

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK CARLETON TURNER,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 201659

Macomb Circuit Court

LC No. 96-001728 FC

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a; MSA 28.797(a), two counts of armed robbery, MCL 750.529; MSA 28.797, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to eight to twenty-five years in prison for the carjacking conviction and the armed robbery convictions, to be served consecutively to a two-year term for the felony-firearm convictions. Defendant now appeals as of right, and we affirm.

I

Defendant contends that the trial court erred in denying his motion to exclude evidence that he was identified at a photographic lineup by some of the complaining witnesses. “The trial court’s decision to admit identification evidence will not be reversed unless it is clearly erroneous. A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Defendant says that because he was in custody in California and had signed papers for extradition to Michigan at the time the photographic lineup was conducted, he was entitled to be represented by counsel. We disagree.

“The Sixth Amendment of the United States Constitution guarantees to one who has been criminally accused the right to have the Assistance of Counsel for his defense. This right is not limited to the formal trial, but extends to all “critical” stages” of the criminal proceeding. *People v Kurylczyk*,

443 Mich 289, 296; 505 NW2d 528 (1993) (citations and internal quotation marks omitted). “In the case of photographic identifications, the right of counsel attaches” only if a defendant is in custody. *Id.* at 302. The ostensible rationale behind this rule is to safeguard the rights of a defendant when the police and prosecution are trying to build a case against the defendant. See *Kurylczyk*, 296-297.

The record clearly establishes that the Mt. Clemens police were not aware that defendant was in custody in California at the time they conducted the photographic lineup. Moreover, had they been aware of the California custody, defendant was not in custody or facing extradition for the instant offense, but for a different alleged offense. Therefore, when they conducted the lineup, the Mt. Clemens police were merely trying to gather evidence to include or exclude defendant as a possible perpetrator of the carjacking and armed robbery at the Broadway Market. They were not gathering evidence to build a case against defendant. He had not yet been arrested on the charges for which they conducted the lineup. Accordingly, defendant was not entitled to counsel at the photographic lineup.

II

Defendant also claims that the photographic lineup was impermissibly suggestive and therefore violated his right of due process. “A photographic identification procedure violates a defendant’s right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Our Supreme Court has held:

If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*Kurylczyk*, *supra* at 302-303, citations omitted.]

The *Kurylczyk* Court further held:

Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant’s physical features and thus sufficient to reasonably test the identification. Thus, differences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others pictured in a photographic lineup have been found not to render a lineup impermissibly suggestive.

However, a court will find that a witness’ identification of a defendant was the product of an improper photographic identification if differences in the photographs led to a substantial likelihood of misidentification. In such cases, witnesses typically select a defendant on the basis of some external characteristic, rather than on the basis of the defendant’s looks. [*Id.* at 304-305 (citations, footnotes, and internal quotes omitted.)]

Additionally, “[p]hysical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility.” *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Defendant maintains that the photographic lineup was impermissibly suggestive because, of the six photographs in the lineup, all the other suspects depicted were between five-feet ten-inches and five-feet eleven-inches tall and weighed 185 to 195 pounds, while he was only five-feet five-inches tall and 128 pounds. We note that the record reflects that the photographs all depicted light skinned black men from their shoulders and above. It was not apparent from the photographs how tall the men were or how much they weighed. Thus, we do not believe that the differences in the photos created a substantial likelihood of misidentification.

Moreover, regardless of the photographic lineup, Anthony Williams testified at trial that defendant was the person who pointed a gun at him, robbed him and stole the truck. Tedearo Burrell also testified at the preliminary examination that defendant was the person who pointed a gun at him and robbed him. Therefore, there was a basis for the in-court identification independent of the photographic lineup identification. Accordingly, the trial court properly denied defendant’s motion to exclude evidence of his identification at the photographic lineup.

III

Defendant also alleges that because the testimony of the complaining witnesses was inconsistent, there was insufficient identification evidence linking him to the incident. “In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Although each of the complainants’ accounts varied with respect to details, such as where each complainant was at the time of the incident, they all ultimately testified that at least four black men in two Explorers drove into the parking lot of the Broadway Market, pointed guns at them, stole pagers and money from them and stole their truck. The jurors were entitled to weigh the witnesses’ credibility and believe that Anthony Williams and Tedearo Burrell accurately identified defendant as one of the men who pointed a gun at them, robbed them and stole their vehicle. This Court will not overturn a defendant’s conviction on the basis of a credibility determination. Nor will this Court interfere with the jury’s determination of the weight of the evidence or the credibility of the witnesses. *People v. Warren*, 228 Mich App 336, 578 NW2d 692 (1998).

IV

Finally, defendant avers that his sentence was disproportionate. We review a sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 667; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 635-636.

Because the trial court's sentence of eight to twenty-five years for the armed robbery and carjacking convictions fell within the guidelines range, the sentences are presumptively proportionate. *People v Lyons*, 222 Mich App 319, 324; 564 NW2d 114 (1997). Defendant has failed to show unusual circumstances sufficient to rebut the presumption of proportionality. *Id.* Defendant's criminal history dates back to 1972, and includes five felony offenses (two convictions of receiving and concealing stolen property over \$100, attempted possession of a stolen vehicle, larceny and possession of stolen property, attempted larceny over \$100, attempted unlawfully driving away an automobile, malicious destruction of personal property over \$100 and carrying a concealed weapon. Although defendant was married with two children and had steady employment before the instant offense, the trial court's sentence was proportionate given the seriousness of the circumstances surrounding the offense and defendant's criminal background.

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Kelly

/s/ Richard A. Bandstra