

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARMIT ARNOLD BANKS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 249837

Wayne Circuit Court

LC No. 03-003426-01

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was convicted of robbery and carjacking only, for which he was sentenced to concurrent prison terms of 90 to 180 months. Defendant appeals as of right, and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's claim on appeal is that the trial court erred in admitting the victim's out-of-court identification of defendant in a photographic lineup after defendant was in custody, which also tainted a subsequent identification made in a corporeal lineup and the in-court identification of defendant at trial, thereby necessitating the suppression of those identifications. This issue has not been preserved for appeal because defendant did not raise it below. MRE 103(a)(1); *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Because defendant failed to preserve this issue, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also claims ineffective assistance of counsel arising out of counsel's failure to seek suppression of the identifications.

The general rule is that where a defendant is in custody, a photographic lineup should not be conducted. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds by *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004). This rule is subject to various exceptions, one of which is where there are not enough people with the defendant's physical characteristics available for a corporeal lineup. *Anderson, supra* at 186-187 n 22. The record shows that a photographic lineup was conducted for just that reason, and there is nothing in the record to indicate that the stated reason was not legitimate, as was the case in *People v Ealey*, 102 Mich App 301, 306; 301 NW2d 514 (1980). In addition, counsel for defendant was present for the procedure, unlike the situation in *People v Means (On Remand)*,

97 Mich App 641; 296 NW2d 14 (1980), which is factually distinguishable for additional reasons.¹ Defendant has not shown plain error.

In addition, any error in conducting a photographic lineup does not require suppression of the victim's in-court identification testimony if there is an independent basis for the identification. *People v Kachar*, 400 Mich 78, 91; 252 NW2d 807 (1977); *McCray*, *supra* at 639. A review of the record shows that under the factors listed in *Kachar*, *supra* at 95-96, the victim had a basis for his in-court identification of defendant independent of the photographic lineup, thus making suppression unwarranted. We likewise find no basis to suppress the identification at the corporeal lineup. Therefore, defendant has not shown plain error affecting his substantial rights. *McCray*, *supra* at 639, 641. Accordingly, defendant's claim of ineffective assistance of counsel also fails. *Id.* at 641.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly

¹ We note that *Hickman*, *supra* at 603-604, held that the right to counsel attaches only to identifications conducted at or after the initiation of adversarial judicial criminal proceedings, thereby overruling *Anderson* in that regard.