

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERENCE DARRYL GRAY,

Defendant-Appellant.

UNPUBLISHED
December 20, 2005

Nos. 257139; 257140
Wayne Circuit Court
LC Nos. 04-005548-01;
04-001585-01

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

In this consolidated appeal, defendant Terence Gray appeals as of right his jury trial convictions for armed robbery,¹ felon in possession of a firearm,² and possession of a firearm during the commission of a felony (felony-firearm).³ The trial court sentenced Gray, as a second habitual offender,⁴ to concurrent prison terms of 15 to 45 years for the armed robbery conviction and 13 months to 7½ years for the felon in possession of a firearm conviction, and a consecutive two-year prison term for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

This case arises out of an armed robbery at the Dollar Mart at 12700 East Eight Mile Road in the city of Detroit at approximately 1:20 or 1:30 p.m. on January 15, 2004. Before trial, Gray filed a motion for a *Wade*⁵ hearing on the admissibility of his identification by Michael Berry, the owner of the Dollar Mart, at a photographic lineup on January 16, 2004, and at a subsequent live lineup on January 29, 2004. Gray argued that his identification during the lineups and any subsequent in-court identification should be suppressed. The trial court granted Gray's motion for a *Wade* hearing and at the hearing Gray moved to suppress his identification

¹ MCL 750.529.

² MCL 750.224f.

³ MCL 750.227b.

⁴ MCL 769.10.

⁵ *United States v Wade*, 388 US 218, 240; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

from the photographic lineup and the live lineup as overly suggestive. The trial court denied the motion, ruling that there was nothing about the photographic array that rendered it unfair. The trial court noted that all the men had the same skin color and that “[t]here’s no way in the world” the police department would have been able to find a number of men with eyes similar to Gray’s. The trial court noted that Gray’s eyes were “unusual” because they were “slanted.” Turning to the live lineup, the trial court noted that all the men were approximately the same height and weight and that they all had similar facial hair. Accordingly, the trial court denied Gray’s motion to suppress.

At trial, Michael Berry testified that he was working alone at the Dollar Mart at approximately 1:20 or 1:30 p.m. on January 15, 2004, when a black man entered the store, walked around to the corner of the counter, and then walked right behind Berry’s counter. The man was “flashing” a shiny silver gun that Berry believed was either a .45 or a .9 mm. The man pointed the gun at Berry and said, “You’d better open the register. I’m not playing.” Berry described the man as wearing a gray jogging outfit with a gray hooded sweatshirt and a mask that covered his face from the tip of his nose to his chin. The man was between 6’2” and 6’4” tall, weighing approximately 180 pounds. Berry saw half of the man’s forehead down to the tip of his nose and noticed the man’s “angry eyes.” Berry testified that he had seen the man in his store three to four times before. Berry opened the register for the man and the man grabbed about \$100 from the register. The man started “wiggling” the tray, so Berry lifted the tray out, put it on the counter, and showed him that there was no money underneath. The man demanded more money from Berry and asked him to go into his office to get more money. Berry went to his desk to get an envelope of “petty cash” that had approximately \$70 in it. The man was still not satisfied with the amount of money. He asked Berry to open the safe behind his desk, but Berry had trouble remembering the combination for the safe because he never used it. The man kept demanding that he hurry. The man stuck the gun in Berry’s stomach and said, “I’m going to shoot you. I’m going to kill you.” As Berry was still trying to look for the combination, the man sideswiped the gun at Berry’s face, creating a scar on the upper-right side of his eyebrow. The man then swiped Berry with the gun again at the bridge of his nose. When Berry opened the safe, the man saw that there was nothing in it. The man then ran out of Berry’s office and out the door of the store.

Berry testified that his interaction with the man lasted at least five minutes and that he was staring at the man’s face approximately three to four minutes. The man was inches from his face. His store was well lit with fluorescent lighting, and there was also daylight coming in through the windows. Berry mainly noticed the man’s “angry” and “almond-shaped” eyes. He could not specifically see the man’s eyebrows, mouth, or facial hair. Berry identified Gray as the perpetrator in the courtroom.

Berry explained that after the man left, he pressed the panic button in his store, and the police arrived approximately one to two minutes later. Detroit Police Sergeant Michael Chambers testified that when he arrived at the store at approximately 1:30 p.m., he observed that Berry was bleeding from his face. Sergeant Chambers interviewed Berry, and Berry described the perpetrator as a black male, 18 to 30 years old, 6’2” to 6’4” in height, 170 to 180 pounds, dark complected, wearing a black face mask covering the lower portion of his face, with a gray hooded sweatshirt and gray sweatpants. Berry told Sergeant Chambers that approximately \$170

had been taken from the store. Sergeant Chambers' partner, Officer Herman King, broadcast the description that Berry gave over his police radio.

Detroit Police Officer Ryan May testified that after he received the description of the perpetrator over the police radio, he drove around the area near the scene in a "semi-marked" police vehicle and observed a black male wearing a gray hooded sweatshirt and gray sweatpants on an enclosed porch at 20513 Alcoy Street at approximately 1:30 or 1:35 p.m. Officer May identified the man as Gray at trial. Officer May notified Officer King that he had observed a man matching the description of the perpetrator. When Officer King arrived at 20513 Alcoy Street, Officer May was speaking with Gray. After entering the residence and speaking with some individuals inside the house, Officer King arrested Gray. Officer King confiscated \$167 from Gray at the Ninth Precinct.

Detroit Police Sergeant Jonathan Parnell, the officer in charge, testified that he arrived at the Ninth Precinct in the early evening hours of January 15, 2004. Sergeant Parnell conducted a preliminary interview of Gray, advised him of his constitutional rights, and completed an interrogation sheet. Sergeant Parnell also photographed Gray. According to the interrogation sheet Gray provided, he was six feet tall and weighed 170 pounds. Gray was wearing a gray hooded sweatshirt and gray sweatpants. Sergeant Parnell attempted to conduct a live lineup but was unable to find five or six people who matched Gray's physical characteristics. Because of the time constraint under the Department of Justice consent decree to issue a warrant within 24 to 36 hours, and the seriousness of the crime involving a weapon, Sergeant Parnell decided to conduct a photographic lineup instead of a live lineup. At approximately 2:27 p.m. on January 16, 2004, Sergeant Parnell and another officer conducted a photographic lineup at the Dollar Mart while accompanied by a showup attorney. Sergeant Parnell presented a photographic array of six people to Berry and asked if Berry could identify the perpetrator. Berry was not told that the person who committed the crime would be in the array. Sergeant Parnell testified that each photograph in the array contained the visage of black males in their early twenties, with medium-to-dark complexions, and short-to-medium black hair. Defendant was number three in the photographic array. Sergeant Parnell told Berry to take as much time as he needed. Berry looked at each photograph closely. Berry placed pieces of paper over the lower and upper portions of the faces of all the men in the photos to replicate the portion of the perpetrator's face that he saw. After looking at the photographs for approximately nine minutes, Berry identified Gray as the perpetrator. Berry told Sergeant Parnell that he recognized Gray because he had seen Gray in his store before the robbery, and he recognized "the anger in his eyes" and his build. Berry testified at trial that he picked Gray out of the lineup because of his "unusual eyes." Berry was certain about his identification at the photo lineup, but requested a live lineup after the photo lineup because he wanted to make sure the individual he picked had the broad shoulders he remembered. Carl Uhlar, the showup attorney for the photographic lineup, testified that Berry's identification of Gary's photograph was not immediate and that Berry expressed concerns about the photographic lineup because he "remembered the build of the individual better than the face." Uhlar testified that he made no objections to the photographic lineup and that the array was fair to Gray because all of the people in the photographs were similar in ages, complexions, and hairstyles.

Sergeant Parnell testified that he arranged a live lineup at the Wayne County Jail on January 29, 2004. The delay between the photographic lineup and the live lineup was due to the

warrant being issued, the arraignment, the setting of Gray's bond, and the transfer of Gray from the Detroit Police Department's custody to the Wayne County Jail. The live lineup was more feasible at the Wayne County Jail because there were more individuals who matched Gray's characteristics. Sergeant Parnell, Officer Kevin White, Berry, the sheriff's deputies, and a showup attorney were present for the live lineup. Berry was asked whether he could select the perpetrator from the lineup. Six individuals participated in the live lineup. All but one of the individuals in the lineup were in their twenties, all of them had facial hair, five of the individuals were dark complected, and one was medium complected. Four of the individuals were Gray's height, and all of the individuals were within 20 pounds of his weight. It took Berry one minute to identify Gray, standing in position number four, as the perpetrator. Sergeant Parnell testified that Berry did not indicate to him that he had identified Gray because he was the same person that he identified in the photo lineup. Berry chose Gray in the live lineup because of his "body size, his body structure, his broad shoulders, and again, the eyes." Berry testified that he was 100 percent sure that Gray was the perpetrator of the crime. Gray was the only person who appeared in both the photographic lineup and the live lineup.

The parties stipulated that Gray had previously been convicted of a felony and was not eligible to possess a firearm. After the prosecution rested, Gray moved for a directed verdict, which the trial court denied.

Romel Saroki, the owner of Romel's Market on East Eight Mile, testified that his store is located one block from Alcoy Street and that Gray came into his store at approximately 1:00 p.m. on the day of the robbery. Gray was in the store for approximately five minutes and left after purchasing a few items. He was not wearing a ski mask and was not accompanied by anyone. Saroki testified that Romel's Market is located six blocks away from the Dollar Mart.

Terronnia Sears, Gray's girlfriend of almost six years, testified that Gray left her house at 20513 Alcoy at approximately 1:00 p.m. on the day of the robbery and went to Romel's Market. Gray was not wearing a ski mask when he left the house. Gray returned at approximately 1:10 p.m. in the afternoon and did not go out again that day.

Christopher Weathers, Gray's friend of five years, testified that he and Gray walked to Romel's Market on the day of the incident. Weathers and Gray then walked directly back to the house on Alcoy Street. On returning to the Alcoy residence, Weathers and Gray sat on the enclosed porch of the house and did not go out again. Weathers and Gray then observed many police cars in the neighborhood and decided to go to the front porch to see what the commotion was about. A police officer approached the porch and "grabbed [Gray] by the arm and pulled him off the porch." When Gray asked what was going on, the officer "reached his hand right in [Gray's] pocket and pulled out his money." Gray did not attempt to flee.

After deliberating, the jury returned a verdict of guilty on all three counts, and the trial court sentenced Gray as outlined above. His appeal followed.

II. Gray's Testimony

A. Standard Of Review

Gray argues that the trial court violated his constitutional right to testify on his own behalf before closing arguments. Although framed in terms of a denial of his constitutional right to testify, Gray's argument is essentially that the trial court erred in denying his defense counsel's request to call him as a witness to testify on surrebuttal regarding when he last lived at the address listed on the notice of alibi. Because Gray disclosed the contents of the proffered surrebuttal testimony at trial, we find that he properly preserved this issue.⁶ We review the trial court's admission or exclusion of evidence for a clear abuse of discretion.⁷ Likewise, we will not disturb the trial court's decision to admit or exclude rebuttal evidence on appeal absent a clear abuse of discretion.⁸ An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision.⁹

B. Rebuttal Evidence

"Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'"¹⁰ A defendant is not entitled to present surrebuttal testimony that merely reiterates evidence previously presented during his case-in-chief.¹¹ Here, after the alibi witnesses testified, the prosecution introduced Gray's alibi notice as rebuttal evidence because it conflicted with the alibi witnesses' testimony regarding Gray's whereabouts and the timing of events. Defense counsel then requested that her colleague, attorney Kim Bason, who filed the notice of alibi, testify on surrebuttal. The trial court denied the request because it would give rise to a conflict of interest and necessitate an adjournment of trial. Defense counsel then requested that Gray be called as a witness. Defense counsel made an offer of proof, stating that she believed that Bason had used Gray's old address in the alibi notice and that Gray could testify to the last time he lived at the address. The trial court denied the request, stating, "That's your offer of proof. But the case is over with. This is rebuttal. . . . Now, you're charged with knowing what was in there."

We hold that the trial court did not abuse its discretion in denying Gray's request to present surrebuttal testimony. The record shows that defense counsel knew the discrepancy between the information contained in the alibi notice and the anticipated testimony of the alibi witnesses, and that she knew the prosecution would admit the alibi notice as evidence after

⁶ MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

⁷ *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

⁸ *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

⁹ *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

¹⁰ *Figures*, *supra* at 399, quoting *People v DeLano*, 318 Mich 557, 570 ; 28 NW2d 909 (1947).

¹¹ *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985).

Gray's alibi witnesses testified. It is well established that once the defendant presents an alibi defense, the prosecution is permitted to attack the alibi by commenting on the weakness of the alibi testimony.¹² In fact, during cross-examinations here, the prosecution questioned two of the alibi witnesses regarding whether Gray had been at 8174 Traverse in the city of Detroit on the day of the incident and had gone to Romel's Market at 13350 Eight Mile Road at approximately 1:30 to 2:00 p.m., as indicated in the alibi notice. The witnesses testified that Gray had been at Tenonnia Sears' house at 20513 Alcoy Street and had gone to Romel's Market at approximately 1:00 to 1:10 p.m. Defense counsel, however, did not address the discrepancies on redirect. It was not until the prosecution introduced rebuttal evidence of Gray's alibi notice that defense counsel requested to address the incorrect information in the alibi notice. Because Gray did not avail himself of the opportunity to address these discrepancies and bolster his alibi defense on redirect, we conclude that he was not entitled to present further evidence regarding the matter on surrebuttal and that there was no abuse of discretion.

In addition, we note that Gray had no constitutional right to testify on surrebuttal. As Gray asserts, his right to testify on his own behalf is an important factor in his constitutional right to due process.¹³ However, this case is distinguishable from *People v Solomon*, where this Court found that the trial court abused its discretion when it failed to honor a defendant's request to reopen the proofs, when there was no indication that the defendant waived his right to testify or that the prosecution would have suffered any surprise or prejudice if the defendant was allowed to testify.¹⁴ Here, Gray did not request to reopen proofs to allow his testimony. Gray only requested to present surrebuttal testimony regarding the last time he lived at the address in the alibi notice. We thus find that the trial court's refusal to permit Gray to present surrebuttal testimony on his residence listed in the alibi notice does not implicate Gray's right to testify.¹⁵

¹² *People v Holland*, 179 Mich App 184, 191-192; 445 NW2d 206 (1989), citing *People v Shannon*, 88 Mich App 138, 145; 276 NW2d 546 (1979); *People v Hunter*, 95 Mich App 734, 738-739; 291 NW2d 186 (1980).

¹³ *People v Solomon (Amended Opinion)*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996), citing *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987) (finding right rooted in Due Process Clauses of Fifth and Fourteenth Amendments, in Compulsory Process Clause of Sixth Amendment, and in Fifth Amendment guarantee against compelled testimony).

¹⁴ *Solomon, supra* at 533-535.

¹⁵ Gray also incorrectly asserts that the denial of the right to testify is a structural error that may not be subject to a harmless error analysis. While a harmless error analysis is unnecessary in this case because Gray was not unconstitutionally deprived of his right to testify, this Court has previously held that the denial of a defendant's right to testify is subject to a harmless error analysis. *Solomon, supra* at 535-536. Even assuming that the trial court's ruling deprived Gray of his constitutional right to testify, given the overwhelming evidence of Gray's guilt, we find that it was harmless error beyond a reasonable doubt.

III. Due Process

A. Standard Of Review

Gray argues that his right to due process was violated because the police improperly conducted a photographic lineup instead of a corporeal lineup. Gray also argues that Berry's in-court identification of Gray was influenced by the prior identification procedure and had no independent basis. We will not generally reverse a trial court's decision to admit identification evidence unless it is clearly erroneous,¹⁶ but we review relevant issues of law de novo.¹⁷ Clear error exists when we are left with a definite and firm conviction that a mistake was made.¹⁸

B. Photographic Showups

When an accused is in custody or can be compelled to appear, identification by photographic showup should not be made unless a legitimate reason for doing so exists.¹⁹ Circumstances which might justify use of a showup include: (1) it is not possible to arrange a proper lineup; (2) there is an insufficient number of persons available with the accused's physical characteristics; (3) the case requires immediate identification; (4) the witnesses are distant from the location of the accused; and (5) the accused refuses to participate in a lineup and by his actions seeks to destroy the value of the identification.²⁰

