STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2004
v	No. 246218 Wayne Circuit Court
DEANO LAVAL WHITLEY, Defendant-Appellant.	LC Nos. 01-010122-01; 01-010123-01

Before: Cavanagh, P.J. and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b (case number 01-010122-01); and his bench trial convictions for armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b (case number 01-010123-01). For his jury trial convictions in case number 01-010122-01, defendant was sentenced to 240 to 480 months in prison for the armed robbery conviction, forty to sixty months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. For his bench trial convictions in case number 01-010123-01, defendant was sentenced to 180 to 480 months in prison for the armed robbery conviction, forty to sixty months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant argues on appeal that his convictions should be reversed because there was no probable cause to arrest him and evidence obtained as a result of his illegal arrest, including lineup, pretrial, and in-court identifications, should not have been admitted. We disagree.

Defendant did not preserve this issue for appeal by filing a timely pretrial motion to suppress. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Lyles*, 148 Mich App 583, 591; 385 NW22 676 (1986). However, this Court may review an unpreserved issue for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). For a defendant to obtain reversal of a conviction based on an unpreserved constitutional claim of error: (1) the defendant must show that plain error affecting his substantial rights has occurred, and (2) the court, in its discretion, has found that the plain error either resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Id.* at 763; *People v Rodriguez*, 251 Mich App 10, 24; 650 NW 2d 96 (2002).

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. The lawfulness of a search or seizure depends on its reasonableness. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). In Michigan, a police officer has statutory authority to make a warrantless arrest in either of the following circumstances: (1) when "[a] felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it," MCL 764.15(c); see also *People v Richardson*, 204 Mich App 71, 78-79; 514 NW2d 503 (1994), or (2) when "[t]he peace officer received positive information broadcast from a recognized police or other governmental radio station, or teletype, that affords the peace officer reasonable cause to believe . . . a felony has been committed and reasonable cause to believe the person committed it," MCL 764.15(f); see also *Richardson, supra* at 78-79.

Probable cause to arrest exists if the facts available to the police at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony. *People v Thomas,* 191 Mich App 576, 579; 478 NW2d 712 (1991). A reviewing court should look to the collective knowledge of the police, not just the individual knowledge of one officer. *US v McManus*, 560 F2d 747, 750-51 (CA 6, 1977); *Beuschlein*, *supra* at App 749. If an arrest is unlawful, then evidence seized as a result of that arrest must be excluded from trial. See *People v Sawyer*, 215 Mich App 183, 193; 545 NW2d 6 (1996).

At the time of defendant's arrest, the police knew felonies had in fact been committed on July 26, 2001, involving victim Tamika Moore, and on August 4, 2001, involving victims Darrin Patrick Walters and Wadi Brikho. The police knew each incident involved the armed robbery of a truck driver delivering products to a grocery store on Gratiot Avenue in Detroit. Moore provided police with a physical description of the robber's vehicle and a license plate number. Each victim provided police with a physical description of the robber himself. Evidence shows that on at least one occasion the license plate number, vehicle description, and physical description of the robber was broadcast over the police radio. Thus, in total, the evidence indicates that police were looking for a 140 to 230 pound black male, between the ages of thirty-two and forty, who was approximately five foot seven to six foot one inches tall, and who was known to be driving a cream colored Cadillac with license plate number SWL 919. Although the record is limited on the circumstances surrounding defendant's arrest, evidence indicates that police arrested defendant while driving a white colored Cadillac with license plate number SWL 919 registered in his name. At the time of the arrest, an officer described defendant as a six foot tall black male, weighing 180 pounds.

Defendant argues that because some of the information available to the police at the time of his arrest included conflicting physical descriptions and an inaccurate vehicle description, the police did not have probable cause to arrest him. Defendant also contends that, since the witness' subsequent identifications of him were obtained only as a result of his unlawful arrest, they should have been excluded as "fruit of the poisonous tree."

Probable cause may stem from physical descriptions and other identifying information, such as a defendant's modus operandi, relayed to police by complainants. *Richardson, supra* at 79; *People v Horton*, 98 Mich App 62, 66; 296 NW2d 184 (1980). Based on the information victims provided to police, a fair minded person could believe that defendant, who was driving the exact vehicle described to police by Moore and whose physical description was similar to those provided to police, had committed the felonies. When police have probable cause to arrest

a defendant, his subsequent participation in a lineup and victim identification are not fruits of the poisonous tree. *Sawyer, supra* at 193. Plain error is a "clear or obvious" error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). The information available to police at the time of defendant's arrest gave them probable cause to arrest defendant, and therefore, we conclude that it was not a clear or obvious error to admit the information obtained incident to defendant's arrest as evidence in defendant's trial.

Even if it was plain error to admit the identification evidence, defendant must establish that this error affected his substantial rights by making a showing of prejudice. *Jones, supra* at 356. Defendant's burden is met if he can show that the error affected the outcome of the lower-court proceeding. *Id*. Defendant has not met his burden in this regard.

An illegal arrest does not bar subsequent prosecution. *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992). The appropriate remedy is suppression of evidence obtained as a result of the illegal arrest under the fruit of the poisonous tree doctrine, unless an exclusion applies. *Id*., citing *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). If there is an independent source for identification evidence or if evidence is acquired before the illegal arrest occurred, then the evidence is not obtained through exploitation of illegal police actions and it can be properly admitted. *Id.*; *People v Potra*, 191 Mich App 503, 508; 479 NW2d 707 (1991). When a victim's court identification of an illegally arrested defendant is a product of his extensive opportunity to observe the defendant at the time of the offense, that identification is made independent from the police taint and is admissible. *People v Jackson*, 46 Mich App 764, 771; 208 NW 2d 526 (1973); *Spencely, supra* at 508.

The prosecution correctly argues that even if defendant's arrest was unlawful, only the victims' lineup and other pretrial identifications of defendant would be tainted. The victims' in-court identifications of defendant would remain admissible as independent sources because they were based upon observations of the suspect other than the lineup identification. *People v Oswald*, 188 Mich App 1, 7; 469 NW2d 306 (1991); *People v Hutton*, 21 Mich App 312, 325; 175 NW2d 860 (1970); see also *People v Drummonds*, 30 Mich App 275, 277; 186 NW2d 7 (1971).

Moore testified that she had no doubt that defendant was the one who robbed her and identified him twice at trial. Although Moore was unable to determine the precise duration of the incident, the record reflects that she had an engaging conversation with defendant during the robbery, she watched him the entire time she was being robbed, and she was able to provide a detailed physical description to police immediately thereafter. Walters identified defendant twice at trial with certainty. Walters testified that the incident took a few minutes and that defendant may have been as close to him as an arm's length away. Walters provided detailed physical descriptions of defendant to police, but testified that he is "terrible at judging." In addition, Brikho's identification of defendant at trial cannot be the fruit of an illegal arrest because he identified defendant for the first time at trial. Since identification evidence from three different sources remains admissible at trial, defendant cannot show he was prejudiced when pre-trial identification evidence was admitted. We therefore hold that defendant has not met his burden to demonstrate plain error affecting his substantial rights has occurred.

Furthermore, even if plain error affecting defendant's substantial rights has occurred, in order to reverse defendant's convictions, we must also find that such error resulted in the

conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Carines, supra* at 764. For the same reasons articulated above, including the victims' identifications of defendant as the robber, license plate number, and description of the car, we do not find such results have occurred. Accordingly, the trial court properly admitted the identification evidence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad