

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS HAWKINS,

Defendant-Appellant.

UNPUBLISHED

July 7, 1998

No. 203705

Recorder's Court

LC No. 96-005246

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to seven to fifteen years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. His seven to fifteen-year sentence for the armed robbery conviction was vacated. We affirm.

Defendant's first issue on appeal is that the prosecution failed to present sufficient evidence to support his conviction. Specifically, defendant argues that there was insufficient identification evidence presented at trial which could lead the trier of fact to conclude that he was the perpetrator. Defendant maintains that the complainant's identification of defendant was unreliable. We disagree.

The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the person or in the presence of the victim; and (3) the defendant was armed with a dangerous weapon or an article which was used in such a way as to lead a reasonable person to believe that it was a dangerous weapon. *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993); *People v Johnson*, 206 Mich App 122, 123-124; 520 NW2d 672 (1994).

To determine whether a witness' identification is reliable, a court must assess the witness' opportunity to observe the perpetrator at the time of the crime. Factors such as the length of observation, the distance between the witness and the perpetrator, and the lighting at the scene of the crime determine the witness' ability to perceive the perpetrator. *People v Storch*, 176 Mich App 414, 417, n 1; 440 NW2d 14 (1989). Because of the fear of mistaken identification, courts will scrutinize a witness' reliability by looking to the length of time between the crime and the identification, the witness'

certainty in making the identification, and circumstances surrounding the crime itself, such as the witness' state of mind. *People v Anderson*, 389 Mich 155, 173; 205 NW2d 461 (1973); *Storch, supra* at 417.

The complainant in this case was robbed by two strangers in front of her home. One of the men appeared to have a weapon and demanded that the complainant hand over her personal belongings. She testified that the man with the weapon was close enough for her to reach out and touch. Even though it was becoming dark outside, the complainant testified that her porch lights were on as well as the lights on the street. She was confident of the one man's physical traits because he was the closest to her during the crime and she was most threatened by him.

The complainant was not given the opportunity to identify defendant as the robber until one day, eight months later, she happened to be in a hospital waiting room and defendant walked in. Again, the complainant had ample opportunity to study defendant and determine that he was the man who robbed her. The mere lapse of time does not necessarily taint the complainant's identification where courts have held that even an eighteen-month delay in identification following a crime does not invalidate eyewitness identification. *People v Kurylczyk*, 443 Mich 289, 307-308; 505 NW2d 528 (1993) (opinion by Griffin, J.). The complainant was also asked to view a lineup and, once again, identified defendant as the robber. The facts, taken in a light most favorable to the prosecution, could lead a trier of fact to reasonably conclude that defendant was guilty of armed robbery. *Jolly, supra* at 466.

Defendant's second argument on appeal is that the court erred in denying defendant's motion to suppress a pretrial identification. Specifically, defendant argues that the lineup in which the complainant chose defendant as the perpetrator was unduly suggestive because he was the only participant wearing jail clothes, and his age was far in excess of the other participants. We disagree.

Unnecessarily suggestive pretrial identification procedures giving rise to a substantial likelihood of irreparable misidentification constitute a denial of due process of law. *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *Kurylczyk, supra* at 311-312. Whether an identification procedure constituted a denial of due process is determined by the totality of the circumstances surrounding the pretrial identification. *Kurylczyk, supra* at 306. For there to be a denial of due process in a lineup, differences among the defendant and the lineup's other participants must act to substantially distinguish the defendant from the other participants and there must be a substantial likelihood that the witness identified the defendant, not upon recognition of the defendant, but upon the differences among the defendant and the other participants in the lineup. *Id.* at 312; *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984). If the trial court finds that a pretrial procedure was unduly suggestive, any testimony regarding that identification at trial is inadmissible. *Kurylczyk, supra* at 303.

To determine whether a lineup has likely led to the misidentification of a defendant, the courts look to a variety of factors including: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the degree of attention the witness pays to the perpetrator; (3) the accuracy of the witness' prior description of the perpetrator; (4) the witness' level of certainty at the confrontation; and (4) the length of time between the crime and the confrontation. *Kurylczyk, supra* at 306.

Here, the complainant based her identification of defendant on a positive recognition of his face which she had ample opportunity to observe during the robbery. Defendant's claim that the complainant's attention was drawn to the fact that he was wearing jail clothes is not supported by complainant's testimony. In fact, the complainant indicated that she did not even notice that defendant was in jail clothes or was wearing a wristband issued by the jail. Defendant claims that he was the only one over the age of twenty-nine at the lineup, but the lineup sheet indicates there was a forty-two-year-old individual as well. In its findings of fact and conclusions of law, the trial court reviewed a photograph of the lineup and determined that defendant did not stand out from the rest of the participants. Physical differences between defendant and other members of a lineup do not go to the admissibility of the lineup, but merely to the weight of the identification. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Physical differences among the lineup participants are only significant to the extent that they are apparent to the witness. *Kurylczyk, supra* at 312. The lineup was not impermissibly suggestive.

Even assuming arguendo that the lineup was unduly suggestive, a witness may still testify as to a defendant's identity so long as the witness has a sufficient independent basis, apart from the tainted procedure, to identify the defendant. *People v Kacher*, 400 Mich 78, 92-93; 252 NW2d 807 (1977). This independent knowledge must have existed before the suggestive lineup was conducted. *Kacher, supra* at 92. The prosecution then has the burden of showing by clear and convincing evidence that the in-court identification has a sufficient independent basis to "purge the taint caused by the illegal confrontation." *Id.* at 97. Some factors bearing upon the basis of a witness' in-court identification to prove that the in-court identification is not the product of a defective pretrial identification are: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the crime; (3) the length of time between the crime and the disputed identification; (4) discrepancies between the pretrial identification description and the defendant's actual appearance; (5) any prior proper identification of the defendant or failure to identify the defendant; (6) any prior identification of another as the culprit; (7) the mental state of the witness at the time of the crime; and (8) special features of the defendant. *Id.* at 95-96.

The complainant's identification was based on independent knowledge. The circumstances of the crime itself were conducive to an accurate identification on the part of the complainant. The incident occurred near nightfall, but the area was lit by street lamps and the complainant's porch lights. The complainant testified that she focused on defendant's features because he was the greatest threat to her safety. She was close enough to touch the robber. While it is not clear how long the entire robbery lasted, there had to have been enough time for the robber to demand the complainant's purse, necklace, watch, and keys and wait for his compliance. The complainant had sufficient opportunity to study the perpetrator. *Kurylczyk, supra* at 306.

In addition, we note that in this case, the complainant identified defendant eight months later while at the hospital. Again, this identification was valid in that the complainant was close enough to observe defendant's face and the lighting in the hospital was bright. The lineup was conducted only after the complainant identified defendant in the hospital and after defendant's arraignment. Clearly, the

complainant's identification of defendant at the time of the crime as well as at the hospital establish an independent basis for her in-court identification of defendant. *Kacher, supra* at 92.

Affirmed.

/s/ Richard Allen Griffin

/s/ Roman S. Gibbs

/s/ Michael J. Talbot