Here, we hold that a photographic lineup was properly used in lieu of a corporeal lineup because the prosecution sufficiently proved that it was not possible to arrange a proper lineup and that there was an insufficient number of persons available with Gray's physical characteristics.²¹ To support his claim that the instant photographic identification was improper, Gray cites *People v Ealey*,²² where this Court found the photographic lineup improper because two or three prisoners matched the defendant's description, off-duty officers could have been called in to participate, no attempt was made to contact neighboring police departments to arrange a lineup, and no special circumstances were present to require immediate identification of the defendant. The instant case is, however, distinguishable. Nothing in the record indicates that Sergeant Parnell sought to avoid a corporeal lineup, as was the case in *Ealey*. To the contrary, the record shows that Sergeant Parnell made substantial efforts to conduct a corporeal lineup but was unable to do so because of the lack of individuals with physical characteristics

¹⁶ *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993).

¹⁷ *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

¹⁸ *Kurylczyk*, *supra* at 303.

¹⁹ *Kurylczyk*, *supra* at 298, 318.

²⁰ *People v Anderson*, 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973), overruled in part on other grds *Hickman*, *supra* at 602; *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

²¹ *Anderson*, *supra* at 186.

²² *People v Ealey*, 102 Mich App 301, 306-307; 301 NW2d 514 (1980).

similar to those of Gray. Although it would have been preferable for the police to call other precincts, we conclude that the failure to do so did not invalidate the photographic identification. “There is no authority that requires the police to make endless efforts to attempt to arrange a lineup.”²³ Here, the trial court gave credence to Sergeant Parnell’s explanation, noting that “there’s no way in the world the Police Department was going to find a number of black men with eyes slanted like [Gray’s.]” Because this Court defers to the trial court’s factual finding that suitable persons were not available for a corporeal lineup,²⁴ we hold that the trial court did not err in finding that the circumstances justified use of a photographic lineup.

Moreover, as the trial court properly found, the photographic lineup was “a necessity.” In *Ealey*,²⁵ this Court determined that no special circumstances existed requiring the immediate identification of the defendant because his arraignment “could properly have been delayed for a reasonable time in order to arrange a corporeal lineup.” Unlike *Ealey*, an immediate identification of Gray was necessary here because the Detroit Police Department was obligated under a consent decree with the Department of Justice “to process a warrant within 24 hours; no later than 36.” Thus, Sergeant Parnell permissibly conducted the photographic lineup when Gray had been in custody for approximately 24 hours.

Further, the record supports the trial court’s finding that the photographic lineup and the subsequent corporeal lineup were “fair.” The fairness of an identification procedure is evaluated in light of the total circumstances.²⁶ The test is whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable.²⁷ When counsel is present at the lineup, as in this case, the defendant bears the burden of showing that the lineup was impermissibly suggestive.²⁸ The United States Supreme Court indicated that the following factors should be considered when evaluating the likelihood of misidentification:

“[T]he 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.”²⁹

²³ *Davis, supra* at 547.

²⁴ *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

²⁵ *Ealey, supra* at 307.

²⁶ *Kurylczyk, supra* at 311-312, 318; *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

²⁷ *Kurylczyk, supra* at 311-312, 318.

²⁸ *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

²⁹ *Kurylczyk, supra* at 306, 318, quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).

Here, with respect to his opportunity to view Gray, Berry testified that the incident occurred during the mid-afternoon and that there were fluorescent lights illuminating the store. With respect to the degree of attention, Berry testified that he was face-to-face with Gray for three or four of the approximately five minutes Gray was in the store. With respect to his prior description of Gray, Berry gave accurate descriptions of the perpetrator. Berry described the perpetrator as a medium or dark complected black man with broad shoulders, standing between 6'2" and 6'4" tall, and weighing approximately 180 pounds. Berry also stated that the perpetrator wore a gray jogging outfit with a gray hooded sweatshirt and had a black rag or mask that covered the lower portion of his face. With respect to Berry's level of certainty, he positively identified Gray at both the photographic and corporeal lineups, and he testified that he had no doubts of his identifications. There was also a short time span between the crime and the identifications. The incident occurred on January 15, 2004, Berry participated in the photographic lineup on January 16, 2004, and in the corporeal lineup on January 29, 2004. Thus, we find that all the factors weighed toward admission of the identification testimony.

