

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD JEFFREY USHER,

Defendant-Appellant.

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UNPUBLISHED  
December 23, 2003

No. 242233  
Oakland Circuit Court  
LC No. 01-176839-FC

Before: Schuette, P.J. and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and felonious assault, MCL 750.82. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to twenty-five to forty years' imprisonment for the armed robbery conviction, twenty-five to forty years' imprisonment for the assault with intent to rob while armed conviction, and five to fifteen years' imprisonment for the felonious assault conviction. We affirm.

**I. FACTS**

On October 24, 2001, defendant filed a motion to suppress identification testimony: (1) a pre-arrest photographic identification, and (2) a post-arrest photographic identification. The photo-lineups were held in relation to a robbery that occurred at a Kroger grocery store ("grocery store") on January 20, 2001. Defendant contested the identifications on the grounds the police should have conducted a physical lineup and the photo-lineups were unduly suggestive. A hearing was held January 7, 2002, and January 8, 2002.

Douglas Culbreath was working as a cashier at a Kroger store on January 20, 2001. Culbreath observed defendant (whom he identified at trial) come out of the manager's office and scream. When Culbreath approached Usher, Usher held up a twelve-inch kitchen knife over Culbreath's head and instructed him to get out of the way. Culbreath observed Usher point a knife at another cashier and grab money from her cash register. Culbreath observed Usher walk out of the grocery store.

Culbreath initially indicated that he first described defendant as a man with Indian features, bloodshot red eyes and a grayish, sticky beard. However, Culbreath first informed the police and testified at the preliminary examination that defendant was clean-shaven. At the

preliminary examination and at the evidentiary hearing, defendant appeared in court with facial hair.

At the evidentiary hearing, Culbreath identified the photo-lineup that he observed on January 20, 2001, after the robbery. Culbreath was presented with a photo-lineup at the grocery store shortly after the robbery. Culbreath identified the person in position number one as the person who robbed the grocery store. The photograph in position number one was a photograph of defendant. Culbreath confirmed that three photographs depicted men with having facial hair. Two men were African-American. Culbreath was able to eliminate the three men that had facial hair before he selected defendant's photograph.

Don Rudick was the co-manger working at the grocery store on the day of the robbery. Rudick was sitting in the manager's office when defendant stepped inside and pulled out a knife. When defendant entered the manager's office, Rudick was able to see defendant's entire face. In Rudick's initial statement to the police, he described defendant as having facial hair, possibly a mustache and a goatee, but he was uncertain. Rudick initially indicated that he was presented with a photo-lineup one month after the robbery; however, he later indicated that the photo-lineup occurred on the same day that the physical lineup was originally scheduled. Rudick identified the person in position number one as the person who robbed the grocery store. The photograph in position number one was a photograph of defendant.

Originally, Rudick was going to view a physical line-up on January 23, 2001, but it was cancelled because the police could not come up with a suitable line-up. After the physical line-up was cancelled, Rudick was presented with a photo-lineup. An attorney, Alan Cooper, was present when Rudick examined the photo-lineup and identified defendant as the robber. Four of the six photographs had men with facial hair. Rudick examined the pictures for approximately sixty seconds to ninety seconds because he wanted to be certain.

Detective Ronald Genereux prepared the photo-lineup that was presented to Culbreath. Genereux was able to get a picture of defendant after receiving information from another police officer who determined that, based on information from the witnesses regarding the Pontiac, defendant was the registered owner and he matched the general description given by the witnesses. Genereux located defendant's picture in the computer database and included five other pictures in the photo-lineup.

Once Genereux prepared the photo-lineup, he immediately went to the grocery store and located Culbreath. Genereux, without referencing anyone specifically, asked Culbreath if he could pick out an individual in the photo-lineup that was responsible. Culbreath took approximately ten seconds to examine the photographs before he selected defendant's photograph.

At the conclusion of the evidentiary hearing, defendant argued that his motion to suppress should be granted because Culbreath and Rudick had emphasized that the robber was clean-shaven, and yet they were presented with a photo-lineup with men who had facial hair. Defendant also asserted that Culbreath and Rudick did not have an independent basis for their identifications because they were able to observe defendant at the preliminary examination. The trial court denied defendant's motion to suppress because (1) Culbreath and Rudick were each able to select defendant's photograph in line-ups that were approximately one month apart and

without any prompting by the police, and (2) defendant's argument concerned the weight and not the admissibility of the identifications.

