

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 28, 2012

v

DEVON SHAROD ECHOLS,
Defendant-Appellant.

No. 303354
Wayne Circuit Court
LC No. 02-003076-FC

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

In September 2002, a jury convicted defendant of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. In January 2003, defendant was sentenced as a third habitual offender, MCL 769.11, to a term of 10 to 30 years' imprisonment for the assault conviction, and a consecutive two-year term for the felony-firearm conviction.¹ Defendant appeals as of right. We affirm.

I. RIGHT TO SPEEDY APPEAL

Defendant initially contends that the nine-year delay between his convictions and this appeal deprived him of due process and mandates a new trial. The constitutional due process argument involves a question of law, which we consider de novo. *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011).

In *People v Missouri*, 100 Mich App 310, 324-325; 299 NW2d 346 (1980), this Court similarly rejected the defendants' complaint that the absence of a prompt appeal deprived them of due process, stating:

Defendants contend that their convictions should be reversed because of a nearly 18-month delay between appointment of appellate counsel and preparation of the trial transcript, five months after this Court ordered that it be prepared. As

¹ The court suspended defendant's sentence for the felon-in-possession conviction.

a result of the lengthy and excessive delay defendants claim to have been irreparably prejudiced, involving continuous incarceration since their sentencing, denial of their freedom of movement and association, lost opportunities for meaningful employment, and disruption of their family life.

We do not dispute the fact that defendants have suffered as a result of a delayed consideration of their appeal. *However, there is no allegation that the merits of the appeal itself have been affected by this delay. Delay in appellate review does not automatically entitle a defendant to a new trial. The remedy for dilatory review is review itself. As our full consideration of the merits of defendants' appeal negates any claim of prejudice arising out of the delay in reaching this Court, we conclude that defendants were not denied due process of law.* [Emphasis added.]

See also *People v Gorka*, 381 Mich 515, 519-520; 164 NW2d 30 (1969).

Notwithstanding the delays in realizing defendant's appeal of his 2002 jury trial convictions, he currently is receiving appellate review of the merits of his challenges to the 2002 convictions. *Gorka*, 381 Mich at 520; *Missouri*, 100 Mich App at 325. Furthermore, defendant simply does not explain any precise manner in which the nine-year delay affected the merits of his appeal. *Missouri*, 100 Mich App at 325. We thus find defendant's due process claim unfounded.

II. IDENTIFICATION TESTIMONY

Defendant next avers that the trial court should have excluded the victim's identification testimony on the basis that he was exposed to an unduly suggestive, one-photograph pretrial identification procedure. Appellate courts generally review for clear error a trial court's ruling whether to admit identification evidence. *People v Kurylczyk*, 443 Mich 289, 303 (GRIFFIN, J.), 318 (BOYLE, J.); 505 NW2d 528 (1993). Clear error exists only when the appellate court possesses a definite and firm conviction that the trial court made a mistake. *Id.*

Because the police showed the victim a lone photograph of defendant for identification purposes, we presume that the photographic identification procedure qualified as unduly suggestive. See *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001). If a trial witness has been exposed to pretrial lineup procedures that are "unnecessarily suggestive or conducive to irreparable misidentification," *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998) (internal quotation and citation omitted), then a court may not allow the witness to make an in-court identification "unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the totality of the circumstances." *Gray*, 457 Mich at 115 (internal quotation and citation omitted). The relevant circumstances include considerations of the following:

1. Prior relationship with or knowledge of the defendant.

2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act.

3. Length of time between the offense and the disputed identification.

4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.

5. Any previous proper identification or failure to identify the defendant.

6. Any identification prior to lineup or showup of another person as defendant.

7. The nature of the alleged offense and the physical and psychological state of the victim. In critical situations perception will become distorted and any strong emotion (as opposed to mildly emotional experiences) will affect not only what and how much we perceive, but also will affect our memory of what occurred.

Factors such as fatigue, nervous exhaustion, alcohol and drugs, and age and intelligence of the witness are obviously relevant.

8. Any idiosyncratic or special features of defendant. [*Gray*, 457 Mich at 116 (internal quotations, citations and emphasis omitted).]

Considering in order the relevant circumstances set forth in *Gray*, 457 Mich at 116, the victim testified that he knew defendant before the shooting, having "seen [defendant] in my neighborhood" for "[a]bout eight, nine years." For between 30 and 50 seconds, as street lights illuminated the area, the victim watched defendant from a distance of eight or ten feet sitting inside a car, then saw defendant "reach out the window" and unleash a hail of gunfire at the victim's car.

