

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP ANTHONY PURCELL,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 249105

Oakland Circuit Court

LC No. 2002-186610-FH

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial for attempted unarmed robbery, MCL 750.92 and MCL 750.530. The trial court sentenced defendant to six months in jail. We affirm.

This case arose when defendant walked into a shopping mart near his house and asked a clerk where he could find the bathroom. When he returned from the bathroom, he asked the clerk for a carton of cigarettes. As the clerk retrieved the carton from a shelf, defendant asked how much the cigarettes cost. The clerk scanned the carton and told him they cost \$33. He then asked for another carton. When the clerk turned back toward the counter with a second carton, defendant had his hand on the first carton. When the clerk told him that he could not touch the carton until he paid for it, defendant pulled his hand back. The clerk then scanned the second carton and told defendant that the total came to \$72. The final total included tax. Defendant looked in his wallet and commented that they were expensive. He then asked to look at the cartons. He reached over the counter and began tugging at them. The clerk held onto them tightly. Eyeing the door, defendant pulled the cartons so hard that he pulled the clerk across the counter and knocked over a display. The cartons flew out of defendant's and the clerk's hands and defendant hesitated, lunged at a fallen carton, and then fled the scene empty handed. A security camera recorded the entire incident.

The store manager followed defendant across the store's parking lot to a car parked up a side street. The manager wrote down the car's license plate, and by the time he returned to the store, police had arrived. The manager gave police the description of the car and the license plate number, and within forty minutes the police pulled over a car matching the description and license plate. The officer at the store immediately took the clerk to the scene. The clerk identified defendant as the man who tried to pull the cigarette cartons away from her.

The sole issue at trial was whether defendant was trying to steal the cartons or whether he was merely trying to check the price. Defendant testified that he did try to take the cartons from the clerk, but only for the purpose of verifying their price. Defendant admitted that he never saw price tags on the carton and that he knew they only displayed an indecipherable universal product code, but he explained that he simply was not thinking clearly when he reached for the cartons. The jury convicted defendant of attempted unarmed robbery.

Defendant argues that police violated his right to counsel when they conducted the on-scene identification by the clerk. We disagree. Defendant failed to preserve this issue in the trial court, so we will not reverse his conviction unless we find plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Here, defendant had no right to counsel under the federal constitution, because the prosecutor had not yet “initiated adversary judicial criminal proceedings” against him. *Moore v Illinois*, 434 US 220, 227; 98 S Ct 458; 54 L Ed 2d 424 (1977). While the federal constitution protects a defendant from unduly suggestive identification processes, *id.*, the facts of this case do not demonstrate such extensive undue suggestion that the trial court committed plain error by not addressing the issue sua sponte. Further, while our state constitution requires counsel for some preliminary identification processes, we recognize an exception for on-the-scene identifications within minutes of the crime. *People v Winters*, 225 Mich App 718, 727; 571 NW2d 764 (1997). Because the on-the-scene exception applies in this case, the trial court did not plainly err when it allowed the identification into evidence.

Defendant also argues that his conviction is void because the jury array did not contain any minorities, and he is black. We disagree. Defendant failed to preserve this issue, so we will not reverse on this basis unless the trial court committed plain error that affected his substantial rights. *Carines*, *supra*. Accepting as true defendant’s unverified affidavit regarding the racial composition of the jury, defendant nevertheless fails to demonstrate “a problem inherent within the selection process” that resulted in the “systematic exclusion” of minorities from his array, so we find no plain error. *People v Williams*, 241 Mich App 519, 527; 616 NW2d 710 (2000).

Defendant also claims that his trial counsel provided him with ineffective assistance because of his defense attorney’s failure to raise these issues below. We disagree. Defendant did not move for a new trial or *Ginther*¹ hearing, so we limit our review to the record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Based on this record, the alleged errors did not warrant an objection, so defendant fails to carry his heavy burden of demonstrating ineffective assistance. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O’Connell

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).