STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2004
v	No. 246234 Genesee Circuit Court
TYRONE WILLIAM MAHAN, Defendant-Appellant.	LC No. 02-010282-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction of armed robbery, MCL 750.529. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to fourteen to thirty years' incarceration. We affirm.

I

Defendant's conviction arises from an armed robbery at a Citgo gas station in Mt. Morris on July 9, 2002. According to the manager-cashier of the gas station, a man wearing a handkerchief mask entered the store at approximately 6:50 a.m. and demanded money. He had a gun. When the man was placing the money into the bag, the mask fell down briefly, and she saw his face. The manager identified defendant as the robber.

Defendant was also identified by a police officer, Janario Thomas, who saw defendant and his girlfriend at a nearby Amoco station just before the Citgo station robbery. The officer ran a LEIN check on their car, a red Pontiac Grand Am, because it was parked so close to the station that the driver's door could not be opened. A video surveillance tape from the Amoco station showed both defendant and the officer at the Amoco station.

Another witness, Andrew Routhier, who had stopped at the Citgo station and saw the robbery in progress, also identified defendant. He stated that he saw defendant and another woman drive up in a red Pontiac Grand Am, saw defendant tie a handkerchief across his nose and enter the station. As Routhier was leaving the station, he realized a robbery was underway, so he turned back and drove his truck up to the station doors in an unsuccessful attempt to block the doors. Routhier obtained the license number of the car, which was the same car seen earlier by Thomas. Routhier's fiancée, who was with him at the Citgo station, also saw the robbery and corroborated these events.

After the robbery, the police stopped defendant's girlfriend in the Grand Am near the gas station. She admitted that she and defendant had stopped at two gas stations the morning of the robbery. She stated that she drove away from the second station after she had an argument with defendant because she thought he planned to rob the station. She later returned, but when it appeared to her that a man outside the station wanted to detain her, she again drove away. She stopped at a pay telephone a few blocks away, where she was apprehended by the police.

Another witness, who worked across the street from the Citgo station, also saw the red Grand Am drive by several times with a man and a woman in it. When it passed the last time, the man was not in the car, and the witness saw him sitting on a retaining wall near the station. He then saw the man enter the gas station. He identified defendant as the man he saw.

The police apprehended defendant a few hours after the robbery while he was standing next to a car in a driveway. Another man, Terrence Taylor, was sitting in the car. The police found a black handgun in the car. Defendant admitted being at the Amoco station. He stated that he had gone there with his girlfriend. They then went to a Sav-a-lot store near another gas station. When he got out of the car to ask for directions, his girlfriend, who had been arguing with him, drove away without him.

Defendant was charged with armed robbery, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and use of a firearm during commission of a felony, MCL 750.227b. The jury acquitted defendant of the concealed weapon and felony-firearm charges, and deadlocked on the felon in possession count.

II

On appeal, defendant argues that the identifications by Thomas and Routhier, based on a photo identification card, were unduly suggestive. Defendant concedes that any error was harmless with regard to Thomas because defendant admitted encountering Thomas in the gas station. Nonetheless, the error was not harmless with respect to Routhier because he and the station manager were the only witnesses to positively identify defendant, and the manager had only a brief glimpse of the robber. Because there was no independent basis for Routhier's identification, and Routhier's in-court identification was crucial to the case, defendant was denied a fair trial and his conviction should be reversed. We disagree.

A trial court's decision to admit identification evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.*

> 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 led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*Id.* at 302-303 (citations omitted).]

Assuming, without deciding, that the presentation of a single photograph to Routhier was an impermissibly suggestive identification procedure, *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000), we find no clear error with regard to the in-court identification. *Kurylczyk*, *supra* at 303.

Factors used to determine whether a witness has an independent basis for an in-court identification include:

> 1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification . . . .
>
> 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
>
> 5. Any previous proper identification or failure to identify the defendant.
>
> 6. Any identification prior to lineup or showup of another person as defendant.
>
> 7. [T]he nature of the alleged offense and the physical and psychological state of the victim. "In *critical situations* perception will become distorted and any *strong* emotion (as opposed to mildly emotional experiences) will affect not only what and how much we *perceive,* but also will affect our *memory* of what occurred."
>
> Factors such as *"fatigue, nervous exhaustion, alcohol and drugs,"* and age and intelligence of the witness are obviously relevant.
>
> 8. Any idiosyncratic or special features of defendant. [*People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977) (emphasis in original; citations omitted).]

Here, the facts adduced at trial demonstrate that an independent basis existed for the identification. Routhier had ample opportunity to observe defendant as the robbery progressed, and when the robber escaped between Routhier's truck and the blocked doorway. Routhier testified that while he was outside the Citgo station, he saw a man get out of a red Grand Am wearing a white jacket with his hair in braids. The man looked over his shoulder at Routhier. Routhier saw the man's face. He saw the man pulling a handkerchief across his face. The man walked past Routhier. As the man was leaving the gas station, he jumped on the hood of Routhier's truck and again looked at Routhier. The man was "like a deer caught in the headlights." His mask fell down. Routhier identified the man as defendant.

Considering the above factors, we note that Routhier was not the victim of the crime, but merely a witness. Routhier had ample opportunity to observe defendant at the time of the crime, and no factors support a conclusion of misidentification, e.g., discrepancies in the description, or identification of someone else. The trial court did not err in denying defendant's motion to suppress the in-court identification. *People v Gray*, 457 Mich 107, 116-117; 577 NW2d 92 (1998); *Kachar, supra.*

III

Defendant argues that the trial court erred in admitting evidence of the gun found in the car because it was improper other acts evidence, MRE 404(b). We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). To the extent that the admission of evidence involves preliminary questions of law, such questions are reviewed de novo. *Id.*

At issue is the handgun found in the car defendant was standing next to when he was arrested. Taylor was in the driver's seat of the car. At Taylor's preliminary examination,[1] defendant testified that the handgun belonged to defendant. He recanted that statement at trial. On appeal, defendant argues that because the handgun was not similar in appearance to the gun used in the robbery, it was improper bad acts evidence. That is, evidence that he had a gun near him two hours after the robbery would demonstrate that he was likely to have had a gun in his possession during the robbery.

Defendant's argument disregards that he was charged with carrying a concealed weapon, felony-firearm, and felon in possession of a firearm.[2] Because the evidence that he had a gun in his presence was relevant to those charges, MRE 404(b) is not implicated. *People v Hall*, 433 Mich 573, 575, 580; 477 NW2d 580 (1989); *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002) ("MRE 404(b) is intended to exclude character evidence, or evidence that would lead the jury to convict a defendant on the basis of his past conduct rather than on evidence of his conduct for the instant offense"). Here, the evidence is not of past conduct, but rather conduct related to the instant charges, and therefore MRE 404(b) is not implicated.

IV

Defendant argues that he was denied his right to a fair trial because the police and the prosecution failed to preserve and produce video images from the Citgo gas station. This issue is unpreserved and therefore subject to review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

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[1] Although Taylor was arrested with defendant, the lower court file does not reveal any connection between Taylor and the instant offense.

[2] The record indicates that these charges were not brought at the time of the armed robbery charge, but instead were a direct result of defendant's testimony at Taylor's preliminary examination that the handgun found in the car belonged to defendant.

At the preliminary examination, the Citgo station manager testified that she recalled defendant because he had come into the gas station several weeks before the robbery. Defense counsel asked the manager if she would check to see whether videotapes from this period existed, and if so, preserve them. The court then suggested that the investigating officer check whether the tapes existed.

Defendant acknowledges that the court's suggestion that the investigating officer check into the tapes was "something less than a specific court order directed toward the prosecutor" and was not followed by a written order. Nonetheless, defendant argues that the failure to produce the tapes was a matter of bad faith on the part of the police and therefore constitutes a denial of due process. Failure to preserve evidence that may have exonerated the defendant will not constitute a denial of due process absent a showing of bad faith on the part of the police. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

We find no plain error affecting defendant's substantial rights. *Carines, supra*. Defendant has not shown that the investigating officer failed to check into the existence of the tapes. Further defendant has not shown that the surveillance tapes would be exculpatory. Considering the overwhelming evidence connecting defendant to the robbery, we cannot conclude that any alleged error affected defendant's substantial rights. *Id*.

V

Defendant argues that the trial court erred in failing to sua sponte arrange for a translator for the Citgo manager, whose command of the English language was limited because she spoke Arabic. Defendant contends that although the manager's courtroom identification of defendant was clear, defense counsel had difficulty communicating with the witness. Defendant argues that the trial court erred in permitting the manager, rather than defendant, to decide whether she needed an interpreter.

"Generally, this Court reviews a trial court's decision regarding whether to appoint an interpreter for a defendant for an abuse of discretion." *People v Warren (After Remand)*, 200 Mich App 586, 591; 504 NW2d 907 (1993). We find no abuse of discretion. A review of the transcript does not suggest that the manager did not understand the questions asked during cross-examination. The manager's testimony, both on direct-examination and cross-examination, was responsive. She stated that she had no trouble reading English and that if she did not understand something she would say so. There is no indication that the manager was not understandable, comprehensible, or intelligible and that the absence of an interpreter denied defendant some basic right. *Id*. at 591-592.

VI

Defendant argues that the trial court erred in denying his request for a one-day continuance so that his sister could testify and that the denial deprived him of his right to compulsory process. We disagree.

This Court reviews the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). A defendant must show prejudice as a result of the trial court's abuse of discretion. *Id.*

Defendant represented that his sister was in Detroit that day because her child was in the hospital. His sister would testify that she saw defendant at his mother's home at the time of the robbery. The trial court rejected defendant's motion for a continuance, finding that the testimony would be cumulative. We find no abuse of discretion.

Defendant offered an alibi defense, which he established by way of his testimony, as well as that of his mother, his mother's fiancé, and two friends, all of whom testified essentially that defendant was at his mother's home at the time of the robbery. At best, his sister's testimony would have been cumulative. The evidence against defendant was overwhelming, and defendant was not prejudiced by the denial of a continuance for additional testimony from his sister.

We find no violation of defendant's constitutional right to compulsory process to obtain witnesses in his favor. Defendant has failed to show that his sister's testimony was imperative, and not merely cumulative. *People v Pullins*, 145 Mich App 414, 418; 378 NW2d 502, 503 (1985). Further, defendant's unsupported statements that the jury would have assigned greater credibility to his sister than the other alibi witnesses is insufficient to establish that her testimony was material. *People v McFall*, 224 Mich App 403, 408, 410; 569 NW2d 828 (1997).

VII

Finally, defendant assigns error to the trial court's failure to sua sponte instruct the jury on the lesser-included charge of unarmed robbery. We find that defendant waived any error with regard to this instruction. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). The record indicates that during discussion of the proposed jury instructions, defendant's trial counsel agreed to omitting the instruction on less serious crimes, CJI2d 3.8. Counsel's decision to forego the instruction on unarmed robbery may have been a matter of strategy. *People v Hall (On Remand)*, 256 Mich App 674, 678 n 1; 671 NW2d 545 (2003). Additionally, following the jury instructions, counsel indicated approval of the trial court's instructions when the court inquired whether there was any request to conference. A defendant may not waive objection to an issue during trial and then raise it as an error on appeal. *Carter, supra* at 214.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio