STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY RILEY,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 190993
Recorder's Court
LC No. 95-002711-FC

Before: Markey, P.J., and Michael J. Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial 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). The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred by admitting testimony concerning a hearsay statement made by codefendant Marlon Richardson inculpating defendant. Because defendant failed to set forth this issue in the statement of questions presented, it was not preserved for appeal. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). In any event, the trial court did not abuse its discretion in admitting the statement. It was properly admitted as a statement against interest. MRE 804(b)(3); *People v Poole*, 444 Mich 151, 161-162; 506 NW2d 505 (1993). Moreover, the statement bore sufficient indicia of reliability under the factors set forth in *Poole* to be properly admitted for purposes of defendant's Sixth Amendment right to confrontation. *Id.* at 165. Richardson's statement was voluntarily given, and was made a relatively short time after the shooting. The statement was not made to the police, but to the doorman of a "dope house" owned by Richardson. The statement appears to have been made without prompting or inquiry. Richardson did not minimize his own role or attempt to shift blame to defendant; according to the statement, both Richardson and defendant participated in shooting the victim. *Id.* We are not persuaded by defendant's contention that the statement was unreliable because there were numerous illegal arrests in this case which created a coercive atmosphere. There is no record evidence that any arrests in this case

were illegal. More importantly, defendant has offered no explanation of how the allegedly illegal arrests would have affected the reliability of Richardson's out of court statement. The statement was made not to the police, but to a confederate. For these reasons, we conclude that Richardson's out of court statement bore sufficient indicia of reliability to be admitted into evidence.

Defendant further argues that the admission of testimony from a prosecution witness who was granted immunity violated his rights to confrontation and due process. This argument has been abandoned on appeal because defendant has failed to cite any authority to support his position. *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994). Moreover, this issue was not included in the statement of the questions presented and is therefore not preserved. MCR 7.212(C)(5); *Hartsuff, supra*.

Defendant's next argument on appeal is that the trial court erred by admitting as impeachment evidence a statement made by Neveda Watson, a witness who testified that he could not recall giving a statement to the police. Because defendant failed to object below to the admission of the statement for impeachment purposes, this issue is not preserved for appellate review. MRE 103(a)(1). Our review is therefore limited to determining whether manifest injustice will result from failure to reverse on this issue. *People v Lyles*, 148 Mich App 583, 589; 385 NW2d 676 (1986).

Manifest injustice is not present. The statement was properly admitted as impeachment evidence. Defendant relies upon the case of *People v Durkee*, 369 Mich 618; 120 NW2d 729 (1963), in support of his argument that a witness' prior statement is not admissible as impeachment evidence where the witness cannot recall making the statement. However, *Durkee* is inapplicable because, in that case, the witness could not even recall talking to the police. *Id*. at 622. Here, the witness could recall talking to the police and answering their questions, but simply could not recall giving a statement. We find the case of *People v Coates*, 40 Mich App 212; 198 NW2d 837 (1972), to be more directly on point. In that case, the defendant, relying on *Durkee*, contended that the trial court erred in admitting the prior inconsistent statement of an alleged accomplice because the accomplice had testified that he could not recall the questions and answers given to the police. *Id*. at 213-214. This Court disagreed and distinguished *Durkee*:

> In *Durkee*, however, the witness could not even remember being questioned. That is not the case here; defendant could remember being questioned, he just could not remember the specifics of the individual questions and the answers he gave. We see no reason for the exclusion of impeachment testimony under these circumstances, and defendant presents no authority requiring us to do so. [*Id*. at 214.]

That reasoning is directly applicable here. Defendant recalled talking to the police, but could not recall giving a specific statement. Therefore, *Durkee* is inapposite. Defendant has cited no other authority that would require exclusion of the impeachment evidence. Manifest injustice has not been shown.

Moreover, even if the admission of the prior statement were erroneous, defendant has still failed to establish manifest injustice. The substance of Watson's statement was merely cumulative

of other evidence presented at trial. Therefore, any error in its admission was harmless. *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991). Also, the trial court instructed the jury that it could consider the prior statement only in deciding whether to believe the witness' testimony, and that the statement could not be considered when deciding whether the elements of the crime had been proven. Defendant has offered no reason to believe that the jury disobeyed the court's instruction. For these reasons, we do not believe that manifest injustice will result from refusal to reverse on this issue.

Finally, defendant contends that he was denied the effective assistance of counsel when his trial counsel failed to object to the admission of Watson's prior statement for impeachment purposes. This issue was not preserved for appeal because defendant failed to include it in the statement of questions involved. MCR 7.212(C)(5); *Hartsuff, supra*. In any event, since Watson's statement was admissible as impeachment evidence, *Coates, supra* at 213-214, counsel's failure to object did not constitute defective performance. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Moreover, given the cumulative nature of the impeachment evidence and the fact that a limiting instruction was provided, there is no reason to believe that the result of the trial would have been different but for counsel's alleged error. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Defendant's ineffective assistance of counsel claim must therefore fail.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck