

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL D. DAVIS,

Defendant-Appellant.

UNPUBLISHED

August 2, 2002

No. 232226

Wayne Circuit Court

LC No. 00-008656

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a term of fifty-one months to fifteen years' imprisonment for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that two in court identifications of him were tainted by the witness' unduly suggestive viewings of defendant in a courthouse hallway two weeks after the attempted robbery. Because defendant failed to preserve this identification issue by raising it before the trial court, our review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001).

Although identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process, *People v Anderson*, 389 Mich 155, 167-169; 205 NW2d 461 (1973), the constitutional protections regarding pretrial identifications apply only to police-induced, arranged confrontations, and do not apply to inadvertent pretrial confrontations between a witness and a defendant. *People v Metcalf*, 65 Mich App 37, 50; 236 NW2d 573 (1975); *People v Hampton*, 52 Mich App 71, 77; 216 NW2d 441 (1974), rev'd on other grounds 394 Mich 437; 231 NW2d 654 (1975).

In this case, the record contains no indication that a state actor orchestrated any arranged confrontation between a witness and defendant or otherwise conducted any pretrial identification procedures. The two witnesses, who were present in the courthouse solely for the preliminary examination of defendant's accomplice, inadvertently observed defendant in a courthouse hallway and spontaneously identified him as the perpetrator. Defendant was in the courthouse to

testify at a preliminary examination in a murder case unrelated to the instant crimes. Because such happenstance confrontations do not implicate the constitutional protections applicable to police-induced, arranged pretrial identification procedures, we conclude that defendant has failed to demonstrate plain error arising from the witnesses' pretrial courthouse confrontations with him. *Metcalf, supra* at 50; *Hampton, supra* at 77.¹

Defendant next argues that the evidence presented at trial was insufficient to support his conviction. In reviewing a challenge to the sufficiency of the evidence, we consider the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

Defendant only challenges the sufficiency of the evidence concerning his identity as the perpetrator. One witness, an assistant manager of the McDonald's restaurant that was robbed, testified that defendant had been in the lobby for a half-hour before the crime and that defendant had been behaving suspiciously. During the assault, defendant stood within one foot of the manager and grabbed his tie. Another assistant manager identified defendant as the individual who drew a gun during the incident, and recalled that she was close enough to defendant to try grabbing the gun from his hand and to notice that he had a facial mark, which she subsequently identified on defendant's face at trial. Two other employees who worked in the restaurant on the day of the robbery also testified with certainty that defendant was one of the two assailants. We further note that although the several suspect descriptions provided to the police immediately following the assault varied somewhat, defendant generally fit the descriptions.² *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

¹ Furthermore, we note that defendant failed to demonstrate prejudice arising from the admission of the challenged identifications because two additional eyewitnesses to the crime identified defendant at trial as one of the participants in the robbery.

² The witnesses' descriptions indicated that the suspect was between twenty and thirty-seven years-old, and defendant actually was twenty years-old. A witness described the suspect as five feet eight inches tall and weighing 150 pounds, and defendant actually was five feet six inches tall and weighed between 140 to 145 pounds. Another witness described defendant as "a little bit" taller than herself, and in actuality defendant and the witness were, in the trial court's estimation, "roughly . . . the same height."

We briefly note defendant's further suggestion that he does not have a mole, while the witnesses described to the police that the suspect had an identifying mark (mole, scar or wart) on his right cheek. During the trial, one witness examined defendant's face and testified that the mark was no longer there. Although the witness' original description did not match defendant's actual appearance at trial with respect to the facial mark, the witness explained that the mark could have been a pimple, which subsequently had disappeared. Another witness examined defendant and identified the same mark (which looked "like dirt") she previously had noticed on the suspect's face. Accordingly, sufficient evidence supported the fact finder's reasonable inference that defendant did have an identifying mark of some sort on the right side of his face.

Viewing the evidence in the light most favorable to the prosecution, we conclude that abundant evidence existed from which a rational fact finder reasonably could have concluded beyond any reasonable doubt that defendant committed the offenses.

Defendant lastly claims that the trial court deprived him of his due process right to present a defense when the court refused to grant a continuance to secure defendant's employment records. We review for an abuse of discretion a trial court's decision whether to grant a continuance. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

In determining whether a continuance was warranted, we consider the following factors: (1) whether the defendant was asserting a constitutional right, (2) whether the defendant had a legitimate reason for asserting the right, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant merely was attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *Id.* at 369. A defendant must show prejudice arising from the trial court's abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

The first four factors weigh in favor of granting a continuance. A constitutional right exists to present a defense, *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984), and defendant legitimately might have presented employment records as evidence that he was working during the robbery. Defendant timely asserted his right because he made reasonable attempts before trial to procure the employment records through compulsory process, and the record does not indicate that defendant merely sought to delay trial by moving for a continuance.

Nonetheless, defendant failed to demonstrate actual prejudice arising from the absence of his employment records. *Snider, supra* at 421-422. No indication of record tended to suggest that the employment records would prove favorable to the defense or even that the requested employment records existed or could be produced with additional time. On two previous occasions, the employer, subject to subpoena, failed to produce the requested records. The court itself also contacted the employer, and the manager indicated that he gave whatever records he had to defendant's sister. The manager also stated to the court that he could not testify regarding whether defendant was at work on the specific day of the robbery. In light of defendant's failure to demonstrate whether the requested employment records would aid his defense and the otherwise overwhelming evidence against him (the testimony of four eyewitnesses who clearly identified him as the assailant), we cannot conclude that the trial court abused its discretion in denying defendant's motion for a continuance.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder