

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERVIN JUKYG ATKINSON, a/k/a JERVIN J.
ATKINS,

Defendant-Appellant.

UNPUBLISHED

September 15, 1998

No. 199507

Oakland Circuit Court

LC No. 95-139822 FC

Before: Whitbeck, P.J., McDonald and T. G. Hicks*, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction for armed robbery, MCL 750.529; MSA 28.797, entered after a jury trial. We affirm.

Defendant's conviction arises out of the robbery of complainant, who was making a bank deposit. The robber approached complainant from behind, stuck an object in his back and demanded a money bag. Complainant struggled with his assailant, saw his face briefly, and saw him drive away in a little black convertible. Complainant was able to give the license plate number to police, who traced it to a black Mercury Capri that was registered to defendant.

Complainant selected defendant's photograph from an array produced by police, but was unable to identify him at the preliminary examination. Complainant identified defendant as his assailant at trial. Defendant argues that the trial court clearly erred in allowing the in-court identification where that identification was impermissibly tainted by an improper photographic identification. We disagree.

Contrary to defendant's argument, the right to counsel for a photographic array only attaches when a suspect is in custody. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (Griffin, J., joined by Mallett, J.), 318 (Boyle, J., joined by Riley, J., concurring in this part of Justice Griffin's lead opinion). Further, in order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it

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

led to a substantial likelihood of misidentification. *Id.* A trial court's decision whether a photo array is unduly suggestive is reviewed for clear error. *Id.* at 303.

The trial court did not clearly err in finding that the photo array was not unduly suggestive. The subjects of the photographs are similar in appearance, and there is no showing that their presentation was suggestive. The totality of the circumstances do not indicate that there was a substantial likelihood of misidentification.

Affirmed.

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Timothy G. Hicks