## II. SUPPRESSION OF EVIDENCE

In defendant's first claim of error, he asserts that the trial court improperly denied his pretrial motion to suppress identification evidence.

### A. Standard of Review

A trial court's decision to admit identification evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "In order to sustain a due process challenge [based on a pretrial identification procedure], 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." *Kurylczyk, supra*, 443 Mich 300-301. When a previous identification procedure is so impermissibly suggestive that it created a substantial likelihood of misidentification, the testimony regarding the previous identification must be excluded, but the witness' in-court identification can still be admissible if an independent basis for the in-court identification is established. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), citing *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

### B. Analysis

A defendant must first establish that there was a high likelihood of misidentification under the factors outlined by our Supreme Court:

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. [*Kurylczyk, supra*, 443 Mich 306.]

Here, a review of the totality of the circumstances does not suggest that defendant's photo-lineup was impermissibly suggestive. First, the store manager and the cashier had sufficient opportunity to view defendant's face. The store manager observed defendant's face when he stepped inside the manager's office. The cashier was able to see defendant's face on at least two occasions: (1) when he was standing "nose to nose" with defendant, and (2) when defendant turned toward him in the parking lot once he realized that the cashier was following him. Further, the cashier had a high degree of attentiveness because he noted the color, make and model of the getaway vehicle and he was able to give the police the license plate number. Additionally, both the store manager and the cashier testified that the lighting in the store was very bright. The cashier selected defendant's photograph within ten seconds and the store manager selected defendant's photograph after sixty or ninety seconds. Additionally, we note that the first photo-lineup occurred within hours of the robbery. Lastly, we note that a victim was presented with the same photo-lineup and she was unable to identify defendant as the person who robbed her cash register, which suggests that the photo-lineup was not impermissibly suggestive.

On appeal, defendant asserts that the witnesses' initial descriptions indicated that defendant may have been clean-shaven and of Indian descent, and thus, it was improper to conduct a photo-lineup with as many as three persons who had facial hair and who were not Indian. We disagree. It is well established that a photo-lineup is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus, are sufficient to reasonably test the identification. *Kurylczyk, supra*, 443 Mich 304. Further, there is no authority requiring the police to make endless efforts to attempt to arrange a line-up. *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). Here, defendant's photograph was not distinctive since he was not the only person depicted as clean-shaven, (2) he was not the only man depicted with Indian features, and (3) it was reasonable to include photographs of men with facial hair and different ethnic backgrounds because the officer in charge testified that he received varying descriptions of defendant from three witnesses at the grocery store.

We are cognizant that there were factors that tended to undermine the reliability of the line-up identification: (1) according to the store manager, defendant was in the manager's office for less than thirty seconds, and (2) the witnesses' uncertainty whether defendant was clean shaven or had facial hair. However, in light of the other factors previously mentioned, these factors do not render the victim's identification inadmissible. As such, we find that defendant has failed to establish that there was a high possibility for misidentification and the identification evidence was properly admitted. *Kurylczyk, supra*, 443 Mich 305-306.

### III. SENTENCING

In defendant's next claim of error, he asserts that the trial court improperly scored two offense variables ("OV") at sentencing. We disagree.

#### A. Standard of Review

This Court will uphold scoring decisions by a trial court where there is evidence in the record to support the decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). As this offense occurred after January 1, 1999, the legislative sentencing guidelines are applicable. MCL 769.344(1) and (2).

#### B. Analysis

At the time that the instant offense occurred, when scoring OV-7, a defendant was assessed fifty points if "[a] victim was treated with terrorism, sadism, torture, or excessive brutality conduct." MCL 777.37(1)(a). "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a). Here, the more compelling evidence to support a conclusion that substantially increased the fear and anxiety of a victim was evidenced by testimony that defendant, in addition to pointing a twelve inch knife at the victim, grabbed the victim by the back of her neck and told her that she had five-seconds to open the cash register. Testimony also indicated that defendant grabbed and shook the victim's head with both hands in the course of the robbery. As such, we are persuaded that scoring of OV-7 was supported by the record.

