

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 13, 2011

v

RALEIGH JAMES JOHNSON,
Defendant-Appellant.

No. 293094
Macomb Circuit Court
LC No. 2008-002845-FC

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 15 to 40 years' imprisonment for the armed robbery conviction, 1 to 15 years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from the theft of property from the victim. The victim was speaking with defendant and Erskine Williams when defendant refused to return the victim's glasses, pulled a gun, struck the victim, and then took additional property. Within an hour of the robbery, the victim encountered Williams at a gas station. The victim identified Williams as a perpetrator of the crimes to police on the scene, and they arrested Williams. Williams implicated defendant in the robbery. A photograph array was compiled, and the victim identified defendant's picture. Despite defendant's challenge to the identification by the victim and the credibility of the testimony by Williams, defendant was convicted as charged.

Defendant first alleges that the photo array was constitutionally defective and tainted the victim's identification at the preliminary examination and trial. We disagree. The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). A photograph identification procedure results in a deprivation of due process if it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of the identification procedure is assessed in light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). "Physical differences among the lineup participants do not necessarily render the procedure defective and

are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Rather, the physical differences among lineup participants relates only to the weight of the identification, not its admissibility. *Id.* The photo spread will not be deemed to be suggestive provided some photographs are fairly representative of the defendant’s physical features. *People v Kurylczyk*, 443 Mich 289, 304; 505 NW2d 528 (1993). A variety of factors are utilized to determine the likelihood of misidentification including the opportunity of the witness to view the criminal at the time of the crime, the victim’s attention, the accuracy of the prior description by the victim, the level of certainty by the victim at the confrontation, and the length of time between the crime and the confrontation. *Id.* at 306.

On this record, we cannot conclude that the admission of the identification from the photographic array was clearly erroneous. *Harris*, 261 Mich App at 51. The photographs were fairly representative of defendant’s physical features, and any physical differences relates to the weight of the identification, not its admissibility. *Hornsby*, 251 Mich App at 466.

Next, defendant contends that the trial court erred in allowing the officer in charge to testify as an expert regarding descriptions by witnesses and the psychology of the perception. We disagree. The admission or exclusion of evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Error may not be predicated upon a ruling admitting evidence unless a substantial right of the party is affected and there is a timely objection offering a specific basis for the objection. MRE 103(a). The party opposing the admission of evidence must object at trial and specify the same ground for objection that he asserts on appeal. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Error requiring reversal cannot be predicated on error to which the aggrieved party contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

In the present case, defense counsel objected to the testimony because the officer was unaware of the victim’s “state of mind.” However, on appeal, defendant contends that the evidence was improper expert testimony. Defendant cannot seek exclusion of evidence on one basis in the trial court and challenge the admission on a different basis on appeal. *Grant*, 445 Mich at 545, 553. Additionally, at the conclusion of the jury questioning, defense counsel made additional inquiry of the officer regarding perception during crimes. A claim of error cannot be predicated on evidence introduced or instigated by the defense to support his theory of the case. *Gonzalez*, 256 Mich App at 224. Therefore, this claim of error does not entitle defendant to appellate relief.

Lastly, defendant contends that trial counsel was ineffective for failing to seek appointment of an expert regarding memory, perception, and identification. We disagree. It is insufficient for a defendant to request an expert because of the mere possibility of assistance. *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Rather, defendant must demonstrate that an expert is necessary for him to safely proceed to trial. See MCL 775.15; *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). In the present case, there is no indication that an expert was necessary for defendant to safely proceed to trial. Rather,

review of the record reveals that defense counsel challenged the reliability of the identification testimony by eliciting discrepancies in the victim's police statement and prior testimony. Accordingly, this challenge is without merit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto