

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH DAVID EDMUNDS,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 245498

Wayne Circuit Court

LC No. 01-014115

Before: Neff, P.J., and Zahra and Murray, JJ.

MEMORANDUM.

Defendant was charged with four counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. Following a nonjury trial, defendant was convicted of two counts of armed robbery and the two weapons offenses for which he was sentenced to prison terms of thirteen to twenty years, thirty months to five years, and five years, respectively. He appeals as of right. We affirm.

Defendant's sole claim on appeal is that the trial court erred in denying his motion to suppress witness identification testimony. The trial court's ruling on the admission of identification evidence is reviewed on appeal for clear error, which "exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Defendant contends that the lineup was unduly suggestive because of the differences in the subjects' ages, heights, and weights. Because counsel was present at the lineup, the burden of proof is on the defendant to factually support his claim that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). The fact that there are physical differences between the defendant and other subjects in the lineup goes to the weight of the identification, not its admissibility, *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997), and does not in and of itself render the lineup impermissibly suggestive. *Kurylczyk*, *supra* at 312. Physical differences among the subjects "are significant only to the extent that they are apparent to the witnesses and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

All of the subjects varied in age, height and weight, but defendant was not significantly different from the others in those areas. Several men were of similar height and although two

were significantly taller, the disparity was concealed to an extent by the fact that the men were seated. At least one other man had a build similar to defendant's and defendant was not the only man in his age group. All of the men had facial hair and all wore baseball caps to conceal differences in hairstyles. Although there were discrepancies in the witnesses' testimony at the suppression hearing, the credibility of identification testimony is a question of fact for the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). In light of the record presented, we conclude that defendant has not met his burden of proof and thus the trial court did not clearly err in ruling the identification testimony admissible.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray