

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AUDRA LATRICE TYLER,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 260304

Wayne Circuit Court

LC No. 04-007380-01

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from her bench trial convictions for stealing/retaining a financial transaction device without consent, MCL 750.157n, and impersonating a peace officer to commit a crime, MCL 750.215(3). She was sentenced as a fourth-offense habitual offender, MCL 769.12, to three years' probation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case involves purchases made at a booth at the Gibraltar Trade Center on December 28, 2003. The owner of a booth testified that defendant purchased items of clothing using a credit card belonging to another woman.¹ While the booth owner was working that day, two people approached the booth. One of them purchased items with a credit card in two separate transactions. The witness identified defendant as this purchaser. She stated that she knew defendant was a woman but that defendant was dressed like a man. When defendant presented the credit card in question, the witness asked her for a driver's license. Defendant told her that she did not have her license with her and instead presented a gold "police" badge and asked whether that would do. After defendant left, the witness became concerned about the transactions and had someone page the person listed on the credit card. When no one responded, the witness went looking for defendant and found her in front of a jewelry booth. She told defendant that she needed to see further identification. Defendant did not present photographic identification but wrote down a driver's license and her alleged badge number on the receipts.

¹ Defendant allegedly improperly obtained the card when she conducted a search of the card owner's purse while performing her duties as a security guard.

The witness later learned that the credit card defendant used had been stolen. She participated in two photograph showups and identified defendant's photograph in the second showup,² which occurred on April 16, 2004.

The witness again identified defendant at the preliminary examination, which occurred on July 19, 2004. During the examination, the witness stated that she had picked defendant's picture "immediately." She also accurately remembered where defendant's photograph was located on the sheet. She also maintained that no one had indicated during the identification procedure that one of the photographs shown to her would be the alleged purchaser. The witness further stated that she was three feet from defendant during the transactions.

Defendant maintains on appeal that the trial court erred when it permitted the prosecutor to present the witness's two prior identifications as well as the witness's in-court identification at the trial. Defendant did not raise this objection below. Therefore, this issue is unpreserved, and we review it using the plain error doctrine. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To show that reversal is warranted, defendant "must demonstrate plain error that was outcome determinative." *Id.*

Defendant asserts that the photographic showup was plainly impermissibly suggestive because she was "singled out" as the only participant with short hair that appeared masculine.

If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed 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).]

A lineup or showup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004). The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306, 311-312 (GRIFFIN, J.), 318 (BOYLE, J.); 505 NW2d 528 (1993). Physical differences among showup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other participants. *Id.* at 304-305, 312 (GRIFFIN, J.), 318 (BOYLE, J.). Physical differences generally affect only the weight of an identification and not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

² The officer who prepared the first showup array testified that it did not have defendant's photograph in it and was apparently conducted in order to exclude the card owner as a possible suspect.

In this case, the copy of the photograph array furnished to this Court does not establish any significant discrepancies among the physical characteristics of the showup participants so as to taint and require the exclusion of the showup identification. One of the other participants also has short hair, and the hair of the other women appears to have been pulled back so as to suggest the presence of short hair. The witness had not specifically stated that the purchaser appeared masculine, but rather that she was wearing masculine clothing. A number of the women appear to be wearing this type of clothing. Although the showup participants did not exactly mirror each other with respect to facial features or hairstyles, nothing significantly distinguishes defendant from the other participants when they are viewed as a group. Nor do the other circumstances suggest that the procedure was otherwise tainted. The identification procedure was not unduly suggestive, and trial court did not err in allowing the admission of this identification evidence or in allowing the witness's in-court identification at the trial.

Defendant also argues that the witness's identification at the trial was fatally tainted by the suggestive nature of the confrontation at the preliminary examination. We disagree. Defendant correctly notes that our Supreme Court has held that confrontation between a witness and the defendant at a preliminary hearing can constitute a suggestive identification procedure. See *People v Solomon*, 47 Mich App 208, 216-221; 209 NW2d 257 (1973) (Lesinski, C.J., dissenting), adopted 391 Mich 767; 214 NW2d 60 (1974). However, this Court has held that *Solomon*, *supra*, was a narrow holding and does not establish that all confrontations at preliminary examinations are impermissibly suggestive. See e.g., *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984); *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975). The relevant test is whether the procedure was so impermissibly suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 302 (GRIFFIN, J.), 318 (BOYLE, J.). Relevant factors include

the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. [*Colon*, *supra* at 304-305.]

In the instant case, there is an insufficient basis to conclude that the identification of defendant during the preliminary examination was impermissibly suggestive. There is no allegation of any police suggestion. Moreover, the witness had already identified defendant from the photographic array. Although defendant was apparently the only female present at the preliminary examination (apart from the witness), other circumstances weigh against finding that this procedure led to a substantial likelihood of misidentification. The witness observed defendant at the booth at short range for a lengthy period of time, was alert and attentive enough to be suspicious of defendant's odd behavior, easily found defendant when she looked for her at the trade center, and provided accurate descriptions of defendant. She was also very certain in all of her identifications.

Under the circumstances, we find that defendant has failed to show that either of the pretrial identifications was impermissibly suggestive. The trial court did not err when it allowed the prosecution to present the witness's various identifications of defendant in support of its case. Moreover, contrary to defendant's argument on appeal, her trial attorney did not render ineffective assistance of counsel in failing to challenge the identifications. Indeed, counsel was

not required to advocate a meritless position. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter