

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE LEROY HUGHES,

Defendant-Appellant.

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UNPUBLISHED  
October 15, 1996

No. 184468  
LC No. 93-02299

Before: Reilly, P.J., and White, and P.D. Schaefer,\* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two concurrent prison terms of four to ten years for the assault convictions and a two-year prison term for the felony-firearm conviction, to be served consecutively. We affirm.

Defendant initially contends that the trial court erred when it admitted testimony indicating that defendant was arrested for an unrelated breaking and entering. We conclude that defense counsel did not preserve the alleged error in the admission of this evidence for appellate review.

The shootings that were the basis for defendant's convictions occurred on February 7, 1993 on Kilbourne Street. Officer Suchoski testified that on that same date, he responded to a breaking and entering call on Manning Street. Defense counsel objected on the basis of hearsay. The court overruled the objection on the ground that the evidence was not offered for the truth of the matter asserted. Suchoski continued, testifying that he went to that address and found four black males, including defendant, inside a house. Suchoski recognized defendant's name as having been given out earlier in connection with the shooting on Kilbourne Street. Defense counsel did not object to this testimony. However, when the prosecutor asked what the officer did after determining that defendant was one of the individuals in the house, the officer responded:

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

At that time we found out the names of the other individuals in the house and where they lived. Nobody lived in that house. They were all arrested that [sic] for breaking and entering.

At that time, defense counsel asked to approach the bench and the transcript indicates that a conversation occurred off of the record. The transcript continues with the court stating, "I'll sustain any objection concerning any indication about any arrest." The court then gave a limiting instruction.

Although defendant contends on appeal that the admission of evidence concerning defendant's possible involvement in an unrelated break-in was unnecessary, prejudicial and in violation of MRE 404(b), we fail to see any error on the part of the trial court. Defense counsel's initial objection was based on hearsay. When Suchoski mentioned the arrest and counsel requested a bench conference, the court sustained the objection. The fact that objection was raised after Suchoski revealed that defendant and the other men were arrested for the breaking and entering does not demonstrate an error on the part of the trial court. Had defense counsel posed a timely objection, the court would have had an opportunity to rule on the evidentiary issues raised by defendant on appeal. Defendant having failed to make a motion in limine or timely object to this evidence waives appellate review in the absence of manifest injustice. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Considering the court's limiting instruction and the other evidence against defendant, and defendant's own explanation that the house on Manning Street was his friend's girlfriend's house, we do not believe that the admission of this evidence resulted in manifest injustice.

Next, defendant argues that the trial court erroneously refused to instruct the jury on the lesser offense of reckless and careless discharge of a firearm. MCL 752.861; MSA 28.436(21). Any error in this regard was harmless. The trial judge instructed the jury on assault with intent to commit murder, assault with intent to do great bodily harm, and felonious assault. The jury convicted defendant of assault with intent to do great bodily harm. Because the jury did not convict defendant of felonious assault, the least serious charge on which it was instructed, any error in failing to instruct the jury on reckless discharge of a firearm was harmless. Compare, *People v Taylor*, 195 Mich App 57, 63; (1992), citing *People v Beach*, 429 Mich 450, 481, 490-491; 418 NW2d 861 (1988).

Finally, defendant argues that he was denied a fair trial because the prosecutor made several prejudicial comments during trial. We do not agree. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267 NW2d 7; 531 NW2d 659 (1995). On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Having examined the remarks in context, we are not persuaded that they were so egregious that they denied defendant a fair trial.

In his discussion of the prosecutorial misconduct issue, defendant also argues that the prosecutor was permitted to introduce irrelevant evidence about the injuries sustained by the child whom defendant shot. This issue is not preserved for our review. Defendant did not set forth this issue

in his statement of questions presented section of his appellate brief. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Furthermore, defendant did not object to this evidence at trial on the basis of relevancy, and the alleged error in the admission of this evidence was not decisive of the outcome of the trial. *People v Grant*, 445 Mich 535, 553-554; 520 NW2d 123 (1994).

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Helene N. White

/s/ Philip D. Schaefer