STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERRY SHARROB HAMPTON,

Defendant-Appellant.

UNPUBLISHED
August 2, 2007

No. 268812
Wayne Circuit Court
LC No. 05-010264-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carjacking, MCL 750.529a, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a third-offense habitual offender, MCL 769.11, to 20 to 60 years' imprisonment for the carjacking conviction, 20 to 60 years' imprisonment for the armed robbery conviction, and one to five years' imprisonment for the felon-in-possession conviction, to be served consecutively to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At approximately 11:30 p.m. on September 26, 2005, Garry Young, Jr., was sitting in the passenger's seat of his mother's rented Pontiac Grand Prix in front of his house in Detroit. Young was talking on a cellular telephone and had $1,100 in his possession. A white Lincoln pulled up next to the Grand Prix, and a man later identified as defendant got out of the passenger side of the Lincoln, walked up to the Grand Prix, and held a gun to Young's head. Defendant took Young's glasses and demanded money and Young's cellular telephone, which Young gave to him. The driver of the Lincoln then opened the driver's door of the Grand Prix. Defendant opened the passenger door and told Young to get out of the car, which Young did. Defendant also told Young to run away, and Young complied. While running away, Young turned and saw defendant get into the driver's seat of the Grand Prix, which then was driven away.

Two days later, while police officers were investigating an unrelated armed robbery, they spotted the Grand Prix and conducted surveillance of the vehicle. Officers saw two individuals who matched the descriptions of the perpetrators walking toward the vehicle. Officers arrested the individuals, one of whom was defendant. Although Young identified defendant at a lineup, defendant maintained his innocence and presented an alibi defense at trial. The jury convicted defendant as charged on all counts.

Defendant first argues that the trial court's denial of his motion to appoint an eyewitness identification expert denied him his constitutional rights to equal protection and due process. We disagree. We review "a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388; *Babcock, supra* at 269.

In order for a trial court to appoint an expert witness for an indigent defendant, the defendant must show that he cannot safely proceed to trial without the witness. MCL 775.15; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, a defendant must establish a nexus between the facts of his case and the need for an expert. *Tanner, supra* at 443. "Without an indication that expert testimony would likely benefit the defense, it [is] not error to deny without prejudice [a] motion for appointment of an expert witness." *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not sufficient that a defendant show a mere possibility that the requested expert will be of assistance. *Tanner, supra* at 443.

Defendant contends that an eyewitness identification expert was necessary because no physical evidence linked him to the carjacking and armed robbery and the case hinged on whether the jury believed Young's identification or defendant's alibi defense. However, we conclude that the trial court did not abuse its discretion by denying defendant's motion to appoint an expert witness because defendant was able to safely proceed to trial without an expert. Defendant presented three alibi witnesses at trial, in addition to himself, who testified that defendant was at an album release party at the time of the offenses. If believed, these witnesses would have cast doubt on Young's identification of defendant. See *People v Carson [Carson I]*, 217 Mich App 801, 807; 553 NW2d 1 (1996), vacated 217 Mich App 801 (1996), pertinent portion readopted by conflict resolution panel *People v Carson [Carson II]*, 220 Mich App 662, 678; 560 NW2d 657 (1996).[1]

In addition, defense counsel cross-examined Young and questioned his ability to clearly see and later identify the perpetrator, considering that it was dark outside when the offenses were committed, that Young was scared, that the perpetrator was holding a gun to Young's head, and that the incident occurred rather quickly. Defense counsel also challenged Young's description of the perpetrator given to the police immediately after the incident and argued that defendant's lineup was suggestive. Thus, defense counsel was able to challenge Young's identification of defendant without the assistance of an expert. See *Carson I, supra* at 807. Accordingly,

[1] The June 14, 1996, order vacating this Court's June 4, 1996, opinion in *Carson I* directed that a special panel be convened to resolve the conflict between *Carson I* and *People v Lino (After Remand)*, 213 Mich App 89, 98; 539 NW2d 545 (1995), overruled by *Carson II*, which involved a sentencing issue unrelated to the instant case. The conflict resolution panel adopted the findings of the *Carson I* panel on the remaining issues, including *Carson I*'s analysis regarding the appointment of an eyewitness identification expert. *Carson II, supra* at 678.

defendant has not shown that expert testimony was necessary in order to safely proceed to trial, and the trial court did not abuse its discretion by denying defendant's motion to appoint an expert. MCL 775.15; *Lueth, supra* at 688.

