

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD SHEPPARD,

Defendant-Appellant.

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UNPUBLISHED

April 10, 1998

No. 198839

Ingham Circuit Court

LC No. 96-070701-FC

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his conviction of armed robbery under MCL 750.529; MSA 28.797. He was sentenced as an habitual offender second offense, MCL 769.11; MSA 28.1083, to three to ten years imprisonment. We affirm.

Defendant first argues the prosecution failed to prove beyond a reasonable doubt he was armed at the time of the robbery. We disagree. In order to prove the defendant was armed during the assault, it is sufficient to demonstrate that the victim had a reasonable belief that the defendant was armed. *People v Johnson*, 206 Mich App 122, 123-125; 520 NW2d 672 (1994). Here, the victim testified defendant was holding the knife by its “casing,” and apparently kept it at his side, “shaking it a little bit.” She also described seeing its sheath. Viewing the evidence in the light most favorable to the prosecution, we find the victim’s description sufficiently demonstrates her reasonable belief that the defendant was armed.

Defendant next argues he was denied his right to a fair trial because the prosecution offered evidence of his prior bad acts without providing notice. He claims testimony concerning his prior theft of cigarettes from the store where the robbery took place was improperly admitted. Defendant’s failure to object to the testimony at trial precludes appellate review absent manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). We decline to review this issue because manifest injustice is not present in this case. In light of the strong evidence of defendant’s guilt, even if the admission of the testimony was erroneous, it was not outcome-determinative. Since we find no

undue prejudice stemming from the failure to object, defendant's claims of ineffective assistance of counsel also fail. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant next argues he was denied his right to a fair trial when the prosecution offered improper rebuttal testimony by one of defendant's arresting officers. We disagree. While defendant is correct that a prosecutor may not impeach a defendant on collateral matters, *People v Sutherland*, 149 Mich App 161, 164; 385 NW2d 637 (1985), we find the current impeachment, in view of the entire trial, to be harmless. *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992). Here, the victim positively identified defendant as the person who robbed the store. He was also identified by the store's owner, who saw him flee from the store after the robbery. This was substantial evidence of defendant's guilt and, at least in the jurors' minds, this evidence held up under cross-examination. As such, it cannot be said impeaching defendant by use of a collateral statement was unduly prejudicial and denied him a fair trial.

Defendant next argues he was denied a fair trial because the prosecution made improper remarks during its closing argument. It is well established a prosecutor may argue the evidence and any reasonable inferences drawn therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Generally, a prosecutor is accorded great latitude regarding his or her arguments and conduct. *Id.* In the absence of an objection, our courts have refused to reverse where a curative instruction could have corrected the problem at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We are not convinced the prosecution's comments rose to the level of misconduct. Moreover, the problem, if any, could have been allayed by a curative instruction at trial. Accordingly, we find defendant was not denied a fair trial.

Finally, defendant argues he was denied a fair trial since the trial court failed to issue a cautionary instruction following the admission of prior bad acts evidence under MRE 404(b). A trial court judge is vested with the duty of instructing "the jury as to the law applicable to the case." MCL 768.29; MSA 28.1052. However, a verdict will not be set aside because of the failure to instruct the jury on any point of law unless the defendant requests the instruction. *Id.*; *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Because defendant did not request the instruction in this case, his claim fails. Defendant further argues his counsel was ineffective for failing to request the instruction. However, the failure to request a cautionary instruction is considered trial strategy; therefore, it is an inappropriate basis for claiming ineffective assistance of counsel. *People v Holcomb*, 47 Mich App 573, 589; 209 NW2d 701 (1973), rev'd on other grounds 395 Mich 326 (1975). Accordingly, defendant has not met his burden of establishing that his counsel was ineffective or that the trial court erred by not sua sponte issuing a cautionary instruction.

Affirmed.

/s/ Gary R. McDonald  
/s/ David H. Sawyer  
/s/ Joel P. Hoekstra