

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE STEWART,

Defendant-Appellant.

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UNPUBLISHED  
September 20, 2002

No. 232244  
Wayne Circuit Court  
LC No. 00-004717

Before: Meter, P.J., and Saad and R.B. Burns\*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of carjacking, MCL 750.529a, and felony-firearm, MCL 750.227b, and his sentences of 9 to 20 years' imprisonment for carjacking, and two years' imprisonment for felony-firearm. We affirm.

Defendant argues, erroneously, that he had a right to a corporeal lineup or, alternatively, a right to counsel at the photographic lineup, and that the photographic lineup conducted by the police was impermissibly suggestive. "Identification by photograph should not be used 'when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup.'" *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995), quoting *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). In *People v Harrison*, 138 Mich App 74, 76; 359 NW2d 256 (1984), our Court construed "readily available" to mean that the accused is subject to legal compulsion to appear at a photographic line-up. This Court has also held that a defendant is *not* under a compulsion to appear if he is not in custody or under arrest, *Strand*, *supra* at 104, or where probable cause to arrest is lacking. *People v Derbeck*, 202 Mich App 443, 445; 509 NW2d 534 (1993).

Here, at the time of the photographic lineup, the only evidence that police officers had to link defendant to the carjacking was that he was found driving Butler's car. Further, though defendant was arrested for receiving and concealing stolen property because he was found driving Butler's car, the police released defendant from custody because of jail overcrowding. Under these circumstances, defendant was not entitled to a corporeal lineup.

We also reject defendant's assertion that he was entitled to the presence of counsel at the photographic lineup. In Michigan, an accused has a right to the presence of counsel at a

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

photographic lineup if the accused is in custody, or in “unusual circumstances” when the accused is not in custody. *People v Cotton*, 38 Mich App 763, 768-769; 197 NW2d 90 (1972). In *Cotton*, unusual circumstances existed where the defendant was released from custody immediately before the lineup, counsel was present for two previous corporeal lineups, and the sole purpose of the photographic lineup was to build a case against the defendant. *Id.* at 770. This Court held in *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994), that unusual circumstances exist in two situations: (1) where the witness positively identified the defendant and the photographic lineup had the clear intent to build a case against the defendant; and (2) the circumstances in *Cotton*, *supra*, 38 Mich App at 770.

Neither circumstance is present here: (1) defendant was not in custody at the time of the lineup, (2) no prior corporeal lineup took place, (3) no witness had previously identified defendant, and (4) there was no indication that the purpose of the photographic lineup was to build a case against defendant. Under these facts, no “unusual circumstances” exist to require the presence of counsel at the photographic lineup.

Furthermore, were we to find error in the way the police conducted the lineup, and we do not, any error is moot because the victim clearly and independently identified the defendant in court. *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993). There are a number of logical factors which we review to analyze a defendant’s claim of improper identification:

1. [The witness’] [p]rior relationship with or knowledge of the defendant.
2. The [witness’] opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
3. [The] [l]ength of time between the offense and the disputed identification. . . .
4. [The] [a]ccuracy or discrepancies in the pre-lineup . . . description and defendant’s actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup . . . of another person as defendant.
7. . . . the nature of the alleged offense and the physical and psychological state of the victim.
8. Any idiosyncratic or special features of defendant. [*People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977) (internal citations omitted).]

Here, the victim testified that he observed defendant at close range for approximately twenty minutes in ample lighting. Furthermore, the victim remained calm during the ordeal and testified that he paid close attention to defendant’s physical features. Defendant alleges a discrepancy between the victim’s initial description of the perpetrator and defendant’s actual appearance, but the record fails to disclose whether an actual discrepancy existed, and if so, to what degree. Accordingly, we find that there is a clear independent basis for the victim’s in-

court identification of defendant which renders moot defendant's claims about the photographic lineup.

Defendant further maintains that the photographic lineup was unduly suggestive because he has a darker complexion than the other men in the array and because Butler testified that an officer told him that a picture of the person found driving his car was included in the array. We hold that the lineup was not unduly suggestive and did not create a substantial likelihood of misidentification. Butler identified defendant, without prompting, from several photographs and, even accepting defendant's assertions as true, any alleged differences in the photographs did not require exclusion of this evidence. See *Kurylczyk, supra*, 443 Mich at 303-304. Moreover, as stated above, there is ample evidence of an independent basis for the in-court identification.

Defendant also says that the trial court erred in admitting evidence of three of defendant's prior convictions for impeachment purposes. Crimes of theft are probative of credibility and evidence of prior crimes of theft may be admitted if the probative value outweighs the prejudicial effect. MRE 609(a)(2)(B); *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

We agree that the trial court misinterpreted MRE 609(a)(2)(B) and mistakenly applied the test under MRE 403. Evidence is admissible under MRE 609 if its probative value outweighs the prejudicial effect; under MRE 403, however, evidence is admissible unless the probative value is *substantially* outweighed by the possibility of unfair prejudice. *People v Taylor*, 422 Mich 407, 419; 373 NW2d 579 (1985). Generally, this Court will not reverse a lower court decision that reached the right result for the wrong reason. *People v Chavies*, 234 Mich App 274, 284; 593 NW2d 655 (1999). Here, the evidence was clearly admissible under MRE 609.

In determining the potential for prejudice, a trial court may consider only the similarity of the conviction to the charged offense, and the possible effect on the defendant's decision to testify. *Bartlett, supra*, 197 Mich App at 19. Because defendant chose to testify regardless of the admission of the prior convictions, this issue is moot. Each prior conviction involved an element of theft (receiving and concealing stolen property, MCL 750.535; attempted breaking and entering a building with intent, MCL 750.92 and MCL 750.111; and entry without breaking, MCL 750.115). One of the elements of the charged crime, carjacking is the theft of a motor vehicle. MCL 750.529a. However, not all of the elements of the crimes are similar because carjacking also involves an element of assault. *Id.* This court has held that evidence of a prior conviction for burglary was admissible in a prosecution for armed robbery because the assault element in the latter offense sufficiently distinguished the two offenses under MRE 609. *People v Finley*, 161 Mich App 1, 6; 410 NW2d 282 (1987). Accordingly, the assault element sufficiently distinguishes the prior convictions and the evidence is admissible under MRE 609. The prior convictions were not similar to the charged offense and their probative value outweighed the prejudicial effect.

Defendant's contention that the trial court abused its discretion by refusing to allow him to raise the prior conviction issue on direct examination was not preserved for appeal and must be reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Under this standard, "1) error must have occurred; 2) the error was plain, i.e., clear or obvious; 3) and the plain error affected substantial rights." *Id.* The record does not show that the trial court refused to allow defendant to introduce his prior convictions on direct examination. Accordingly, we find no plain error.

Defendant says that the trial court erred by stating that it could not impose a lower sentence. Absent scoring errors or inaccurate information, we do not review sentences that fall within the range specified by the legislative guidelines. *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000); MCL 769.34(10). The trial court imposed a sentence within the appropriate guidelines range and defendant has not alleged that the trial court used inaccurate information or that scoring errors occurred. Accordingly, there is no basis to review the sentence.

Affirmed.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Robert B. Burns