STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DANIEL DUSSEAU,

Defendant-Appellant.

UNPUBLISHED
April 3, 1998

No. 199670
Monroe Circuit Court
LC No. 95-026958-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, one count of kidnaping, MCL 750.349; MSA 28.581, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Pursuant to MCL 769.12; MSA 28.1084, defendant was sentenced as a fourth habitual offender to four concurrent terms of forty to sixty years' imprisonment for the armed robbery, assault with intent to do great bodily harm, and kidnaping convictions. He was also sentenced to a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On July 16, 1994, defendant robbed the owner of a market at gunpoint, while his friend, Esdras Hatt, waited outside in the driver's seat of defendant's car. Defendant and Hatt led the police on a high speed chase, during which defendant fired his gun at a police car. The chase ended when the two men crashed their vehicle into a tree and escaped on foot. Still accompanied by Hatt, defendant forced a man at gunpoint to drive them south and later ordered the man out of the car somewhere past the Ohio border. According to Hatt's testimony, which was obtained pursuant to a plea agreement, Hatt and defendant continued driving to California, committing various robberies along the way. The police eventually apprehended defendant and Hatt in Wisconsin. Defendant denied any involvement in the charged crimes, asserting that Hatt committed the charged crimes with an individual named "Mike."

Defendant argues that the trial court erred in admitting evidence of crimes allegedly committed by defendant after the events giving rise to the charged crimes. We disagree. Defendant's first attorney

made an effort, by a pretrial motion in limine, to bar this evidence as too prejudicial, which the trial court declined to decide without hearing the evidence at trial. At trial, defendant was represented by a different attorney, who apparently waived appellate review of this issue. First, in his opening statement, defendant's new counsel referred to the other bad acts that occurred, but attributed the acts to someone else, relying on an identification defense. Also, defense counsel did not object at trial when the prosecution submitted the evidence of defendant's other bad acts. Compare *People v Wells*, 102 Mich App 122, 125; 302 NW2d 196 (1980). Third, defense counsel made use of the evidence himself, questioning Hatt about the bank robbery in California. Last, defense counsel objected to the trial court's proposal to instruct the jury in accordance with CJI2d 4.11 and limit the purpose for which the jury could consider the evidence of other bad acts. Defendant's attorney stated that there were "tactical reasons" for not wanting the court to read this instruction. In this case, where the evidence overwhelmingly supported defendant's convictions, we conclude that no manifest injustice will result from our failure to review the merits of this issue. See *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Next, defendant argues that his trial counsel's failure to impeach Hatt denied him effective assistance of counsel. Specifically, defendant asserts that Hatt's testimony at trial that he participated in the charged crimes because defendant threatened Hatt with a gun was inconsistent with Hatt's prior testimony at his guilty plea hearing in which Hatt did not indicate that his participation in the crimes was due to defendant's threats. Defendant did not move for a new trial or a *Ginther*[1] hearing below. Therefore, our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). This Court will find ineffective assistance of counsel only where a defendant demonstrates that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Here, the record reveals that defense counsel impeached Hatt's credibility by questioning him about the terms of his plea agreement, which included Hatt's promise to testify against defendant in the instant case, although defense counsel declined to impeach Hatt's credibility with his prior testimony. The cross-examination of witnesses is trial strategy that this Court will not question on review. *People v Moreno*, 112 Mich App 631, 638; 317 NW2d 201 (1981). Therefore, we conclude that defendant has not shown that he was denied a fair trial by the ineffective assistance of counsel.

Last, defendant argues that the trial court erred in failing to instruct the jury that armed robbery and assault with intent to do great bodily harm are specific intent crimes. We disagree. Defense counsel did not object to the court's instructions either before or after jury deliberations began; therefore, defendant has waived any error unless relief is necessary to avoid manifest injustice. *People v Turner*, 213 Mich App 558, 573; 540 NW2d 728 (1995). We find no manifest injustice here. The trial judge properly instructed the jury that to convict defendant of armed robbery, it must find that defendant had the intent to permanently deprive the owner of the property. See *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Also, the trial judge properly instructed the jury that to find defendant guilty of assault with intent to do great bodily harm less than murder, it must find that

defendant intended to cause great bodily harm. See *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). Failing to use the phrase "specific intent" is not error where the trial court adequately describes to the jury the intent required to convict. *People v Yarborough*, 131 Mich App 579, 581; 345 NW2d 650 (1983).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).