

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER CARLOS BROWN,

Defendant-Appellant.

UNPUBLISHED

April 26, 1996

No. 171382

LC No. 92-000867-FC

Before: MacKenzie, P.J., and Cavanagh and T.L. Ludington*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to three to ten years' imprisonment for the robbery conviction, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right and we affirm.

This case arises out of a carjacking that took place at approximately 1:00 a.m. on March 24, 1991 at a restaurant drive-up window. Complainant Kevin Hlavaty was in the driver's seat of his car and complainant Tammy Hammontree was in the passenger seat when another vehicle with four men pulled up and blocked Hlavaty's car. A man identified at trial by Hammontree as defendant walked up to the front of Hlavaty's window, pointed a gun at his chest, and demanded that he leave his wallet and walk away. Another man approached Hammontree's side of the car and ordered her to get out and leave her purse. The robbers then drove away with Hlavaty's car. Four or five days later, both Hammontree and Hlavaty identified defendant in a photographic lineup as the person who approached Hlavaty.

Defendant denied committing the robbery. He testified that in March 1991, he was living at that home of Joseph Arnold, and that on the night in question he was at the house watching television. On

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

the morning of March 24, 1991, defendant noticed the subject car parked in front of Arnold's house, and Arnold asked him to help remove the T-tops and radio speakers from the vehicle. Defendant was arrested the same day and then released. On April 24, 1992, he was again arrested in connection with the robbery.

On appeal, defendant first contends that he was denied due process by the thirteen-month delay between the offense and his second arrest. To establish that a delay in arrest requires the dismissal of a case, a defendant must show substantial prejudice to his right to a fair trial and an intent by the prosecution to gain a tactical advantage. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). In this case, we agree with the trial court that defendant failed to establish prejudice from the delay in his arrest. Defendant's claim that the delay prevented him from presenting alibi witnesses at trial does not establish prejudice; the record indicates that defendant presented no alibi witnesses because none were willing to testify for him. His claims that the delay prevented proper identification are also without merit. The photographic lineup took place within days of the robbery. The subsequent loss of the photographic array was not caused by the delay, and the record does not support defendant's contention that the delay made it difficult to determine whether the Hammontree had an independent basis for identifying defendant. We find no error in the court's conclusion that defendant was not prejudiced by the delay. Moreover, defendant has not established that the delay was intended to present the prosecution with a tactical advantage. Under *White, supra*, therefore, reversal is not warranted.

Defendant next contends that the trial court should have suppressed his identification based on the photographic lineup because he was denied his right to have counsel present at the lineup. *People v Kurylczyk*, 443 Mich 289, 299, 303, 318; 505 NW2d 528 (1993). However, there is no right to counsel at a pre-custodial investigatory photographic lineup unless the circumstances underlying the investigation and lineup are unusual. *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). Here, defendant was not in custody at the time of the photographic lineup and there is no evidence of unusual circumstances that would warrant the presence of counsel. Defendant was not entitled to counsel at the lineup.

We also reject defendant's claim that the trial court erred in allowing Hammontree's in-court identification of defendant. An in-court identification must have an independent basis if a pretrial identification procedure is improper or unduly suggestive. See *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Here, there is nothing in the record establishing that the photographic lineup was tainted by improper procedure or was unduly suggestive. As previously noted, defendant was not in custody or the focus of the investigation when the lineup was conducted. Accordingly, there was no need to establish an independent basis for Hammontree's in-court identification of defendant. We find no error.

Next, defendant argues that the district court abused its discretion in denying defendant's motion for a pretrial corporeal lineup. We disagree. The photographic lineup was procedurally proper and there was other identification evidence suggesting that defendant was one of the robbers. Under these

circumstances, we find no abuse of discretion. *People v Emanuel*, 98 Mich App 163, 183; 295 NW2d 875 (1980).

Defendant also claims that the trial court abused its discretion in denying defendant's motion for the appointment of an identification expert. Again, we disagree. MCL 775.15; MSA 28.1252 authorizes payment of the fees for an expert witness, provided the accused is able to show "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial." Consistent with this statute, it is not error to deny a motion for appointment of an expert witness when there is no indication that expert testimony would likely benefit the defense. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). Because defendant has failed to make a showing that he would have benefited from the appointment of an expert, we find no error.

Defendant's final claim is that the trial court abused its discretion in refusing to allow defendant to testify that Joseph Arnold, who was unavailable as a witness due to the assertion of his Fifth Amendment rights, told defendant that he stole Hlavaty's car. We disagree with defendant's contention that Arnold's statement was admissible under MRE 804(B)(3). In order to be admissible under that rule, there must be "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." While defendant has alleged facts appearing to link Arnold to the carjacking, he has failed to present anything that would tend to corroborate the trustworthiness of Arnold's statement. Accordingly, we find no abuse of discretion in the trial court's ruling.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Mark J. Cavanagh
/s/ Thomas L. Ludington