STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v	No. 224162 Wayne Circuit Court
MITCHELL D. SPROESSIG, Defendant-Appellant.	LC No. 99-002372

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

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f). He was sentenced as a second habitual offender, MCL 769.10, to thirty to sixty years' imprisonment.[1] Defendant appeals his convictions and sentence as of right. We affirm.

I

Defendant was convicted of three counts of CSC I following his identification by a real estate saleswoman who was sexually assaulted on December 23, 1998, while showing a model home in Canton Township. According to the complainant, she was working alone in the home's garage, which served as an office and had been modified so that the garage door was all glass with just a single door for entry. At approximately 3:00 p.m., a man, identified by the complainant as defendant, arrived to view the home. The complainant spoke with the man for approximately five minutes, then he went alone to look through the home. He returned a couple minutes later, asking the location of the basement entry, which the complainant showed him, and she again allowed him to look around on his own.

When the man returned to talk to her a third time, she gave him a brochure and they were again talking when he suddenly grabbed the complainant from behind and dragged her into the master bedroom, and then into the walk-in closet, punching her in the nose, forcing fellatio, digitally

[1] We note the discrepancy between the trial court's pronouncement of defendant's sentence at the sentencing hearing (an enhanced sentence of two terms of thirty to sixty years' imprisonment and one term of life imprisonment) and what appears on the judgment of sentence (a single enhanced sentence of thirty to sixty years' imprisonment). A trial court speaks through its orders and written judgments. *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989). Therefore, defendant's actual sentence is that shown on the judgment of sentence.

penetrating her vagina, and forcing sexual intercourse. The man then left the home, and the complainant contacted the police. After the assault, the complainant worked with the police to prepare a computer-assisted composite of her assailant, which ultimately led to a tip from another real estate agent when defendant allegedly came to one of his open houses. Defendant was arrested on February 17, 1999 and charged with the assault.

II

Defendant first argues that the complainant's in-court identification was tainted by impermissibly suggestive pretrial procedures and should have been suppressed. At his preliminary examination, defendant objected to the complainant's in-court identification of him based on the identification procedures used by the police. Ruling that identification was a question of fact, the district court bound defendant over for trial. Later, in the final pretrial conference, defendant sought leave to file a motion to suppress the complainant's identification. Noting that there was other evidence to identify defendant as the assailant, the trial court indicated that there was no basis for suppressing the complainant's in-court identification of defendant.[2]

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). A photographic identification procedure violates a defendant's right to due process 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); *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "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).

After her assault, the complainant helped the police produce two computer composites of her assailant. The second composite was distributed among the real estate community, which led to defendant's arrest after he showed up at another model home, and the real estate agent, noting that defendant resembled the computer composite, followed defendant to his vehicle, obtained his license plate number, and reported the incident to the police. When defendant's fingerprint subsequently was found on a brochure in the home where the attack occurred, defendant was arrested.

According to the complainant, the police informed her of defendant's arrest, and the officer-in-charge of the case showed her a photograph of defendant, whom she identified as her assailant. She could not recall if the police showed her photographs of other suspects. The officer-in-charge, however, denied showing the complainant a photograph of defendant. The complainant was not asked to participate in a lineup.

The pretrial identification procedures used by the police in the present case were impermissibly suggestive. One circumstance that commonly leads to an impermissibly suggestive identification is when the police tell a witness, or the witness believes, that the police have apprehended the right person. *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973). Another is when the witness is shown an individual or small group. *Id*. According to the

[2] The record indicates that the trial court granted defendant an opportunity to file a motion to suppress, but it appears that no motion was filed, and the matter was not subsequently addressed.

complainant's testimony, both factors were present here. However, a finding of an invalid identification procedure does not end the inquiry; the next step is to determine whether the witness had an independent basis to make the in-court identification. *Gray, supra* at 114-115. "The independent basis inquiry is a factual one, and the validity of a complainant's in-court identification must be viewed in light of the 'totality of the circumstances.'" *Id.* at 115, quoting *Neil v Biggers,* 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972).

In *Gray,* the Supreme Court utilized the following eight factors to determine if an independent basis existed for the complainant's in-court identification of the defendant following an impermissibly suggestive photographic identification:

> "1. Prior relationship with or knowledge of the defendant.
>
> "2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act.
>
> "3. Length of time between the offense and the disputed identification ....
>
> "4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
>
> "5. Any previous proper identification or failure to identify the defendant.
>
> "6. Any identification prior to lineup or showup of another person as defendant.
>
> "7. ... [T]he nature of the alleged offense and the physical and psychological state of the victim ….
>
> * * *
>
> "8. Any idiosyncratic or special features of defendant." [*Gray, supra* at 116, quoting *People v Kachar,* 400 Mich 78, 95-96; 252 NW2d 807 (1977).]

In this case, factors two and seven weigh in favor of finding an independent basis for the complainant's in-court identification of defendant, while the other factors are primarily neutral. The complainant had an excellent opportunity to observe defendant before the offense occurred. Her office and the entire model home were very well-lit for showing. It was a bright day outside, the home had a lot of windows, and the blinds were never closed during the showing. The complainant stood next to her assailant in the brightly-lit garage and talked to him for approximately five minutes. After the man looked around the house, the complainant and the man twice again engaged in face-to-face conversation, for several minutes. The complainant viewed the man's face additional times during the assault. The opportunity to observe factor weighs in favor of an independent basis for the complainant's identification.

The nature of the offense and the complainant's composure also weigh in favor of finding an independent basis for her in-court identification. "'[R]ape complainants usually have a better opportunity to observe their assailants than complainants or witnesses of other crimes.'" *Gray, supra* at 117, quoting Sobel, *Eyewitness Identification* (2d ed), § 6.3, pp 6-8. There was no evidence that

the complainant's "perceptions were distorted … to an extent that she would not be able to later identify her attacker." *Gray, supra* at 123. The complainant had the presence of mind to get her assailant out of the model home after the attack by telling him that her boss would soon arrive and find them. She also had planned in her mind to grab her purse with her car keys and her cell phone and leave.

After the assailant left, she waited approximately five minutes, got dressed, went to her car, and called 911 on her cell phone. She reported the attack to the police dispatcher and drove herself to the hospital, where she was able to relay what had happened to the police officer who met her there. She went to the police station the following day to assist in making a computer composite and returned to improve the composite. Therefore, factor seven also weighs in favor of finding that the complainant had an independent basis for her identification of defendant.

Because we determine that the complainant had an adequate basis, independent of the photograph shown to her by the police, for her in-court identification of defendant, we also find that the trial court did not clearly err in denying defendant's request to suppress the complainant's in-court identification of defendant. Given this finding, we need not address the issue whether defendant was denied his right to counsel at the photographic identification. See *Anderson, supra* at 169; *Gray, supra* at 114 n 8 ("The remedy for a violation of the right to counsel is the same as the remedy for an unduly suggestive identification procedure: suppression of the in-court identification unless there is an independent basis for its admission").

III

Defendant next argues that the trial court created sympathy and bias in favor of the complainant during voir dire, excessively interfered in cross-examination, and made disparaging remarks to and about defense counsel, thus depriving defendant of his right to a fair trial. Defendant failed to object to the conduct of jury voir dire and expressed satisfaction with the jury panel. Therefore, his challenges to jury voir dire have not been preserved for appellate review. *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). However, defendant raised some objection to the court's conduct during trial, which was sufficient to preserve this portion of his challenge for our consideration. See *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996); *People v Moore*, 161 Mich App 615, 620 n 1; 411 NW2d 797 (1987).

> A defendant in a criminal trial is entitled to expect a "neutral and detached magistrate." While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. [*People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (citations omitted).]

Having extensively reviewed the entire record, we find that, while we would not describe the trial court's conduct as "detached" or showing "caution and restraint," defendant was not deprived of his right to a fair trial. Regarding defendant's contention that the trial court repeatedly criticized defense counsel, belittling him and marginalizing him in front of the jury, we note that judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the

parties, or their cases do not generally support a challenge for partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Partiality is also not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. *Id.* Those of the challenged remarks that are clearly expressions of the trial court's impatience or annoyance with defense counsel, who appeared in court late after several breaks in the trial, do not demonstrate that the trial court was biased against defendant.

More serious are defendant's challenges to the trial court's interruption of defense counsel's cross-examination of witnesses. A primary interest secured by the constitutional right of confrontation is the right of cross-examination. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Defendants are guaranteed a reasonable opportunity to test the truth of a witness' testimony." *Id.* "If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated." *Ho, supra* at 189. However, "'[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogations that is repetitive or only marginally relevant.'" *Adamski, supra* at 138, quoting *Deleware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

Most of defendant's challenges to the court's interruptions of cross-examination occurred during the cross-examination of the complainant. When two of the interruptions are viewed in isolation, the court seemingly reinforced to the jury the complainant's testimony on direct examination that it was defendant that entered the model home and had conversations with her before the offense occurred. However, portions of the record should not be taken out of context in order to show that the trial court was biased against the defendant. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Rather, the record should be reviewed as a whole. *Id.* Although the trial court extensively interrupted defense counsel during cross-examination of the complainant, we find that defense counsel had adequate opportunity to cross-examine the complainant at length. Counsel was allowed to use the complainant's preliminary examination testimony to impeach her trial testimony on the critical issues of her opportunity to view her assailant and her memory of the offense. Therefore, defendant had a reasonable opportunity to test the complainant's testimony, *Adamski, supra* at 138, and his right to confrontation of this witness was not violated.

