S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 25, 2004
v RAPHAEL SANDERS, Defendant-Appellee.	No. 242027 Wayne Circuit Court LC No. 01-012495-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v CHRISTOPHER SANFORD, Defendant-Appellee.	No. 242028 Wayne Circuit Court LC No. 01-012495-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v HAROLD LOOPER, Defendant-Appellee.	No. 242029 Wayne Circuit Court LC No. 01-012495-03

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing various charges against defendants Raphael Sanders, Christopher Sanford, and Harold Looper. All three defendants were charged with carjacking, MCL 750.529a, armed robbery, MCL 750.529, and assault with intent to

commit murder, MCL 750.83. Defendant Sanders was also charged with felony-firearm, MCL 750.227b. Before dismissing the charges, the trial court suppressed Looper's lineup identification because it stemmed from an illegal arrest, suppressed Sanders' and Sanford's lineup identification because of unduly suggestive lineup procedures, and concluded that the witnesses lacked an independent basis from which to make an in-court identification of Sanders and Sanford. The prosecution takes issue with these preliminary rulings. We affirm in part and reverse in part.

In docket numbers 242027 and 242028, plaintiff contends that the trial court erred in concluding that the lineup procedures used in identifying Sanders and Sanford were unduly suggestive. The trial court suppressed the lineup identifications made by Grace Watts, who was the victim, and Clarence and Lakina Nelson. Because counsel was present at the lineup, the burden was on defendants to show that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 289; 545 NW2d 18 (1996). A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk,* 443 Mich 289, 303 (Griffin, J.); 505 NW2d 528 (1993); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

Plaintiff asserts that the trial court clearly erred in finding that the police suggested to the witnesses that more than one suspect was in the lineup. The trial court found:

> Placing three individuals in one line-up, and then the question that was presented to the witnesses as recorded on the line-up sheet, show-up sheet, the question on each one: What did they do? Now, I know there was testimony yesterday that said, well, that was the only thing I said, but that's what was written down, and that's what the Court is looking at. The question that was presented to each of the witnesses as they stood there is: What did they do? That is suggestive.

Put in context, the trial court believed that the use of the word "they," as opposed to the word "he," suggested to the witnesses that more than one defendant was present in the lineup. We disagree.

There is no question that all three defendants were placed in the lineup together, and that the witnesses selected three of the participants in the lineup. But there was no evidence that the witnesses were explicitly told that there were multiple suspects in the lineup, let alone how many. Officer Wagner testified that he asked the witnesses, "Do you see anyone that you recognize; if so, what did they do?" Although the first question was not written on the lineup sheet, we believe that it is simply illogical to assume as the trial court did that, therefore, "What did they do?" was the only question posed to the witnesses. We believe that the question must be considered in its entirety. Officer Wagner's use of the term "they" certainly constituted a poor grammar choice, but we do not find that this colloquialism supports the trial court's conclusion that the witnesses were aware that more than one suspect was present in the lineup.[1]

[1] Notably, when asked by the trial court what he told a witness a lineup was, Officer Wagner
(continued…)

The officer's phraseology is similar to the grammatically incorrect statement, "No one can escape their destiny." Both mix a singular noun with a plural reference. The trial court clearly erred in concluding on the basis of the officer's phraseology that the witnesses were informed that there were multiple suspects in the lineup.

Next, we consider whether the factual findings of the trial court support its conclusion that the lineup was unduly suggestive. In *Kurylczyk, supra* at 306, the Court observed:

> [A] suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification. [*People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1997).] The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification.
>
> When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification. Some of the relevant factors were outlined in *Neil v Biggers* [409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972)]:
>
> > As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include 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.

In arguing that the trial court's decision to suppress the identification evidence was clearly erroneous, the prosecution takes issue with the trial court's reasoning that the fact that all three defendants appeared in a single lineup irreparably taints the lineup. The prosecution correctly points out that Michigan case law indicates that simply because more than one defendant is present in the lineup does not, by itself, render the lineup unduly suggestive. See *People v Curtis,* 34 Mich App 616, 617; 192 NW2d 10 (1971); *People v Williams*, 14 Mich App 186, 189; 165 NW2d 296 (1968).