Defendant also argues that the trial court erred by denying his motion in limine requesting the trial court to take judicial notice of and provide a special jury instruction regarding the inherent unreliability of eyewitness identifications as discussed in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled in part by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). We review de novo claims of instructional error. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

This Court has previously recognized that "*Anderson* does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Moreover, as this Court recognized in *Carson I*, the *Anderson* principles are adequately presented to a jury in the context of CJI2d 7.8, which it appears "was drafted to reflect the *Anderson* opinion." *Carson I, supra* at 807. Here, the trial court instructed the jury pursuant to CJI2d 7.8, thus apprising the jury of the proper considerations in determining whether to accept Young's identification of defendant. Accordingly, the jury instructions sufficiently protected defendant's rights and reversal is not warranted. *Huffman, supra* at 371-372.

Defendant next contends that the trial court clearly erred by denying his motion to suppress his lineup identification because his clothing differentiated him from the other lineup participants. Absent clear error, this Court will not reverse a trial court's decision admitting identification evidence. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists if we are left with a definite and firm conviction that a mistake was made. *Id.*

"An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Harris, supra* at 51. The relevant inquiry is whether the lineup was unduly suggestive in light of all the circumstances surrounding the identification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). Differences among lineup participants are significant only if they are apparent to the witness and distinguish the defendant from the other participants such that there exists a substantial likelihood that the differences among the participants, rather than the witness's recognition of the defendant, was for the basis for the identification. *Id.* at 312.

Defendant argues that the lineup was unduly suggestive because he was the only person wearing a solid black tee shirt, and Young described the perpetrator as wearing a black shirt. Defendant opines that Young identified him based on this alleged distinctive feature, which differentiated him from the other lineup participants. Defendant's argument lacks merit.

Differences in the clothing worn by a defendant and the other lineup participants has been found not to render a lineup unduly suggestive. *Kurylczyk, supra* at 304-305. The fact that defendant was wearing a black tee shirt did not distinguish him from the other lineup participants such that the lineup was impermissibly suggestive. A photograph of the lineup participants shows that three of the participants wore dark-colored shirts and the remaining four participants

wore light-colored shirts. Some of the shirts contained writing or logos while some did not contain any design. Although Young described the perpetrator as wearing a black shirt, he did not indicate whether the shirt was solid black or contained lettering or print. Even assuming that the perpetrator wore a solid black shirt as defendant wore in the lineup, however, a solid black tee shirt is not a unique or distinctive clothing item such that it would distinguish defendant from the other participants and render the lineup unduly suggestive. Although defendant contends that Young identified him based on his shirt alone, this contention has no record support. According to the record, when Young viewed the lineup, he immediately identified defendant and stated, "he robbed me while I was in the car." Because it did not appear that the black tee shirt, rather than Young's recognition of defendant, was the basis for Young's identification, the identification procedure was not so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification. *Id.* at 312; *Harris, supra* at 51. Further, to the extent that defendant challenges the lineup on the basis of physical differences between himself and the other lineup participants, such differences "go[] to the weight of the identification and not its admissibility." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Thus, the trial court did not clearly err by denying defendant's motion to suppress his lineup identification.

Defendant further argues that the unduly suggestive lineup identification rendered Young's in-court identification inadmissible because Young's description of the perpetrator did not match defendant. Because we find no clear error regarding the trial court's ruling, however, we need not determine whether Young had an independent basis for his in-court identification. See *Kurylczyk, supra* at 303 (if the trial court determines that the pretrial identification procedure was unduly suggestive, an in-court identification is inadmissible unless an independent basis for the in-court identification is established).

Defendant next argues that his convictions are contrary to the great weight of the evidence. We disagree. Defendant failed to preserve this issue for appellate review by raising it in a motion for a new trial in the trial court. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Thus, our review is limited to determining whether a plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763.

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Musser, supra* at 218-219. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Further, conflicting testimony, even if impeached to some extent, is an insufficient basis to grant a new trial. *Lemmon, supra* at 647. "[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (internal citations and quotation marks omitted).

Defendant's argument is premised solely on his contention that Young's identification of him was unreliable and constituted the only evidence connecting him to the charged offenses.

Young's credibility regarding his identification of defendant, however, was a question for the jury. Young testified that defendant got out of the passenger side of a white Lincoln, approached the Grand Prix in which Young was sitting, and held a gun to Young's head. Defendant's face was "right next" to Young's, Young made eye contact with defendant, and street lights, porch lights, and the interior light of the car sufficiently illuminated defendant's face. Defendant took Young's glasses, cellular telephone, and money before directing Young to get out of the car and run away. Young immediately identified defendant at a lineup conducted two days after the offenses.

Moreover, contrary to defendant's argument, evidence other than Young's identification connected him to the carjacking and armed robbery. Defendant and another man were arrested two days later while walking toward the Grand Prix, which reportedly had recently been used in another armed robbery. After transporting defendant and his companion to the police station, police officers discovered a set of keys in the backseat of the squad car that matched the Grand Prix. Therefore, other evidence in addition to Young's identification supported the jury's verdict. Defendant has failed to establish plain error.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood