

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON SMOTHERS,

Defendant-Appellant.

UNPUBLISHED

October 3, 1997

No. 187850

Recorder's Court

LC No. 95-000440 FY

Before: O'Connell, P.J., and White and C. F. Youngblood*, JJ.

MEMORANDUM.

On this appeal of right from a conviction by jury of unarmed robbery, MCL 750.530; MSA 28.798, and adjudication of being a fourth offender, MCL 769.12; MSA 28.1084, defendant contends that an identification proceeding in which the victim and sole eyewitness to the crime selected defendant was unnecessarily suggestive and irreparably conducive to misidentification. After an evidentiary hearing, the trial court found that defendant had failed to carry his burden of proving that the lineup was unfair in any significant respect.

Of the six lineup participants, four were heavier and one lighter in weight than defendant. Defendant and four others had facial hair, and were reasonably similar in height and complexion. The only significant distinction between defendant and the other lineup participants was that defendant had a visible cut under one eye, sustained, according to his testimony, when he was set upon by civilians shortly after the robbery and before being turned over to police. There is no record evidence, however, that the victim had any reason to suspect that the person who robbed her would have any injuries or visible wounds; so far as the record indicates, the robber was wholly uninjured in the struggle with the victim over the bag of money. Thus, this distinctive feature of defendant would, if anything, have confused or misled the victim into identifying someone else, rather than have singled defendant out as a likely suspect. The trial court accordingly did not clearly err in concluding that the lineup was not so impermissibly suggestive as to be irreparably conducive to misidentification. *People v Kurylczyk*, 443 Mich 289, 303-304; 505 NW2d 528 (1993). Further, the victim's testimony was inconsistent with defendant's testimony regarding coaching by police.

* Circuit judge, sitting on the Court of Appeals by assignment.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood