STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID HICKS,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 171833
LC No. 93-002188-FC

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant received a sentence of two years' imprisonment for the felony-firearm conviction, and a consecutive sentence of life without parole for the murder conviction. We affirm.

I

Defendant first argues that he was denied a fair trial due to numerous instances of alleged prosecutorial misconduct, including the extensive cross-examination of defendant on the irrelevant matter of defendant being a marijuana dealer, and the mention of defendant's supposed confession. Defendant also argues that the prosecutor erred in introducing evidence concerning his employment status, and the discovery of both crack cocaine and an empty .380 shell in his Bronco. We disagree. Since defendant failed to raise an objection to the prosecutor's statements and/or questions on cross-examination, he has failed to preserve this issue for appeal absent a miscarriage of justice. *People v Humphreys*, 24 Mich App 411; 180 NW2d 328 (1970). We find no injustice.

After admitting to being a marijuana dealer in his opening statement, and introducing evidence concerning his dealings in Battle Creek as support for his alibi that he was collecting drug money on Warren Street when the victim was shot and killed on Kendall Street, defendant cannot now claim that the prosecutor erred in exploring that defense. When taken in context, we find that the prosecutor was

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

merely questioning defendant on issues that defendant himself previously raised. We find no error in the prosecutor's responsive questioning. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Furthermore, when defendant introduced an alibi defense and then took the stand to testify on his own behalf, he can be cross-examined like any other witness, and his credibility is subject to impeachment. *People v Fields*, 450 Mich 94, 109-110; 538 NW2d 356 (1995). At trial the prosecutor did nothing more than explore the strength of defendant's alibi defense, and attack his credibility as a witness. Defendant cannot expect to present an alibi without challenge by the prosecution, nor to put forth his version of the facts without having his credibility attacked while on the witness stand. *Id*. at 109.

Although evidence of defendant's drug habits may not be introduced to prove a propensity to commit crimes, or to show that he is a "bad" person, the prosecution is not precluded from introducing such evidence where it may be relevant and admissible for other purposes. *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993). A witness' credibility is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995). We further note that despite defendant's failure to object and request an instruction, the jury was specifically instructed by the court not to consider other crimes defendant may have committed, as evidence that he was a "bad" person or likely to commit crimes.

With respect to the alleged error in the admission of evidence, we find that given the fact that defendant openly admitted to being in the business of selling marijuana, and because he denied ever possessing a gun, the admission of evidence concerning defendant's employment, and the discovery of crack cocaine and a .380 shell casing, were either properly admitted for impeachment purposes or presented no further prejudice and revealed nothing that defendant himself had not already introduced at trial.

Last, we find no manifest injustice in the prosecutor's comment during his opening statement that defendant allegedly confessed to the crime to a fellow inmate, even though the prosecution later failed to produce that witness. Any potential prejudice that may have resulted from this preliminary statement was later remedied when the jury was specifically instructed that they could assume that the witness the prosecution was unable to produce would have testified unfavorably to the prosecution, and that they were not to consider defendant's alleged out-of-court admission as evidence of his guilt.

II

Defendant next argues that he was denied his constitutional right to due process because Norma Lewis' in-court identification was the product of a suggestive trial confrontation that was conducive to misidentification, and lacked any foundational basis of reliability. We disagree. Absent an objection by defendant, our review is limited only to a search for manifest injustice. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). Again, we find no injustice.

Although one-on-one courtroom confrontation is admittedly suggestive, we conclude that because Lewis had the opportunity to observe defendant confront the victim on the day in question, and because her description of defendant essentially matched those of the other eyewitnesses, her in-court

identification raises no issue of manifest injustice. Furthermore, even though eyewitness testimony is "rife with instances of mistaken identification," *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), as with any other witness, the jury has the option whether to accept Lewis' testimony as true, and to decide whether she is a credible witness overall, *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1989). We also note that the jury was specifically informed, pursuant to a stipulation by the parties, that Lewis never once mentioned to the police that she remembered defendant's eyes, as she contended at trial.

III

Last, defendant argues that he was denied effective assistance of counsel. We disagree. Despite defendant's failure to properly preserve this issue, our review of the record reveals that in each instance, the action defendant suggests that counsel should have taken, would have either been futile, or a matter of strategy that this Court is unwilling to second-guess on appeal. The record provides no support for defendant's proposition that counsel's failure to object to the admission of evidence, his failure to request a pretrial lineup, his failure to extensively cross-examine an eyewitness, or his presentation of defendant's defense, fell below the objective standard of reasonableness. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). We find that defendant has failed to overcome the presumption that he was afforded effective assistance of counsel. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US __; 115 S Ct 923; 130 L Ed 2d 802 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress