

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TADARALL DEJUAN HACKNEY,

Defendant-Appellant.

UNPUBLISHED

March 6, 1998

No. 190990

Recorder's Court

LC No. 95-000839-FC

Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of armed robbery, MCL 750.529; MSA 28.797, and one count each of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), possession of a short-barreled shotgun, MCL 740.224b; MSA 28.421(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to thirty years' imprisonment for each of the armed robbery convictions, ten to twenty years for the first-degree home invasion conviction, three to five years for the possession of a short-barreled shotgun conviction, and two years for the felony-firearm conviction. The armed robbery, first-degree home invasion, and possession of a short-barreled shotgun sentences are to run concurrently with each other and consecutive to the felony-firearm sentence. We affirm.

Defendant first claims that the trial court erred in admitting into evidence the results of a photographic lineup, which was conducted while defendant was in custody. We disagree. Although defendant did not object to the admission of the photographic lineup at trial, we believe the issue was properly preserved for appeal as the trial court considered the issue on remand. We review a trial court's ruling on legal grounds on a motion to suppress under a clearly erroneous standard. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996). Clear error exists when we are left with a definite and firm conviction that a mistake has been made. *Id.*

In *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), our Supreme Court stated that, subject to limited exceptions, photographic lineups should not be used when the accused is in custody. If a legitimate reason exists to use photographs for identification, the accused has as much

right to counsel as he would have for corporeal identification procedures. *Id.* at 187. Among the legitimate reasons noted in *Anderson* that justify a photographic lineup is when there are an insufficient number of persons available with the accused's physical characteristics. *Id.* at 186-187 n 22.

In the present case, Officer Spruce testified that he was unable to locate anyone with defendant's physical characteristics, particularly his large size and very short haircut, so the officer conducted a photographic lineup. Under the circumstances, the photographic lineup was properly conducted under an exception set forth in *Anderson*, and the witness's photographic identification of defendant was properly admitted at trial.

Defendant next claims that he was denied effective assistance of counsel when his trial counsel failed to object to the in-court identification and the photographic identification evidence. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). On defendant's motion, this Court remanded to the trial court to hold a *Ginther*¹ hearing on defendant's assertion that he was denied effective assistance of counsel. After conducting an evidentiary hearing, the trial court determined that admission of the photographic identification was proper because defendant possesses unique physical characteristics, the police conducted a reasonable search for individuals with similar characteristics, and a defense attorney was present for the identification. Moreover, the witness had ample opportunity to view defendant during the crime and never misidentified him or wavered from his identification. The trial court thus determined that counsel was not ineffective because defendant could not show that he was prejudiced by counsel's alleged mistakes.

Similarly, we find that defendant has made no showing that supposed errors by trial counsel prejudiced his defense. There was ample evidence upon which the jury could have relied to convict defendant. The witness described defendant's car, gave a partial license plate number for that car, and stated that defendant was armed with a sawed-off shotgun. Police officers observed defendant throw a sawed-off shotgun from the window of a car that matched the witness's description. Therefore, defendant has failed to show that there is a reasonable probability that the outcome of his trial would have been different had his trial counsel objected to the photographic identification or the witness's in-court identification.

Finally, defendant claims that there was insufficient evidence concerning the length of the short-barreled shotgun to convict him of possession, and the trial court erred in failing to instruct the jury on this element of the offense. When reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997). Defendant contends that the length of the shotgun is an essential element of MCL 750.224b; MSA 28.421(2), which provides, "[a] person shall not manufacture, sell, offer for sale, or possess a short-barreled shotgun or a short-barreled rifle." A short-barreled shotgun is defined by MCL 750.222(e); MSA 28.419(e):

“Short-barreled shotgun” means a shotgun having 1 or more barrels less than 18 inches in length or a weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon as modified has an overall length of less than 26 inches.

Defendant is correct when he states that the actual length of the shotgun was never established at trial. However, the weapon that police recovered after defendant threw it from a car window was itself introduced into evidence at trial. Every witness that described the weapon described it as a sawed-off shotgun. Defense counsel never argued that the weapon was not short-barreled. Instead, defense counsel tried to show that defendant did not have possession of the shotgun. There was no issue at trial as to whether the shotgun was a short-barreled shotgun. Viewing the evidence in a light most favorable to the prosecution, we find that sufficient evidence was presented to convict defendant of possessing a short-barreled shotgun.

Regarding defendant’s claim that the jury was improperly instructed on this offense, defendant failed to object to the jury instructions at trial. This issue is not, therefore, preserved for our review. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996). This Court will review jury instructions that have not been properly preserved for review when the failure to do so would result in manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *Id.* Whether the recovered shotgun was short-barreled was never brought into issue during defendant’s trial. Therefore, manifest injustice will not result from our failure to review this unpreserved issue.

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).