the making of the sketch, picked someone else in the first lineup and failed to identify defendant in the second lineup. A third witness identified someone else from the first lineup before picking defendant out of the second lineup. As the trial court pointed out, if the sketch were unduly suggestive and conclusive, the witnesses would not have been confused or would not have picked someone other than defendant. The totality of the circumstances in this case demonstrates that the police procedure for the lineups was not suggestive. Therefore, the court did not err by denying defendant's motion to suppress the pretrial identifications.

Since the pretrial identification procedure was not unduly suggestive, there was no need to establish an independent basis for the in-court identifications. *People v McElhaney*, 215 Mich App 269, 288; 545 NW2d 18 (1996). Nonetheless, we are satisfied that an independent basis existed for each witness' in-court identification of defendant as the passenger in the gray car.

Defendant next argues that his warrantless arrest in his home was illegal and that the fruits of his illegal arrest, i.e., information used in obtaining subsequent search warrants for his father's house and for the car that belonged to defendant's brother should have been suppressed. Defendant claims that the suppression of the information would make the search warrants invalid for lack of probable cause, thereby resulting in the suppression of the forty-caliber clip and bullets taken from the house and the spent cartridge from his brother's car. We disagree.

This Court reviews a trial court's factual findings in a suppression hearing for clear error. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). In the present case, we review the application of a constitutional standard to uncontested facts. "Application of constitutional

² *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

³ Defendant was not present in the first lineup.

standards by the trial court is not entitled to the same deference as factual findings.” *People v Nelson*, 443 Mich 626, 631, n 7; 505 NW2d 266 (1993). The lower court’s ultimate ruling with regard to the motion to suppress is reviewed de novo, *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999), because the application of constitutional standards regarding searches and seizures to undisputed facts is entitled to less deference. *Oliver, supra*.

Regarding defendant’s warrantless arrest in his father’s house, where defendant resided, a police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). The police must have an arrest warrant before entering a suspect’s residence to conduct a routine felony arrest, absent the existence of exigent circumstances or consent. *People v Adams*, 150 Mich App 181, 184; 388 NW2d 254 (1986). Probable cause to arrest exists if the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony. *Kelly, supra*, at 631.

In this case, the police were legally inside defendant’s father’s home because defendant’s father cooperated with the police and paged them to return to his house less than an hour after their first visit in which they informed him that that they were searching for his son, and he consented to their presence. Once lawfully inside a residence, a police officer may make an arrest without a warrant that is authorized by law. *People v Ohlinger*, 438 Mich 477, 486; 475 NW2d 54 (1991). Inside the home, the police had probable cause to arrest defendant because he fit the written description of the suspected shooter and he had a striking resemblance to the composite sketch of the suspect. A fair-minded person of average intelligence would be justified in believing that defendant had committed a felony on the basis of the written description and the composite sketch. *Kelly, supra*. Therefore, the warrantless arrest was legal.

With respect to the search warrants, the trial court found that there were inaccuracies in the sworn affidavit supporting the search warrants for defendant’s father’s house and defendant’s brother’s car. In particular, the court found that the affiant misrepresented that defendant’s brother had been identified at a lineup and that defendant had a history of shooting at people from a gray car. However, the court found that, even without the inaccuracies in the affidavit, probable cause existed for the search warrant for the house. The court further found that defendant did not have standing to challenge the search of the car.

We are satisfied that the trial court did not err in finding that probable cause existed to support the search warrant for defendant’s father’s house when the inaccurate statements were excluded from the affidavit. The affidavit describes the incident culminating in the victim’s death and indicates that defendant, who resided at the house, was selected from a lineup as the shooter. These statements provide probable cause for the search of the house. We also believe that the trial court properly found that defendant did not have standing to challenge the search of the car. Standing is contingent upon whether, in light of the totality of the circumstances, the defendant had an expectation of privacy in the object of the search and seizure, and whether that expectation is one that society is prepared to recognize as reasonable. *People v Armendarez*, 188 Mich App 61, 70-71; 468 NW2d 893 (1991). This Court recognized, in *Armendarez*, that possessory interest in the automobile is sufficient to give the automobile owner and possessor a privacy interest that allows him to challenge the search. *Id.* However, in this case, defendant’s brother, and not defendant, was the registered owner of the car. Therefore, defendant has no

standing to challenge the search of the car or to move for the suppression of the spent casing found in it.

Finally, defendant argues that the trial court denied him a fair trial by refusing to instruct the jury that his “mere presence” in the car from which the gunshots were fired at the victim’s car was insufficient to convict him of the charged offenses. Defendant alleges that, since the witnesses identified him only as the passenger in the car and did not see him shoot at them, the court’s failure to give the requested instruction allowed the jury to convict him on the basis of his mere presence in the car and not on a belief that he actually fired the shots. We disagree.

We review a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. The instructions must not be “extracted piecemeal to establish error.” Even if the instructions are not perfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001) (citations omitted). Instructions must cover each element of each offense charged, and all material issues, defenses, and theories that have evidentiary support. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Conversely, an instruction that is without evidentiary support should not be given. *Id.*

In this case, the guard at the Department of Public Works yard near the scene of the shooting testified that he told the police that the shots were fired from the rear passenger side of the gray car. However, he did not know whether the shots had been fired from the rear instead of the front passenger side. The three eyewitnesses who were the passengers in the victim’s car identified defendant as the passenger in the gray car. Defendant tried to elicit testimony from these witnesses that there could have been someone in the rear passenger seat of the gray car; however, each witness denied seeing anyone in the rear seat. Further, counsel for defendant admitted that there had been no evidence to support his theory that there was a third person in the gray car. In addition, defendant’s argument throughout the trial was misidentification, not that he was merely present in the gray car. There was no evidentiary basis for instructing the jury on defendant’s mere presence in the gray car. Therefore, the trial court did not commit error requiring reversal in denying defendant’s request for a “mere presence” instruction.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly