STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON VIRGIL BURKS,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 187197
Oakland Circuit Court
LC No. 95-137755 FH

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree retail fraud, MCL 750.356c; MSA 28.588(3), and habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant's motion for a new trial was denied by the trial court. He now appeals as of right and we affirm.

Defendant first argues that he is entitled to a new trial because evidence of his post-arrest statement was improperly introduced at trial. We disagree. Statements made by an accused during custodial interrogation are inadmissible in the prosecution's case in chief unless the accused was advised of his right to remain silent, that any statements he does make may be used against him, and that he has the right to the presence of an attorney, either retained or appointed. US Const, Am V; Const 1963, art 1, § 17; *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, statements that are inadmissible because they violate *Miranda* may be admitted to impeach the defendant's testimony at trial. *Harris v New York*, 401 US 222, 223; 91 S Ct 643; 28 L Ed 2d 1 (1971). Contrary to defendant's argument, the holding in *Harris* is equally applicable to a case, as here, alleging a violation of the defendant's Fifth Amendment right against self-incrimination, as it is to a case, as in *Harris*, alleging a violation of the defendant's Sixth Amendment right to counsel:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing

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

> devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross examination. [*Id.* at 225-226. Citations omitted.]

Based on the rationale of *Harris*, and on the fact that our courts have declined to extend the Michigan constitutional protection beyond that of the federal constitution in this area, see *People v Stacy*, 193 Mich App 19; 484 NW2d 675 (1992), the admission of defendant's prior statement for purposes of impeachment did not violate either his state or federal constitutional right against self incrimination.

Defendant also argues that the statement was inadmissible because it was involuntarily made. We disagree. The issue of voluntariness is a question of law for the court. In reviewing this issue, we must examine the entire record and make an independent determination of voluntariness. However, this Court will not reverse the trial court's findings unless they are clearly erroneous. *People v Ethridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). Here, Officer Rochon testified at the *Walker*[1] hearing that, while he was in the police car with defendant, he asked defendant why he stole the merchandise. Defendant responded that he intended to sell it on the street for fifty cents on the dollar. Officer Rochon testified that he asked the question for his own personal knowledge. The court found that the officer had asked the question in good faith and that defendant's statement was a voluntary response to that question. After reviewing the record, we agree with the trial court's findings and conclusion that the statement was voluntarily made. Accordingly, defendant is not entitled to appellate relief on this basis.

Defendant also argues that the trial court erred in admitting his statement to Officer Rochon as rebuttal evidence because it was collateral to the prosecution's case in chief. However, because defendant did not object on this basis below, we decline to address this issue on appeal. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

Defendant next argues that he is entitled to a new trial because the prosecution failed to produce a res gestae witness. We disagree. Prior to its amendment in 1986, the res gestae statute required that the prosecutor endorse and produce all res gestae witnesses. *People v Wolford*, 189 Mich App 478, 483; 473 NW2d 767 (1991). The current statute, MCL 767.40a; MSA 28.980(1), however, requires only that the prosecutor provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. *People v Burwick*, 450 Mich 281, 287-289; 537 NW2d 813 (1995).

Here, the prosecutor submitted a witness list that included the names of eight res gestae witnesses who might be produced at trial, none of whom was the unidentified woman that was in the mall parking lot. The store's loss prevention officers testified that they did not know the woman's name or address and that, although the woman volunteered to identify defendant as the man she had seen hiding the merchandise under the car, her identification was not necessary because one of the officers recognized defendant as the man he saw leaving the store. The record does not indicate that defendant requested the prosecution's assistance in locating the woman as a witness. Accordingly, the trial court

did not abuse its discretion in denying defendant a new trial based on the prosecution's failure to produce the unidentified woman as a res gestae witness.

Defendant next argues that he is entitled to a new trial because the prosecutor's statements to the jury were not supported by the evidence and resulted in prejudice to defendant. Defendant did not object to any of the alleged improper statements. Because we find that the misconduct was not so egregious that a curative instruction would have been futile in removing any prejudice to defendant, we decline to review the issue. *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995).

Defendant next argues that he is entitled to a new trial because the jury was not properly instructed. However, because defendant did not object at trial to the jury instructions, appellate review is waived absent manifest injustice. *Paquette, supra* at 339. A miscarriage of justice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996). Because the instructions were not erroneous, we decline to review this issue further.

Finally, given our holdings above, we find no merit to defendant's claim that the cumulative nature of the alleged errors denied him a fair trial. See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).