

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVON DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 26, 2002

No. 228259

Wayne Circuit Court

LC No. 99-008456

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit great bodily harm, MCL 750.84, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to fifteen to twenty-five years' imprisonment for the carjacking conviction, two years' imprisonment for the felony-firearm conviction, and five to ten years' imprisonment for the assault with intent to do great bodily harm conviction. Defendant's sentences are to run consecutive to prior sentences imposed on identical convictions.¹ Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting identification evidence because the photographic line-up was impermissibly suggestive and the prosecution failed to establish an independent basis for the in-court identification of defendant. We disagree.

In order to preserve a claim on appeal that an in-court identification was improper because a prior identification was impermissibly suggestive, a defendant must either object at trial to the admission of the photographic line-up identification, to the witness' in-court identification of the defendant, or request a *Wade*² hearing. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Defendant failed to object or request a *Wade* hearing.

¹ On February 17, 2000, defendant was sentenced to twelve to twenty-five years' imprisonment for carjacking, twenty-three months to ten years' imprisonment for assault with intent to do great bodily harm, and two years' imprisonment for felony-firearm. The carjacking and assault with intent to do great bodily harm sentences are to run concurrently with each other and consecutive to the felony-firearm sentence. (Docket No. 226313.)

² *United States v Wade*, 388 US 218; 87 S Ct 218; 18 L Ed 2d 1149 (1967); *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973).

Therefore, we review defendant's unpreserved issue for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“In order to sustain a due process challenge [based on a pretrial identification procedure], a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” *People v Kurylczyk*, 443 Mich 289, 302 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993). The burden rests with the defendant to factually support a claim that a line-up was impermissibly suggestive when counsel was present. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). When a previous identification procedure is so impermissibly suggestive that it created a substantial likelihood of misidentification, the testimony regarding the previous identification must be excluded, but the witness' in-court identification can still be admitted if an independent basis for the in-court identification is established. *McCray*, *supra* at 639, citing *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Defendant argues that the reliability of the line-up identification was undermined because Investigator Kerwin Smith instructed Terrance Crank to “Look close,” after Crank initially failed to make a positive identification of defendant, and because of the differences between Crank's description of the carjacker and the physical characteristics of defendant. We conclude that these factors alone did not render Crank's identification inadmissible. See *McElhaney*, *supra* at 287. Tentative or initial false witness identifications do not render an identification inadmissible where there were other indicia of reliability. *Kurylczyk*, *supra* at 309. The likelihood of misidentification is based on factors such as:

The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Kurylczyk*, *supra* at 306.]

After a review of the record, we conclude that the totality of the circumstances does not suggest that defendant's photographic line-up was impermissibly suggestive, or that the witness' identification of defendant lacked sufficient indicia of reliability. First, defendant had the benefit of line-up counsel. Second, defendant's picture was not the only picture where the camera was closer to the subject's face. Third, despite the poor quality of the picture which portrayed defendant as being heavier and having a different complexion than he appeared in person, Crank was still able to identify defendant. Fourth, Crank had an opportunity to view defendant's face for several minutes on December 9, 1998, when Crank alternated between looking at defendant's face and the gun that defendant had pointed at him. Fifth, Crank had some familiarity with defendant because defendant was an acquaintance of Crank's brother. Sixth, Crank testified at trial that he was certain that defendant was the carjacker. Lastly, Crank exhibited no signs of psychological debilitation, but instead, Crank demonstrated aggressiveness when he smacked the gun from defendant's hand. Accordingly, in light of these factors, defendant has not established that there was a high likelihood of misidentification and the photo line-up identification was properly admitted. *Kurylczyk*, *supra* at 306.

Nor has defendant established prejudice regarding Officer Leonard Riccinto's failure to record Crank's initial inability to make a positive identification because counsel was present at

the photographic line-up and testified regarding the events at the line-up. Further, Smith's direction to "looker closer" did not make defendant's line-up impermissibly suggestive. See *McElhaney, supra* at 287. Accordingly, defendant has not established error in admitting the identification from the photographic line-up.

Defendant's final argument is that his consecutive sentences violate the principle of proportionality. We disagree. This Court reviews sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A trial court abuses its discretion when it violates the principle of proportionality. *Milbourn, supra* at 635-636. This principle is violated when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* In determining the proportionality of an individual sentence, the cumulative length of consecutive sentences need not be considered. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). If each sentence is proportionate, the cumulative effect of the sentences is irrelevant. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994).

Here, defendant's carjacking sentence is proportionate in light of the severity of the offense and defendant's background. *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). Defendant shot at Crank, an unarmed person at a gas station, which created a danger not only to Crank but also to the community in light of the explosive nature of gasoline. Defendant showed a blatant disregard for human life when he shot Crank. Lastly, defendant's sentence is proportionate in light of defendant's criminal record. Defendant had prior felony convictions, including a conviction for unauthorized driving away of an automobile, and the convictions in Docket No. 226313, as well as a pending probation violation. Accordingly, defendant's sentence is proportionate. *Rice, supra* at 446. Because defendant's sentence is proportionate, the cumulative effect of his consecutive sentences is irrelevant. *Clark, supra* at 502.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot