

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURTIS SHOWERS a/k/a MARK DUNBAR,

Defendant-Appellant.

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UNPUBLISHED

September 20, 1996

No. 174583

LC No. 93-004345

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,\* JJ.

PER CURIAM.

Defendant appeals by right his conviction of armed robbery, MCL 750.529; MSA 28.797, felony firearm, MCL 750.227b; MSA 28.424(2), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm both the convictions and sentences.

In his first issue on appeal, defendant claims that the trial court erred in admitting voice identification evidence. In *People v Bozzi*, 36 Mich App 15; 193 NW2d 373 (1971), this Court held that voice identification evidence is admissible if the identifier is positively and unequivocally certain of the identification and if there is "some reason to which the witness can attribute his ability to make the voice identification, of which familiarity or peculiarity are the most common example." *Id.* at 22. In the instant case, the prosecution established that Anne Ledda was certain of her identification and that she was familiar with the voice, having heard it on the telephone one hour before the robbery. We concluded that this satisfied the *Bozzi* requirements, and the trial court's decision was not clearly erroneous.

In his second issue, defendant claims that the prosecutor placed the prestige of his office behind the charges against defendant by stating to the jury that he represented all the people of the state of Michigan, and that he took this responsibility seriously. We decline to review this issue, as defendant made no objection to this statement. A defendant's failure to object or request a curative instruction forecloses appellate review of improper remarks by the prosecutor unless the prejudicial effect of the remarks is so serious that no objection or instruction could have cured the prejudice, or if manifest injustice would result from failure to review the misconduct. *People v Holt*, 207 Mich App 113, 122;

523 NW2d 856 (1994). Defendant has failed to demonstrate that the statement constituted manifest injustice.

In his third issue, defendant claims that the sentence of life in prison was disproportionate to the offense and to his background. He claims that he has no record of assaultive offenses. This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). This Court's review of an habitual offender sentence is limited to a consideration of whether the sentence violates the principle of proportionality set forth in *Milbourn* without reference to the guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). Defendant has failed to convince us that this sentence was disproportionate to the offense or to his background. Defendant's record includes breaking and entering an occupied dwelling and carrying a concealed weapon in a motor vehicle. Although there is no indication that defendant actually harmed any individuals during these offenses, these crimes do suggest that defendant does not restrict his criminal activities to situations in which no one will be hurt. Furthermore, defendant used threats of violence and psychological terror to commit the robbery. He pointed a gun at Ledda's temple and advised her to "make this just a robbery, not a murder." He ordered the employees into a walk-in refrigerator and asked whether it could be locked, suggesting that he was considering imprisoning them in the refrigerator. At one point he stated that he would kill them because he was a devil worshipper. Under these circumstances, the sentence of life in prison did not violate the principle of proportionality. We find no abuse of discretion.

Lastly, defendant claims that the trial court abused its discretion in denying his motion for a new trial. A trial court's decision regarding a motion for a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995). A defendant claiming that he is entitled to a new trial on the basis of newly discovered evidence must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *Id.* at 46-47.

We do not find it probable that evidence of a palm print which was not attributable to defendant or any of the three employees tested would have produced a different result. The jury in this case apparently gave credence to the employees' identification of defendant as the robber. It is unlikely that the jury's faith in the employees' testimony would have been shaken by evidence of an unidentified print on the oven, especially when defendant's expert admitted that he did not know the number of employees in the store. It is more probable that the jury would have inferred that the print was left by an employee who was not tested.

Defendant argues that the jury's credence was unwarranted, given the dissimilarity between his appearance and the employees' description of the robber. However, an appellate court must not interfere with the jury's role of evaluating the weight and credibility to be given to witnesses' testimony.

*People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). The witnesses' testimony that defendant was the perpetrator was not inherently incredible. The jurors had the opportunity to observe defendant and determine whether there was a significant discrepancy between his appearance and the witnesses' description of the robber. Both witnesses testified that they had a good opportunity to observe the robber's face, and both selected defendant's photograph during the show-up without hesitation. Under these circumstances, it is unlikely that the jury would have acquitted defendant on the basis of an unidentified hand print.

Defendant also argues that evidence that the palm print was identifiable proves that the prosecution relied on perjured testimony to obtain a conviction. The discovery that testimony introduced at trial was perjured may be grounds for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). However, defendant has failed to establish that the prosecution relied on perjured testimony. Although a Livonia police officer testified that the print was not identifiable, there was no indication that this was a deliberate falsehood. Assuming that defendant's expert correctly determined that the print was identifiable, the prosecution expert's testimony could be attributable to a mistake rather than deception. Defendant is not entitled to a new trial on this ground.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ William B. Murphy  
/s/ Charles W. Simon, Jr.