STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRENTON MILLENDER,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 186524
LC No. 94-008610

Before: Young, P.J., and Taylor and R. C. Livo,* JJ.

PER CURIAM.

Following a jury trial involving one of the most horrific and sadistic crimes we have ever reviewed, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.288(2)(1)(e), three counts of armed robbery, MCL 750.529; MSA 28.797, three counts of felonious assault, MCL 750.82; MSA 28.277, one count of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of twenty-five to sixty years for the criminal sexual conduct convictions, twenty to forty years for the robbery convictions, five to ten years for the assault with intent to do great bodily harm conviction, two to four years for the felonious assault convictions, and to a consecutive term of two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. This Court previously denied defendant's motion to remand for a *Ginther*[1] hearing. Our review, therefore, is limited to the record. *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). In *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994), the Supreme Court adopted the federal test for reviewing claims of ineffective assistance of counsel under the Michigan Constitution. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Also, defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors

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

were so serious as to deprive defendant of a fair trial, i.e., a trial whose result is reliable. The *Pickens* Court stated that to find prejudice a court must conclude that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Id.* at 312. The Court then stated as follows in a footnote:

> Furthermore, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's errors may grant the defendant a windfall to which the law does not entitle him. [*Lockhart v Fretwell*, 506 US __, __; 113 S Ct 838; 122 L Ed 2d 180, 189 (1993).]

People v Reed, 449 Mich 375, 401, n 21; 535 NW2d 496 (1995), similarly stated:

> The proper inquiry is not whether "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, *supra* at 694. An analysis that focuses "solely on outcome determination, with attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v Fretwell*, *supra* at 369.

Thus, in order to establish that counsel was ineffective, defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable.[2] Further, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defense counsel's excellent brief and arguments notwithstanding, we find defendant is not entitled to any relief regarding this issue. After reviewing the alleged instances of ineffective assistance of counsel, individually and in the aggregate, we are unable to conclude that the result of the proceeding (the guilty verdicts) was fundamentally unfair or unreliable.

We do not believe that trial counsel's failure to move for a *Wade*[3] hearing was ineffective assistance of counsel. *People v Johnson*, 202 Mich App 281, 285-286; 508 NW2d 509 (1993). The fact that only three of the six victims picked defendant out of the lineup belies the claim that the lineup was unduly suggestive. Also, the fact that two of the victims that identified defendant at trial said they had seen defendant before the night of the crime diminishes the chance that a false identification was made. Trial counsel's failure to object to the prosecutor's argument was not ineffective assistance of counsel. *Bahoda*, *supra* at 287, n 54 (there are times when it is better not to object and draw attention to an improper argument). Trial counsel's failure to request an instruction that defendant was merely present was not ineffective assistance of counsel because such an instruction was not warranted by the evidence. *People v Mills*, 450 Mich 61, 81-82; 537 NW2d 909 (1995) amended 450 Mich 1212.

Defendant next argues that he was deprived of a fair trial because the trial court failed to give jury instructions regarding identification and impeachment by a prior inconsistent statement. Once again, we find defendant is not entitled to any relief. Defendant did not request either of these instructions and he stated his satisfaction with the instructions that were given. MCL 768.29; MSA 28.1082 states that the failure of a court to instruct on a point of law shall not be grounds for setting aside the verdict unless such instruction was requested by the accused. Similarly, MCR 2.516(C) states that a party may assign error to the court's failure to give an instruction only if the party objected on the record. Absent an objection, reversal is only required in cases of manifest injustice. *People v Ullah*, 216 Mich App 669, 676-677; __ NW2d ___(1996). Even if the jury instructions are somewhat imperfect, reversal is not required if the instructions that were given presented the issues to be tried and sufficiently protected the rights of the defendant. *Id*. While we believe it would have been better if the court had given the identification and impeachment by prior inconsistent statement instructions, we do not find the failure to give these instructions resulted in manifest injustice and we are further satisfied that the instructions that were given adequately presented the issues to be tried and sufficiently protected defendant's rights. Cf. *People v Heflin*, 434 Mich 482, 512-513; 456 NW2d 10 (1990). For example, we believe the giving of CJI2d 2.6 sufficiently protected defendant's misidentification defense.

Defendant also argues that he was denied a fair trial as a result of improper prosecutorial argument. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because it deprives the court of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Nevertheless, we still will reverse if a curative instruction could not have eliminated the prejudice or if failure to review the issue would result in a miscarriage of justice. *Ullah*, *supra* at 679. We are satisfied that an objection could have cured any prejudice relating to the challenged remarks. We agree that a small part of the prosecutor's closing argument bordered on an appeal to sympathize with the victims. However, any prejudice was dispelled when the court subsequently instructed the jury not to let sympathy influence the verdict. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Failure to review this issue further will not result in a finding of a miscarriage of justice.

Defendant further argues that the court abused its discretion in allowing the prosecutor to bring out certain information during redirect examination of a prosecution witness. We find no abuse of discretion because we agree with the trial court that defendant opened the door to this questioning during his cross-examination of the witness. *Bahoda*, *supra* at 280-281. Assuming error, we find it was harmless because it had negligible if any influence on the verdicts. See *People v Mateo*, 453 Mich 203, 221; __ NW2d __ (1996).

Finally, defendant claims that even if the individual errors, standing alone, were harmless, the cumulative effect of the errors necessitates reversal. We disagree. See *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987) (test is not whether there were some irregularities, but whether defendant had a fair trial), and *Reed*, *supra* at 379 (in both federal and state systems, the constitution guarantees only a fair trial, not a perfect one).

Affirmed.

/s/ Robert P. Young
/s/ Clifford W. Taylor
/s/ Robert C. Livo

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

[2] Accord *Jones v Page*, 76 F 3d 831, 841 (CA 7, 1996) (court may not focus solely on outcome determination but "must make an additional determination"); *Jenner v Class*, 79 F3d 736, 739 (CA 8, 1996) (*Lockhart* "refined" the prejudice inquiry).

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L E2d 1149 (1967).