Defendant also challenges the trial court's interruptions during cross-examination of the fingerprint witness, Officer Siterlet. On cross-examination, Officer Siterlet testified that he processed for fingerprints certain items delivered to him by the officer-in-charge, which included a real estate brochure. Officer Siterlet testified that the brochure contained a police evidence tag or "sticker" when he photographed it, and the officer read to the jury the information on the tag. After the brochure was offered for admission, defense counsel asked Officer Siterlet on recross-examination whether there was a property tag with the number 14882 on the brochure when it was delivered to him. The court interrupted, indicating that the witness had already testified to what he received and what the tag on the item read. On appeal, defendant maintains that this interference precluded his counsel from establishing a breakdown in the chain of evidence regarding the brochure. However, there was no evidence at trial and has been no offer of proof on appeal that such a breakdown occurred. Moreover, the trial court was correct that Officer Siterlet had already testified to what appeared on the brochure when it was delivered to him. Therefore, the court was within its discretion to limit cross-examination to prevent interrogation that was repetitive. *Id.* at 138. Defendant also contends that the trial court told the jury that there was no defense to fingerprint

evidence. Although the court's comments were more extensive than necessary, the court did not tell the jury that there was no defense to fingerprint evidence. Moreover, the court's interruption was within the latitude granted to the trial court to clarify testimony or elicit additional relevant information. *Cheeks, supra* at 480.

The trial court's comments do not demonstrate bias against defendant and the interruptions of the cross-examination of the complainant and Officer Siterlet did not deprive defendant of the right to confrontation. Therefore, defendant has not shown that his convictions should be reversed based on the trial court's conduct.

IV

Defendant next argues that he was denied due process and a fair trial because the prosecution committed multiple violations of discovery orders and the trial court refused to accord defendant any remedy for these violations. Pursuant to MCR 6.201(A)(5) and (6) a party upon request must provide all other parties with "any document, photograph, or other paper" or "any tangible physical evidence" that the party intends to introduce at trial. The prosecutor also has a duty under MCR 6.201(B)(1) to provide upon request "any exculpatory information or evidence known to the prosecuting attorney." MCR 6.201(J) provides that "[i]f a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy."

Defendant first challenges the admission into evidence and playing to the jury of a taped news interview with defendant after his preliminary hearing. We find no discovery violation regarding the tape. Defense counsel acknowledged at trial that the videotape was listed on the prosecution's witness list and that he had not asked to see the tape. Therefore, the tape's existence and the prosecutor's intention to use it at trial were made known to defense counsel.

Defendant also argues that the prosecutor committed discovery violations by not releasing to him the complainant's medical records or photographs of other suspects, both of which defendant claims are potentially exculpatory evidence. In order to warrant a new trial based on a discovery violation, a defendant must show

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

Defendant contends that he was not provided with the complainant's medical records until the fifth day of trial, and that upon review of the records his counsel discovered that the complainant had been taking multiple medications at the time of the assault. Although defendant argued to the court that he had made two demands to the Canton Police Department for the complainant's medical records, he has made no offer of proof to support his contention that either the prosecution or the police suppressed the records. Moreover, although defendant contends that evidence that the complainant was taking prescription medications would have been favorable to him, there has been no offer of medical proof that the medications taken by the complainant might have affected her perceptions on the day of the offense. Therefore, defendant has not shown that he is entitled to a new trial based on an alleged discovery violation by the prosecution with regard to the complainant's

medical records because he has not demonstrated that the evidence was suppressed or that it would have been favorable to him.

Defendant has also not shown that the photographs of other suspects were exculpatory evidence. Defendant became aware of the existence of the photographs during trial when he noticed them in front of Detective Schreiner. The prosecutor indicated that he did not plan to use the photographs. Detective Schreiner had previously testified that the police followed up on approximately fifteen tips following the publication of the composite drawing, and all but one, the tip from the real estate agent, were eliminated as possible leads. Presumably, these tips were prompted by some resemblance between the suspected individuals and the composite. That others, who were not identified by the complainant and not otherwise connected to the assault, resembled the composite does not lead to the conclusion that the availability of the photographs was outcome determinative, i.e., that there was a reasonable probability that the outcome of the proceedings would have been different had defendant had use of the photographs. *Id.* Therefore, defendant is not entitled to a new trial on this basis.

V

Next, defendant argues that the trial court abused its discretion in inadvertently admitting into evidence an unfairly prejudicial exhibit and in holding that the exhibit had not been submitted to the jury during deliberations. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). The taking of exhibits to the jury room lies within the discretion of the trial judge. *Socha v Passino*, 405 Mich 458, 471; 275 NW2d 243 (1979).

The trial court denied the admission into evidence of People's Proposed Exhibit 18, which was a note pad found in defendant's vehicle when he was arrested two months after the offense occurred. Four photographs of pages from the note pad, which contained statements depicting sexual advances to an unnamed woman in explicit, vulgar language, were marked as People's Proposed Exhibit 22A-D. The court ruled that, because the complainant did not testify to having seen any writing involving her assailant, the pages from the note pad were not relevant to prove that defendant perpetrated the assault and may be more prejudicial than probative. However, Exhibit 22A-D was apparently inadvertently admitted into evidence although the contents of the pages were not revealed to the jury.

At the second sentencing hearing, the court noted that defense counsel had raised some questions about which exhibits were sent into the jury room, and the prosecutor asked to make a record of what had occurred. The prosecutor indicated that when the jury asked for the exhibits, defense counsel was not in the court room. The prosecutor and Deputy Sheriff Lawrence Morrow went through the exhibits "one by one" and "only submitted certain exhibits." Deputy Morrow testified under oath that Exhibit 22 was not submitted to the jury. The trial court stated for the record that the note pad was not given to the jury because the jurors commented after the verdict that they had not received it. The prosecutor also read from his list of exhibits that were admitted and submitted to the jury, and specifically noted that Exhibit 22, a group of photographs marked A to D, was not submitted to the jury.

Although the trial court abused its discretion in admitting Proposed Exhibit 22A-D into evidence after ruling that the writing in the note pad was not relevant to the issue of defendant's guilt and was more prejudicial than probative, defendant failed to object to the admission of this exhibit and the contents of the note pad writings were not revealed to the jury at trial. Moreover, the record

demonstrates that the prosecutor excluded this exhibit when working with the court's assigned deputy in preparing exhibits for the jury. Therefore, any error was harmless.

VI

Finally, defendant presents two arguments concerning his sentence as a second habitual offender. He first argues that the enhanced sentencing as a habitual offender is invalid because the prosecutor did not file the notice of intent mandated by MCL 769.13. However, the Amended Information plainly stated that defendant had previously been convicted of a sexual assault and provided notice to defendant that he was subject as a second habitual offender to the penalties provided in MCL 769.10. At defendant's arraignment, the trial court addressed defendant, noting that the prosecutor claimed that defendant had previously been convicted of a sexual offense in Texas and was therefore subject to a mandatory five-year minimum sentence and subject to sentence enhancement of one and one-half times the maximum sentence, which was life, and defendant indicated that he understood this. Although the record does not establish that notice was served upon defendant or his attorney and does not contain a written proof of service, this Court has previously rejected the argument that such a deficiency in the record amounts to a denial of due process or entitles a defendant to resentencing. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999). As in *Walker*, defendant has not claimed that he did not have actual notice of the prosecutor's intent. Therefore, defendant is not entitled to be resentenced on this basis.

Defendant also argues that his thirty- to sixty-year sentence is disproportionate.[3] A sentence must be proportionate to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). The sentencing guidelines do not apply to defendant because he is an habitual offender. *People v Hansford*, 454 Mich 320, 323; 562 NW2d 460 (1997). "If an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate." *People v Compeau*, 244 Mich App 595, 599; 625 NW2d 120 (2001).

Defendant was convicted of three counts of first-degree criminal sexual conduct, which is punishable for a first offender by life or any term of years in prison. MCL 750.520b(2). After two sexual assault convictions, defendant has demonstrated that he is unable to conform his conduct to the law. Therefore, the trial court did not abuse its discretion by sentencing defendant within the statutory limits.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

---

[3] The offenses of which defendant was convicted were committed on December 23, 1998, and therefore the judicial sentencing guidelines would apply if defendant were not an habitual offender. MCL 769.34(1).