In addition, there was nothing about the other participants in the photographic and corporeal lineups that rendered Gray "substantially distinguishable."³⁰ Gray, in fact, does not dispute that he did not stand out in terms of complexion, height, weight, and approximate age at the lineups. Therefore, when viewing the totality of the circumstances, we find that the challenged pretrial identification procedure was not unduly suggestive, and thus, the trial court did not clearly err in admitting the identification evidence.³¹

Gray maintains, however, that the photographic lineup was unduly suggestive with respect to the corporeal lineup because he was the only common participant in both lineups. The fact that Gray was the only common participant in both lineups does not make the second lineup suggestive or prejudicial. As discussed above, Gray was identified in the photographic and corporeal lineups, both of which were properly conducted. As such, we hold that Gary's assertion is without merit.

Gray further argues that there was an insufficient independent basis for the admission of his in-court identification. However, the need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive.³² In this case, we have already determined that the evidence supports the trial court's finding that Gray's pretrial identification was fair and not unduly suggestive, and thus, there is no need to establish an independent basis for Gray's in-court identification.³³ Even assuming error in the challenged lineup procedure, the record shows that, under the factors listed in *People v Kachar*,³⁴ Berry had an independent basis for his in-court identification of Gray.

³⁰ *Kurylczyk, supra* at 312.

³¹ *Id.* at 311-312, 318.

³² *McElhaney, supra* at 286.

³³ *Id.* at 288.

³⁴ *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

IV. Search And Seizure

A. Standard Of Review

Gray claims that his state and federal constitutional rights to be free from unreasonable arrests, searches and seizures were violated when the police arrested him without a warrant or probable cause, and that, consequently, the money seized from him should have been suppressed as fruit of his illegal arrest. Because Gray did not file a pretrial motion to suppress the money obtained during the warrantless search, this issue has not been properly preserved.³⁵ Our review of Gray's unpreserved claim is for plain error that affected his substantial rights.³⁶

B. Warrantless Arrests Based On Probable Cause

Both the United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures.³⁷ "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment."³⁸ In reviewing a finding of probable cause, the reviewing court must determine whether the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony.³⁹

We find that the existing record shows that there was probable cause to arrest Gray. Here, the robbery occurred at approximately 1:30 p.m. on January 15, 2004. When Sergeant Chambers and Officer King arrived at the scene one or two minutes after the robbery, Berry gave them the description of the perpetrator, including his complexion, age, height, weight and clothing. Berry also told them that approximately \$170 had been taken from his store. Officer King broadcast the description of the perpetrator over the police radio. After receiving the description of the perpetrator, Officer May drove through a nearby neighborhood at approximately 1:30 or 1:35 p.m. and observed Gray standing inside an enclosed porch at 20513 Alcoy Street, which was approximately four blocks away from the scene. Gray matched the description of the perpetrator. Gray looked in Officer May's direction and went inside the house. When Officer May drove around the block and returned to 20513 Alcoy Street, Gray was on the front porch. Officer May notified Officer King that he found an individual matching the description of the perpetrator. Officer King then arrested Gray after speaking with people in the house. Officer King confiscated \$167 from Gray at the Ninth Precinct. The outfit that Gray was wearing at the time of arrest matched the description of the outfit that Berry saw.

³⁵ *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004).

³⁶ *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

³⁷ US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

³⁸ *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

³⁹ *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998).

These facts would justify a fair-minded person of average intelligence in believing that Gray had committed the crime.⁴⁰ Particularly significant is the fact that Officer May found Gray four blocks from the scene approximately ten minutes after the robbery, that Gray fit the description of the perpetrator and was wearing the same outfit as the perpetrator, and that Gray went into the house when he saw Officer May. Accordingly, we conclude that Gray's arrest was supported by probable cause, and thus, Gray failed to show that the admission of the money found during the search was plain error affecting his substantial rights.⁴¹

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

⁴⁰ *Kelly, supra* at 631.

⁴¹ *Carines, supra* at 763, 774.