The prosecutor also takes issue with the trial court's consideration of the fact that defendants were represented by a single attorney at the identification as a factor in determining that the lineup was unduly suggestive. We agree. Although defendants had a right to have an attorney present because they were in custody, *People v Anderson,* 389 Mich 155, 168; 205

(…continued)

testified, "I told her she would be placed in a room where she could see them, they couldn't see her, and if she recognized anyone, to point to them, identify them by number, and state what, if anything, that they did." It is apparent from this response to the court, and from other similar statements, that Officer Wagner often used the plural form of a word when, grammatically speaking, the singular form should have been used.

NW2d 461 (1973); *People v Winters,* 225 Mich App 718, 722; 571 NW2d 764 (1997), we fail to see how the lack of an independent attorney for each client rendered the identification unduly suggestive. As plaintiff points out, there was nothing to suggest any apparent conflict between defendants at the lineup. There was no finger pointing or any indication to suggest that one defendant incriminated another. Therefore, we find that the trial court clearly erred in considering this as a factor that affected the lineup procedures.

Lastly, plaintiff argues that the physical differences between the participants in the lineup did not render it unduly suggestive. Physical differences do not automatically render a lineup unduly suggestive. Rather, these differences relate to the weight given the identification, not to its admissibility. *Kurylczyk, supra* at 312. It is axiomatic that the lineup should feature people that resemble the suspects. But physical differences are only significant to the extent that they are readily apparent to the witness and substantially distinguish the defendant from the other lineup participants. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Unfortunately, the witnesses were not asked about their visual impressions of the similarities or differences in the appearances of the individuals present in the lineup. Therefore, we must rely on our own assessment of the lineup participants' physical differences.

The record indicates that six of the seven lineup participants were 5'9"-6'1" tall and, among them, the greatest weight discrepancy was thirty pounds. The remaining participant, who was in the number four position, was 5'6" tall and weighing 220 pounds. All participants had facial hair; six had goatees and one, who was in position number one, had a mustache only. Also, all participants were relatively close in actual age, except for the participant in position number three who was forty-four years old. The trial court appeared to put much emphasis on these numbers. However, the critical comparison needs to be between each participant as he actually appeared in the lineup.

Looking at the photograph of the lineup, the numerical differences between the participants in age, height, and weight are not accentuated. The oldest participant does not appear markedly older and the difference in appearance of the shortest/heaviest participant is not as significant as a strict numerical comparison indicates. Viewing the lineup participants' actual appearances, the physical differences among them did not substantially distinguish defendants from the other participants.

The trial court also stated that it had "a problem with the fact that the description initially was two men and a woman." Although the police description initially identified the suspects as two black males and one black female, two of the three witnesses were emphatic that three black males were involved in the carjacking and denied stating that a woman was involved. The third witness, in providing a description of the suspects, speculated that one might have been a woman. Therefore, the fact that the lineup featured all black males was not highly significant.

Regarding the other factors to be considered in determining whether a lineup was unduly suggestive, *Neil, supra*, the record also showed that (1) the lineup was conducted less than a day after the incident; (2) two of the three witnesses immediately identified defendants and were able to state where they had been standing in relation to the victim's car; and (3) each witness had an opportunity to view defendants at the time of the carjacking. The evidence did also indicate that the witnesses were upset by the incident, two were visibly shaken, the witnesses gave fairly general descriptions of the suspects, and there were inconsistencies between the witnesses'

recollections of how long the incident lasted and the lighting on the scene. Considering the totality of circumstances, we find that the trial court clearly erred in finding that the lineup was unduly suggestive. In light of this holding, we need not address whether an independent basis existed for each of the witnesses' identifications. See *People v Gray,* 457 Mich 107, 115; 577 NW2d 92 (1998) (independent basis for in-court identification needed where the pretrial identification is found to be tainted).

