

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIQUEL ANGEL RIVERA,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 188804

Recorder's Court

LC No. 94-007769-FC

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and twenty to forty years' imprisonment for the armed robbery conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erroneously admitted evidence of his pretrial photographic identification because the use of a photographic showup in place of a corporeal lineup was not justified in his case.

Generally, identification by photograph should not be used when a suspect is in custody. *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). However, where it is not possible to arrange a proper line-up or where there is an insufficient number of people available with a suspect's characteristics, an identification by photograph is permissible. *People v Hider*, 135 Mich App 147, 149-150; 351 NW2d 905 (1984); *People v Powell*, 97 Mich App 287, 290; 294 NW2d 262 (1980). We will not reverse a trial court's decision to admit identification evidence unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

In this case, we cannot say that the trial court clearly erred when it admitted the photographic showup evidence. Defendant was arrested late on a Friday night and, thus, in custody when the

photographic showup was conducted the following day in the presence of a “showup attorney.” However, the officer in charge of the case attempted to arrange a corporeal lineup, but was informed that at that time there were no other Hispanic males at police headquarters. A lineup could not be conducted at the county jail because the jail was closed for the weekend and persons detained in the jail were unavailable for lineups. We find no clear error in the trial court’s determination that the police were not required to hold defendant in custody over the weekend. We distinguish this case from *People v Ealey*, 102 Mich App 301; 301 NW2d 514 (1980), because in *Ealey* there were at least two or three people available for participation in a corporeal lineup. Here, there were no other Hispanic males available for participation in a lineup. We conclude that the use of a photographic showup was permissible *Hider, supra; Powell, supra*.

Defendant also argues that there was an insufficient independent basis for the admission of his in-court identification. However, the need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). In this case, we have already determined that defendant’s pretrial photographic identification was permissible. Moreover, defendant does not contend that this identification was unduly suggestive. Accordingly, there was no need to establish an independent basis for defendant’s in-court identification. *Id.* at 288.

Next, defendant argues that the trial court limited defense counsel’s cross-examination of key witnesses to the extent that defendant’s constitutional right of confrontation was violated.

“Cross-examination is arguably the most effective, and sometimes the only, tool a defendant has to defend against the charges brought against him.” *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990). Cross-examination is so critical to a defendant’s defense that it is considered a primary interest secured by the confrontation clause. *Id.* A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes a denial of the constitutional right of confrontation. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). We review an issue regarding whether the trial court improperly limited cross-examination for an abuse of discretion. *Mumford, supra* at 154.

In this case, our review of the record does not disclose that the trial court infringed upon defendant’s right to confrontation. Rather, we conclude that the trial court complied with its duty to exercise control over the proceedings and to limit the introduction of evidence to relevant and material matters. MRE 611; MCL 768.29; MSA 28.1052. Although the trial court questioned a witness on its own initiative, our review of the record indicates that such questioning was necessary to clarify the testimony of the witness. The trial court’s action was proper pursuant to MRE 614(b), and we do not find any indication of bias or favoritism towards the prosecutor.

Defendant also argues that the trial court abused its discretion when it refused to allow defendant to introduce evidence that the window on the store door through which the victim initially

viewed defendant was so cloudy that it was not transparent. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McElhaney, supra* at 279-280.

In this case, we agree with the trial court that the evidence was irrelevant. MRE 401, 402. Defendant offered the testimony of a private investigator who would testify that from outside the store he could not see into the store through the window. However, the victim testified that he saw defendant from the inside of the store looking out. Defendant also offered photographs of the store door and window, but the photographs were taken when the store was closed and there were grates covering the door and window. The crime occurred at 2:00 in the afternoon when the store was open for business, and there were no grates across the door. Additionally, the victim testified that he came face-to-face with defendant before defendant pulled on his mask. Therefore the victim clearly viewed defendant without the obstruction of a window. Accordingly, we conclude that the trial court did not abuse its discretion in excluding defendant's proffered evidence.

Next defendant raises a claim of prosecutorial misconduct and judicial partiality. During rebuttal argument in this case, the prosecutor stated that "you've got to be very careful about half-truths that are presented to you by defense counsel." Defense counsel immediately objected, stating "I don't claim she's making half truths up here," to which the trial court responded "Well counsel, you've made some fairly pejorative arguments, at least as I observed it or as I understand it." On appeal, defendant claims that he was denied a fair trial by the prosecutor's and the court's remarks, which defendant characterizes as disparaging.

The prosecutor may not question defense counsel's veracity. *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). A prosecutor cannot personally attack defense counsel because this type of attack can infringe upon the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). In reviewing claims of prosecutorial misconduct, this Court reviews the remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *Kennebrew, supra* at 608.

A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. *City of Lansing v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995). The test for determining whether the court's comments pierced the veil of judicial impartiality is whether the court's comments were of such a nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial. *Id.* at 350. Upon review, this Court examines the record as a whole and considers the remarks in context. *Paquette, supra*.

After reviewing the record in this case, we conclude that the trial court's remark did not disparage defense counsel. Rather, we conclude that the court's remark was simply an attempt to characterize defense counsel's closing argument where counsel suggested that the prosecutor had used

facial expressions to elicit the answers she desired from the victim, that witnesses were bolstering their testimony, that the police were lazy and overworked, and that defendant was being “railroaded.” The trial court’s comment did not pierce the veil of judicial impartiality.

Likewise, viewed in context, we conclude that the prosecutor’s references to defense counsel’s “half-truths,” although unfortunate, was not a deliberate personal attack on defense counsel’s veracity or an assertion that counsel was intentionally trying to mislead the jury. Rather, we conclude that the disputed remarks reflect the hotly contested nature of this case and were directed only at defense counsel’s review of the evidence, following which the prosecutor summarized her view of the evidence. The prosecutor’s comments did not deny defendant a fair trial.

Next, defendant claims that the cumulative effect of the above alleged errors denied him a fair trial. However, having found no actual error, we reject defendant’s argument. *Bahoda, supra* at 292, n 64.

Finally, defendant argues that his sentence violates the principle of proportionality. We disagree. Defendant’s twenty-year minimum sentence was within the corrected guidelines range of four to twenty years’ imprisonment and, therefore, presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). The factors cited by defendant, i.e., that it had been eight years since his previous felony conviction, that no one was physically injured, and that the only threat delivered by the robber to the victim was “open the cash drawer or be shot,” are not unusual circumstances that overcome the presumption. *Id.*

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gibbs