A brief, one-day period elapsed between the offense, February 10, 2002, and the allegedly improper photographic identification procedure at the hospital on February 11, 2002, a "relatively short period" that helped to "ensure[] that the crime was still fresh in the victim's mind, and should not weigh against finding an independent basis." *Gray*, 457 Mich at 120. The victim did not describe with particularity defendant's appearance before the photographic identification procedure, although he did mention to Officer Jackson that defendant was the person in the black leather jacket, and Jackson testified that "[t]o my knowledge, [defendant] was the only one" who wore a leather jacket that morning. And at no point did the victim ever identify anyone other than defendant as his assailant.

The victim was 26 years of age at the time of trial, and the record contains no indication that he suffered from any cognitive impairments that would have impacted his identification of defendant, or that at the time of the shooting the victim was under the influence of alcohol or drugs. As in *Gray*, "[t]here is no evidence in the record that indicates the victim's perceptions were distorted by h[is] physical or psychological state to an extent that []he would not be able to

later identify h[is] assailant.” *Gray*, 457 Mich at 123. Lastly, the record does not specify whether or not defendant had any idiosyncratic features.

We conclude that the testimony surrounding the victim’s identification of defendant clearly and convincingly illustrates that the victim possessed a sufficient basis for his in-court identification of defendant as his assailant, independent of the presumptively improper photographic identification procedure. The victim knew defendant for many years before the shooting, had a good opportunity to see the defendant nearby and illuminated at the time of the shooting, nothing apparently impeded the victim’s cognition at the time of the shooting, a short time elapsed between the shooting and the challenged photographic identification procedure, and the victim never implicated anyone other than defendant in the shooting. Consequently, the circuit court did not clearly err to the extent it found clear and convincing evidence establishing an independent basis for the victim’s identification testimony.

III. ADMISSION OF EVIDENCE

Defendant lastly challenges the admissibility of an eight-millimeter firearm and many rounds of ammunition seized from 4391 Nottingham in Detroit, where defendant lived in a lower-level flat. After the prosecutor elicited testimony by a Detroit police officer who participated in a search and seizure at 4391 Nottingham on February 12, 2002, concerning his seizure of the firearm, an eight-millimeter clip and other ammunition from an upstairs flat at 4391 Nottingham, the prosecutor moved to admit the gun, clip, and ammunition. Defense counsel responded that he had “[n]o objections” to the admissibility of the gun and ammunition. Defense counsel’s affirmative expression that he had no objection to the admissibility of the gun and ammunition intentionally abandoned or extinguished any appellate claim of error pertaining to the admissibility of these evidentiary items. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007).

Even were we to consider this issue under the plain error doctrine applicable to review of unpreserved issues, MRE 103(1)(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), we detect no outcome-determinative error. A Detroit police officer testified that some shells recovered from the upper flat at 4391 Nottingham appeared to match six shells that officers recovered at the scene of the shooting. Defendant elicited testimony from two defense witnesses who agreed that he lived in the lower flat of 4391 Nottingham. However, the presence of shells that matched spent shells recovered at the shooting scene, in the upper flat of the same address where defendant occupied the lower flat, allowed the jury to draw a reasonable inference that defendant placed the shells upstairs shortly after the shooting. The matching shells thus had some tendency to prove defendant’s identity as the victim’s assailant, a fact of consequence to this action. MRE 401.

We find irrelevant to any issue of consequence in this case the eight-millimeter gun and ammunition recovered from the upstairs flat of 4391 Nottingham. MRE 401. However, the admission of the eight-millimeter gun and ammunition did not affect defendant’s substantial rights. *Jones*, 468 Mich at 355. The properly admitted evidence of record amply supports the jury’s verdict; the victim, who had a substantial basis for identifying defendant at trial, independent of the challenged photographic showup procedure, testified that he had a confrontation with defendant’s brother at a Coney Island restaurant an hour before a red and gold

Dodge Intrepid appeared in the victim's neighborhood and defendant fired repeatedly into the victim's car; a friend of the victim testified consistently with the victim's accounts of the fight at the Coney Island involving defendant's brother and defendant driving the red Intrepid, and he identified defendant as the brother of the person who had begun arguing with the victim; and police officer testimony confirmed that a Coney Island altercation had occurred early on February 10, 2002, defendant's brother was arrested at the fight, an hour later the shooting of the victim occurred in the same neighborhood, and the victim identified defendant, "the guy that was at the fight earlier, his brother," who drove a red Intrepid, as the shooter.

In summary, no reasonable likelihood exists that the admission of the unrelated, eight-millimeter gun and ammunition affected the outcome of defendant's trial, or otherwise adversely impacted defendant's substantial rights. Any evidentiary error was not outcome determinative. *Jones*, 468 Mich at 355. Further, because defendant was not prejudiced by the evidence, his alternative ineffective assistance of counsel claim related to this issue also cannot succeed. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004) (with respect to the prejudice aspect of the test for ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have differed).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra