STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JORGENSON,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 174839
LC No. 93-000983

Before: Reilly, P.J., and Cavanagh and R.C. Anderson,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to nine to twenty years in prison. Defendant now appeals as of right and we affirm.

I.

Defendant contends that he was denied a fair trial by virtue of a hypothetical posed to the jurors by the trial judge during voir dire. Although defendant failed to object to the judge's comments, this Court will review allegations of error based on the conduct of the trial court, even in the absence of a timely objection, where manifest injustice exists resulting in a denial of a fair trial. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992). Review without the benefit of an objection at the trial court level is particularly appropriate in cases where any objection would had to have been made to the trial judge himself concerning his own conduct. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988).

A trial judge has wide discretion and power over matters of trial conduct; however, that power is not unlimited. *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989). The test for determining whether a trial judge's conduct or comments pierced the veil of judicial impartiality is whether the court's conduct or comments were of such a nature as to unduly influence the jury and

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

thereby deprive the defendant of a fair and impartial trial. *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989).

After reviewing the record, we conclude that the trial judge did not abuse his discretion. In attempting to explain to the prospective jurors that the quality of the evidence was more important than the quantity, the judge never stated nor implied that he believed the testimony of the hypothetical witness. Rather, the judge told the jurors that the scenario was based on "the allegations," and that he did not know the facts to which the actual witness would testify. The judge also warned the jurors that they should accept the testimony of the hypothetical witness only for purposes of the scenario.

Any prejudice which may have resulted from the judge's comments was mitigated by the fact that the trial judge posed another scenario to the jurors in which various hypothetical witnesses for the prosecution were characterized as not being credible. Furthermore, the jurors were properly instructed regarding their role as the trier of fact, the presumption of innocence, and the burden of proof.

Finally, given the overwhelming nature of the evidence against defendant, any error was harmless beyond a reasonable doubt.[1]

II.

Defendant next contends that the trial court erred in instructing the jury regarding the elements of armed robbery. Because defendant failed to object to the jury instructions, appellate review of this issue is waived absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Jury instructions are reviewed as a whole rather than extracted piecemeal to establish error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are somewhat imperfect, there is no error if they fairly presented the issues to be tried and sufficiently safeguarded the defendant's rights. *Id.* Viewed in context, the court's instruction with regard to the intent element of armed robbery did not jeopardize defendant's presumption of innocence or usurp the jury's function as factfinder. Accordingly, we find that manifest injustice has not been shown.

III.

Next, defendant argues that the trial court erred in failing to declare a mistrial upon the admission of evidence indicating that defendant had previously been incarcerated. Defendant did not object to the admission of the allegedly prejudicial evidence, nor did he request a cautionary instruction or move for a mistrial. Therefore, this issue has not been preserved for appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994).

IV.

Defendant next argues that he was denied a fair trial by the prosecutor's remarks during opening and closing argument. Defendant failed to preserve this issue by making the appropriate objection in the

trial court. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Appellate review of allegedly improper remarks is generally precluded absent a timely objection by counsel unless a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *Id.*

The prosecutor did not denigrate defendant's trial counsel by implying to the jury that counsel called a witness to the stand in the hope that he would lie. The prosecutor's remark was not directed at defense counsel personally, but rather at the testimony of the defense witness. Furthermore, a timely objection or curative instruction could have easily cured any prejudice resulting from the allegedly improper comment.

We also find that the prosecutor did not shift the burden of proof during her rebuttal argument. The prosecutor neither asserted nor implied that defendant had a duty to present a defense. To the contrary, she merely responded to the unsupported factual allegations made by defense counsel during the prosecutor's opening statement. Prosecutorial remarks must be evaluated as a whole in light of defense arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Accordingly, no miscarriage of justice occurred.

V.

Finally, we conclude that defendant was not denied the effective assistance of counsel. To establish a denial of effective assistance of counsel, the defendant must prove that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant contends that defense counsel was ineffective in calling Freddie Howard to the stand without investigating to determine whether he could substantiate defendant's alibi. We disagree. At the *Ginther*[2] hearing, defense counsel testified that she did interview the witness, but that he changed his story prior to testifying on defendant's behalf. Under such circumstances, defense counsel was not ineffective in calling Howard to the stand.

Counsel's decision not to move for a mistrial after Howard, Juanita Weaber and Valerie Price testified regarding defendant's criminal background was a matter of trial strategy which this Court will not second guess. *People v Ferguson*, 208 Mich App 508, 513; 528 NW2d 825 (1995).

Defense counsel was not ineffective in failing to move to exclude evidence regarding the first line-up in which the complaining witness, Heather Little, participated. Evidence is relevant if it tends to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *People v Milton*, 186 Mich App 574, 576; 456 NW2d 371 (1990). The fact that Little did not pick any suspects out of the December 15, 1992, line-up, but within a matter of thirty seconds identified defendant at the December 17, 1992, line-up, tends to make it more likely that her subsequent identification of defendant was accurate.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Mark J. Cavanagh
/s/ Robert C. Anderson

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[1] Defendant's reliance on *People v Kinnard*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 1989 (Docket No. 107471), is without merit. As an unpublished opinion, *Kinnard* is not binding precedent. MCR 7.215(C)(1); *People v Powell*, 199 Mich App 492, 496 n 2; 502 NW2d 353 (1993). Moreover, *Kinnard* is factually distinguishable from the case at bar. The defendant in *Kinnard* took the stand, as did two of his relatives, and their testimony differed drastically from that of the complaining witness. *Id.* at pp 1-3. Thus, there was a substantial risk of prejudice to the defendant resulting from the court's emphasis on one scenario. In the instant case, only the complaining witness testified with respect to the details of the robbery. The witnesses for the defense contradicted that testimony only to the extent that they placed defendant elsewhere at the time of the crime. Accordingly, the potential for prejudice as a result of the hypothetical posed to the jurors in this case was much less than in *Kinnard*.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).