

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALIK DAOD ODEN,

Defendant-Appellant.

UNPUBLISHED

November 19, 1996

No. 186768

LC No. 94-008738

Before: Gribbs, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment and appeals as of right. We affirm.

Defendant first argues that the trial court should have granted his motion for a directed verdict as to the felonious assault charge on which the jury acquitted defendant. We disagree. We review this claim by considering the evidence presented by the prosecutor in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

The complainant testified that while driving to a friend's house defendant and another person approached in another vehicle. The vehicle forced the complainant to stop and, from the passenger seat, defendant displayed a gun and said to the complainant, "don't follow any of my boys home again cause this is how I'm ridin'." Taken in the light most favorable to the prosecution, this evidence indicates all elements of felonious assault, i.e., (1) that defendant assaulted the complainant, (2) with a dangerous weapon, and (3) with intent to injure or to place the victim in reasonable apprehension of immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). Therefore, the trial court properly submitted this charge to the jury.

Defendant next argues that the jury was tainted because a member was acquainted with the complainant. The juror brought his connection to the trial court's attention immediately after the direct

examination of the complainant. The trial court excused the juror and replaced him with an alternate, a procedure to which defendant did not object. Because defendant did not object, this claim will not be considered on appeal. See *People v Hoag*, 113 Mich App 789, 800; 318 NW2d 579 (1982).

Defendant objects to two aspects of the trial court's jury instructions. Defendant did not object at trial to the jury instructions and, therefore, appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). First, defendant claims that the trial court confused and mislead the jurors as to the correct application of the law when it instructed the jury that it could find defendant guilty of felony-firearm without finding him guilty of the underlying felony. We disagree. The court's instructions were a correct statement of the law. *People v Lewis*, 415 Mich 443, 448; 330 NW2d 16 (1982).

Second, defendant claims that the trial court did not instruct the jury that defendant was entitled to acquittal if his alibi evidence raised a reasonable doubt as to his involvement in the crime. We have carefully examined the jury instructions and find that they fairly presented the issues to be tried and sufficiently protected defendant's rights. Therefore, these instructions do not trigger reversal even if they were somewhat imperfect. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Moreover, manifest injustice would not result if we decline to review this issue.

Defendant also claims that the prosecutor's rebuttal summation was improper. We disagree. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless the prejudice was so serious that a timely requested instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant did not object to the prosecutor's rebuttal summation.

We have carefully reviewed the prosecutor's rebuttal summation and find that manifest injustice would not result if we decline to review this issue as the prosecutor's comments were proper. A prosecutor can comment on the evidence in a case, can argue upon the facts and evidence that a witness is not worthy of belief, and can contend that a witness is lying. *People v Sharbnaw*, 174 Mich App 94, 99; 435 NW2d 772 (1989). This is precisely what the prosecutor did in this case.

Defendant claims that he was denied effective assistance of counsel by his attorney's failure to object to the jury instructions and to the prosecutor's rebuttal summation. To prevail on such a claim, defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). As previously discussed, neither the jury instructions nor the prosecutor's rebuttal summation were improper. Therefore, defendant cannot establish either element of an ineffective assistance of counsel claim. Nor can defendant establish that he was denied effective assistance of counsel at his post-trial hearing on his motion for bail pending appeal. The record indicates that the trial court denied this motion because the verdict was proper, not because defense counsel was unable to quote a particular court rule or because he failed file a brief in support of the motion.

Finally, defendant argues that the cumulative effect of the jury instructions, the prosecutor's rebuttal summation, and his attorney's failure to object to these errors denied defendant a fair trial. We disagree. Once again, neither the jury instructions, the prosecutor's rebuttal summation, nor his attorney's failure to object to the instructions or summation were improper. Therefore, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Roman S. Gibbs

/s/ Barbara B. MacKenzie

/s/ Richard Allen Griffin