

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID NATHANIEL HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 187999

Recorder's Court

LC No. 93-006267 FC

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant appeals as a matter of right from his jury trial conviction of robbery armed, MCL 750.529; MSA 28.797. Defendant was sentenced to ten to twenty years' imprisonment. We affirm.

Defendant first argues that the trial court erred when it denied his motion for a directed verdict. We disagree. When ruling on a motion for a directed verdict, this Court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and 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 Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The essential elements of the crime of armed robbery are (1) an assault committed by the defendant on the complainant; (2) a felonious taking of property from the complainant or in the complainant's presence; (3) committed while the defendant was armed with a dangerous weapon or with an article fashioned to make the complainant reasonably believe it to be a dangerous weapon. *People v Newcomb*, 190 Mich App 424, 430; 476 NW2d 749 (1991).

Defendant argues that the trial court erroneously considered impeachment testimony as substantive evidence of defendant's identification as a perpetrator of the robbery. Our Supreme Court ruled in *People v Malone*, 445 Mich 369, 371, 377; 518 NW2d 418 (1994), that MRE 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as non-hearsay, provided the witness is available for cross-examination. The *Malone* Court also indicated that the rule does not distinguish between first-party and third-party testimony. In the case at bar, the prosecution

presented two witnesses, Dinkins and Warrior, who were also involved in the robbery. At trial, both witnesses denied knowing defendant and denied that defendant was involved in the robbery. The prosecutor then introduced prior statements in which each witness identified defendant as a perpetrator in the robbery. Pursuant to MRE 801(d)(1)(C) and *Malone*, the trial court could properly consider the witnesses' prior statements of identification of defendant as substantive evidence because both witnesses were available for cross-examination.

We also find that the prosecution presented evidence from which a rational trier of fact could find that the essential elements of armed robbery were proven. In addition to Dinkins' and Warrior's statements of identification of defendant as one of the robbers, the investigating officer testified that Warrior immediately picked out defendant from a photographic lineup. This testimony was also admissible as substantive evidence pursuant to MRE 801(d)(1)(C). The complaining witness testified that one of her assailants was shorter and held a hand gun. Dinkins identified defendant as the shorter man who went into the grocery store that was robbed. The license plate of the vehicle seen leaving the grocery store was registered to Warrior, who drove with defendant. Dinkins gave investigators a pager number of a man named Dave who participated in the robbery. That number was registered to defendant. Dinkins described where the man named Dave lived, and defendant's residence matched that description. The trial court did not err in denying defendant's motion for a directed verdict.

Defendant also argues that the trial court erred because it did not timely instruct the jury that it could not consider impeachment evidence as substantive evidence of guilt. Again, we disagree. Defendant did not request such an instruction at trial. Thus, this issue is not preserved for appeal and we review only for manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

The record reveals that the trial court instructed the jury regarding the proper use of impeachment testimony along with the rest of its instructions at the close of the proofs. The trial court's instruction conformed with CJI2d 4.5, Michigan's approved impeachment testimony instruction. We do not find any manifest injustice.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Myron H. Wahls

/s/ Jane E. Markey