STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2012
v	No. 306185 Wayne Circuit Court
GREGORY IVORY, Defendant-Appellant.	LC No. 11-000918-FC

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of carjacking, MCL 750.529a, unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm less than murder, MCL 750.84.[1] Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 13 to 25 years' imprisonment for the carjacking conviction, 6 ½ to 15 years' imprisonment for the unarmed robbery conviction, and 5 to 10 years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction. We affirm.

I. JUDICIAL DISQUALIFICATION

Defendant argues that his due process rights were violated by the trial judge's failure to recuse himself from presiding over defendant's trial because the judge was casually acquainted with the victim several years ago.

Defendant properly preserved this issue because he moved to disqualify the trial judge and, after the judge denied his motion, he sought review before the chief judge, who also denied his motion. *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). "This Court reviews a trial court's factual findings on a motion for disqualification for an abuse of discretion, but the application of the law to the facts is reviewed de novo." *People v Wade*, 283 Mich App 462, 469; 771 NW2d 447 (2009).

[1] Defendant was also convicted of unlawfully driving away a motor vehicle, MCL 750.413, but this conviction was vacated.

Due process requires that all parties have an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Under the Michigan Court Rules, the disqualification of a judge is warranted if, among other reasons not pertinent here, a "judge is biased or prejudiced for or against a party" or where the judge, under an objective and reasonable view, "has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556] US [868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."[2] MCR 2.003(C)(1)(a) and (b). A trial judge is presumed to be impartial; the party asserting bias bears the heavy burden of overcoming this presumption. *Wade*, 283 Mich App at 470.

Absent a showing of actual bias or prejudice, "[d]ue process principles require disqualification . . . 'in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable[.]'" *In re MKK*, 286 Mich App 546, 567; 781 NW2d 132 (2009), quoting *Cain*, 451 Mich at 498; see also *Caperton*, 556 US at 877. The inquiry is an objective one that focuses on whether, "under a realistic appraisal of psychological tendencies and human weakness," the judge's interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id*. at 883-884 (internal citation and quotation marks omitted). Situations in which the risk of actual bias is too high to be constitutionally tolerable include where the judge:

> (1) has a pecuniary interest in the outcome;
> (2) has been the target of personal abuse or criticism from the party before him;
> (3) is enmeshed in [other] matters involving petitioner . . . ; or
> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (internal citations and quotation marks omitted).]

Nevertheless, due process requires the removal of a judge only in the most extreme circumstances. *Cain*, 451 Mich at 498.

Defendant concedes that the trial judge never exhibited actual bias; he alleges only an appearance of impropriety. The record reflects that the trial judge knew the victim from approximately seven or eight years ago when their sons participated in a soccer program. The extent of their interaction essentially consisted of a polite remark at a soccer game on one or two occasions. The judge indicated that their limited connection never involved frequent communication, exchanging telephone numbers or telephone calls, having dinner, or going to events together. The trial judge also had no pecuniary interest in the outcome of defendant's

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[2] Canon 2 of the Michigan Code of Judicial Conduct provides, in part, that "[a] judge must avoid all impropriety and appearance of impropriety." Code of Judicial Conduct, Canon 2(A)

trial; he had not been the target of any abuse or criticism by any party; he was not enmeshed in other matters with any party; and he was not previously an accuser, investigator, factfinder, or decisionmaker in a case involving a party. The trial judge was forthcoming about the prior contact and indicated that there was nothing about it that would affect his impartiality.

Viewed objectively, *Caperton*, 556 US at 883-884, the mere acquaintance between the trial judge and the victim from seven or eight years ago did not give rise to an appearance of impropriety or create a constitutionally intolerable risk of actual bias. Defendant has failed to overcome the strong presumption that the trial judge was impartial, *Wade*, 283 Mich App at 470, or establish that the circumstances presented were so extreme as to warrant disqualification, *Cain*, 451 Mich at 498. Reversal is not warranted.

II. DOUBLE JEOPARDY

Defendant next argues that his double jeopardy rights were violated when, after his first trial ended in a mistrial at his request, he was retried and convicted in a second trial. Because defendant failed to raise this claim in the lower court, review is limited to determining whether plain error occurred that affected defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

Double jeopardy protections are twofold; they prohibit multiple prosecutions for the same offense after an acquittal or a conviction and they also prohibit multiple punishments for the same offense. *People v Grace*, 258 Mich App 274, 279; 671 NW2d 554 (2003).[3] The prohibition against multiple prosecutions, however, does not automatically bar retrial in every case. *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002). Generally, retrial is not barred if the defendant, in the absence of provocation by the prosecutor, requested or consented to the mistrial, or if the mistrial was required because of manifest necessity. *Id.*; *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). If the mistrial resulted from innocent or even negligent conduct by the prosecutor, or from facts beyond his control, double jeopardy does not bar retrial. *Id*. at 257. In contrast, retrial is prohibited if, under the objective facts and circumstances of the case, a defendant's motion for a mistrial was "prompted by intentional prosecutorial conduct" that was "intended to provoke the defendant into moving for a mistrial." *Id*. at 253, 257.

Defendant argues that retrial should have been barred because the prosecution's failure to disclose that the van that was carjacked was recovered several months later constituted a *Brady*[4] violation that essentially "goaded" him into requesting a mistrial.

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[3] There is no dispute that jeopardy had attached in defendant's first trial. At the time defendant moved for a mistrial, the jury had already been selected and sworn and the trial was well into the second day of testimony. See *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002).

[4] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

We find no evidence that the prosecutor or the police engaged in "intentional prosecutorial conduct" that was "intended to provoke the defendant into moving for a mistrial." *Id*. at 253. The trial court stated that it did not believe there was any deliberate or intentional wrongdoing and that the mistake was inadvertent. The prosecutor, who opposed defendant's motion for a mistrial, stated that she was surprised by the testimony of the officer in charge that the victim's van had been recovered. She indicated that she gave all of her discovery documents to defendant before trial, but she did not know of the development regarding the van until the officer testified. Nothing in the record suggests that the prosecutor had anything to gain from starting over with a new trial. In addition, the officer in charge explained that he was not immediately informed of the recovery of the van and that it was back in the victim's possession before he was notified of its recovery. He also indicated that the van was not preserved for evidence because the recovering officer did not know it was a vehicle that had been the subject of a carjacking. Also, the ignition was damaged, which suggested that someone else handled the van in the interim. The officer opined that there was likely little evidentiary value in testing the van for fingerprints because of the lapse of time and interim handlers.

The objective facts and circumstances of the case do not show any deliberate prosecutorial conduct that was intended to provoke defendant's motion for a mistrial. *Id*. at 253, 257. Defendant has failed to establish that the prosecutor or the police suppressed favorable evidence that would have changed the outcome of the trial. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The record supports that the conduct of the prosecutor and the police was innocent and inadvertent, or, at most, negligent. Thus, defendant's retrial was not barred by the principles of double jeopardy. *Dawson*, 431 Mich at 257. The trial court did not err in failing to declare sua sponte that these principles prohibited defendant's retrial.

III. PHOTOGRAPHIC LINEUP

Defendant contends that the trial court erred in determining that the photographic lineup shown to the victim was not impermissibly suggestive.

Defendant properly preserved this issue for appellate review by requesting that the trial court suppress the identification. Cf. *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). We therefore review this issue for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

A pretrial identification procedure violates an accused's due process rights when, considering the totality of the circumstances, "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). A photographic array is usually not considered suggestive if it contained some photographs that were fairly representative of the defendant's physical features and therefore adequately tested the witness's identification. *Kurylczyk*, 443 Mich at 304. "[D]ifferences 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." *Id.* at 304-305 (footnotes omitted).

The fact that defendant's photograph was somewhat narrower than the others and his head size was slightly different than some of the other subjects' head sizes did not render the

lineup unduly suggestive. Overall, the photographs were fairly representative. *Kurylczyk*, 443 Mich at 304. There is no indication from the trial testimony that, in selecting defendant's photograph, the victim relied on any of the minor differences of which defendant complains. *Kurylczyk*, 443 Mich at 305. Rather, the record reflects that the victim was able to identify defendant because he observed defendant during the attack and he was previously acquainted with defendant as a potential tenant at one of his rental properties. Giving further credence to the finding that the lineup was not unduly suggestive is the fact that another witness failed to identify defendant when he was shown the same photographs.[5] In addition, any minor differences were further minimized by the officer's use of an overlay over the photographs; this placed the focus on the subjects' faces and "equalize[d]" the size of the photographs. We conclude that the trial court's determination that the photographic lineup was not impermissibly suggestive was not clearly erroneous. *Kurylczyk*, 443 Mich at 303.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

[5] This witness narrowed his choices to two individuals, including defendant, but eventually picked the other individual from the photographic lineup. At trial, the witness clarified that after seeing defendant in person he could identify him as the perpetrator.