In scoring OV-14, MCL 777.44(1)(a) requires an assessment of ten points if “[t]he offender was a leader in a multiple offender situation.” Further, MCL 777.44(2)(a) provides that “[t]he entire criminal transaction should be considered when scoring this variable.” Here, in our review of the entire criminal transaction, the evidence supported the assessment of ten points for OV-14. Defendant instructed the co-defendant to drive to the grocery store, and wait while he went inside. When the locks of the vehicle were engaged, defendant ordered the co-defendant to let him in the vehicle. Additionally, after the robbery, defendant instructed the co-defendant to drive him home and keep the vehicle. More importantly, when the co-defendant was asked why he assisted defendant, the co-defendant indicated, “I don’t know,” which is evidence that the co-defendant just blindly followed defendant’s instructions. Consequently, we conclude that the scoring of OV-14 was supported by the record and defendant properly received ten points as the leader of a multiple offender offense. *Hornsby, supra*, 251 Mich App 468.

In an unpreserved claim of error, defendant asserts that the trial court failed to consider his history of mental and substance abuse before it imposed his sentences. Defendant failed to challenge his sentences on this basis at sentencing and thus, we our review is limited to plain error. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002) (even if forfeited, a sentencing guidelines error is subject to reversal if it constituted a plain error which affected substantial rights in that prejudice thereby effected the outcome of the proceedings).

Here, the applicable guidelines range for defendant’s respective crimes of armed robbery and assault with intent to rob while armed,<sup>1</sup> as a fourth habitual offender, were 270 months to 900 months’ imprisonment and defendant received sentences of 300 months to 480 months. MCL 777.63; MCL 769.12. Because defendant’s sentences were within the applicable guidelines range, they are presumptively proportionate and must be affirmed. See MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003) (a sentence within the sentencing guidelines range is not subject to review for proportionality). Even if we were to review whether the trial court erred for failing to consider a downward departure, we would nonetheless conclude that the trial court did not abuse its discretion by failing to consider his history of mental and substance abuse. Defendant informed the investigating agent that he was mentally stable and the PSIR indicated that he has previously received the benefit of substance abuse treatment. Therefore, because defendant failed to (1) articulate any mental abuse problems or (2) establish how his substance abuse problems constituted mitigating circumstances, we conclude that he has failed to establish plain error. *Babcock, supra*, 469 Mich 257-258; *Kimble, supra*, 252 Mich App 269.

Next, to the extent that defendant asserts that his sentences constitute cruel and unusual punishment, we disagree. It is well established that a proportionate sentence is not cruel and unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002); *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

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<sup>1</sup> In instances of multiple convictions, the legislative sentencing guidelines require the preparation of an SIR only for the highest convicted offense. Michigan Sentencing Guidelines, (1999), p 1.

In defendant's final unpreserved claim of error, he asserts that the trial court incorrectly calculated his credit for time served. Defendant was credited with 462 days for time served; however, he asserts that he should have received credit for 472 days because he remained in jail from January 20, 2001, to the date of sentencing on May 6, 2002. We disagree. A defendant is entitled to jail credit under MCL 769.11b<sup>2</sup> only when a defendant is incarcerated for being denied or being unable to furnish bond for the conviction for which sentence is imposed. *People v Adkins*, 433 Mich 732, 746; 449 NW2d 400 (1989).

Here, the lower court record does not support defendant's assertion and indicates that (1) defendant was originally incarcerated for the commission of a retail fraud on January 1, 2001, by the Oak Park Police department between January 20, 2001, and January 29, 2001, and (2) he was not transferred to the Bloomfield Township police department for the instant offense until January 29, 2001. Therefore, defendant is only entitled to jail credit for time served from January 29, 2001, to May 6, 2002, for the instant offenses. In sum, although defendant established that he was in jail on January 20, 2001, he failed to establish that he was in jail for the instant offense to entitle him to jail credit before January 29, 2001. MCL 769.11b; *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985).

Affirmed.

/s/ Bill Schuette  
/s/ William B. Murphy  
/s/ Richard A. Bandstra

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<sup>2</sup> MCL 769.11b provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.