In docket number 242029, the prosecution contends that the trial court erred in suppressing Looper's lineup identification on the basis of an illegal arrest. We review for clear error a trial court's factual findings regarding a motion to suppress and its ultimate decision is reviewed de novo. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000).

In this case, Looper was arrested without a warrant. A warrantless arrest is legal "if a misdemeanor is committed in the officer's presence or if there is reasonable cause to believe a felony was committed and that the person arrested committed it." *People v Manning,* 243 Mich App 615, 622; 624 NW2d 746 (2000), citing MCL 764.15(1). The unchallenged testimony showed that when Officer Raby saw Sanders fire a shot from a rifle into an open field, Looper was sitting in a van with the doors closed, watching Sanders and Sanford who were seated at a picnic table approximately twenty feet away. Looper was located about fifty yards from Watts' carjacked car. The prosecution presented no evidence that linked Looper, at the time of his arrest, to either Watts' car or the other defendants. In fact, there was no evidence that Looper even knew Sanders or Sanford. Moreover, Officer Raby testified that he would have released Looper had it not been for the order of Officer Russell to arrest him.

Under these facts, we find that the trial court did not err in ruling that there was no evidence which would have led a reasonable person to conclude that Looper had been involved in any crime. At best, the prosecution showed that Looper was in the proximate area where the carjacking occurred and Sanders fired a weapon. Because Looper's arrest was illegal, his post-arrest lineup identification was also illegal, and the trial court properly suppressed it. *People v Harrison,* 163 Mich App 409, 420; 413 NW2d 813 (1987).

Plaintiff counters that under *People v Degraffenreid,* 19 Mich App 702, 708; 173 NW2d 317 (1969), Looper's presence alone near Sanders was sufficient to justify his arrest. In a footnote, the *Degraffenreid* Court observed that "while mere presence, even with knowledge that a criminal offense is about to be or is being committed, is not enough to support a conviction of a person as an aider or abettor under the statute, such presence is enough to establish probable cause justifying an arrest." *Id.* at 708 n 2. Plaintiff's reliance on this case is misplaced. First, the Court's use of the phrase "*such* evidence" clearly indicates that the Court was stating the mere presence *plus* knowledge of the crime is sufficient to justify an arrest on an aiding and abetting theory.[2] Second, and more importantly, this footnote is clearly dicta. The actual

[2] This Court has held that a person's mere proximity to others independently suspected of criminal activity does not establish probable cause to search or seize that person. A search or seizure of a person must be supported by probable cause particularized with respect to that person. *People v Coscarelli*, 196 Mich App 724, 726-728; 493 NW2d 525 (1992), citing *Ybarra*
(continued…)

circumstances surrounding the defendant's arrest in *Degraffenreid* involved considerably more than the defendant's "mere presence," and this Court relied on those circumstances, rather than the defendant's mere presence, in refusing to suppress certain evidence. *Id.* at 706-708.

Plaintiff also argues that the police had probable cause for detaining Looper because he witnessed Sanders' possession and discharge of a weapon. However, the prosecution's argument ignores the fact that Looper was actually arrested, not merely detained. The propriety of Looper's detention was never at issue. Also, even if Looper was validly detained, no evidence was discovered as a result to implicate him in any crime; thus, the police still lacked probable cause to arrest Looper. Therefore, the prosecution's argument justifying Looper's detention on the street is irrelevant.

Affirmed in part and reversed in part.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski

(…continued)

v Illinois, 444 US 85, 91; 100 S Ct 338; 62 L Ed 2d 238 (1979). Even for a less-intrusive investigatory stop, the officer must have a reasonable particularized suspicion that that individual has committed or is about to commit a crime. *People v Nelson*, 443 Mich 626, 631-632; 505 Nw2d 266 (1993).