

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFTON BARNES,

Defendant-Appellant.

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UNPUBLISHED

August 3, 1999

No. 207726

Washtenaw Circuit Court

LC No. 96-006175 FC

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

PER CURIAM.

After a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to three to fifteen years' imprisonment on the armed robbery conviction, and a consecutive term of two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in allowing the victim to make an in-court identification of defendant. Because defendant did not object to this identification or move for an evidentiary hearing concerning the victim's identification, he has failed to preserve his claim of error. *People v Lee*, 391 Mich 618, 626-627; 218 NW2d 655 (1974). Where issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). In this case, there is no evidence that pretrial identification procedures were unduly suggestive. Although defendant contends that the victim saw him twice in the courtroom before a lineup was conducted, his contention is not supported by the record. We note that the record indicates that pretrial examination hearings were adjourned so defendant could participate in a lineup. The need to review whether an independent source exists to support in-court identification testimony arises only when there is evidence that the lineup procedures used were unduly suggestive. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Given that no such evidence exists in this case, we find no manifest injustice and decline further review of this issue.

In a related argument, defendant contends that his defense counsel rendered ineffective assistance in failing to move to suppress the in-court identification or failing to object to the victim's identification testimony. Because defendant did not make a testimonial record to support his claim, our review is limited to the available record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). To establish that he was prejudiced by defense counsel's failure to object to the identification, defendant must show that there was a reasonable probability of a different outcome. *Whitfield, supra*. As we have stated, the instant record contains no indication that the pretrial identification procedures were unduly suggestive. Because we have no basis from which to conclude that any motion by defense counsel would have had merit, we conclude that he was not ineffective for failing to object or move for a hearing. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), lv granted in part \_\_\_ Mich \_\_\_ (Docket No. 111745, order issued June 9, 1999).

Defendant next argues that the evidence was insufficient to support his conviction and that the jury's verdict was against the great weight of the evidence. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the offense were established beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). With respect to defendant's great weight of the evidence argument,<sup>1</sup> a trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *Id.* at 27.

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). At trial, the victim identified defendant as the person who had pointed a shotgun at him and to whom the victim had surrendered his belongings. The victim also testified that he feared for his life. This testimony constitutes sufficient evidence from which a rational trier of fact could have found the elements of armed robbery beyond a reasonable doubt. *People v Towns*, 69 Mich App 475, 476-477; 245 NW2d 97 (1976). Furthermore, we conclude that the trial court did not abuse its discretion in denying defendant a new trial because, considering all the evidence produced at trial, defendant has failed to show that it would be a miscarriage of justice to allow the verdict to stand.<sup>2</sup> *Gadomski, supra*.

Defendant also claims that the trial court erroneously permitted the prosecutor to elicit hearsay testimony. Officer Steven Johnson testified that he interviewed the victim after the robbery and searched the area where the robbery occurred. When the prosecutor asked where he and the victim had gone after they first met, Johnson responded, "[The victim] advised that he was approached by two black males—". Defense counsel objected on hearsay grounds, arguing that Johnson could indicate that a robbery had been reported, but that the substance of the victim's statement was hearsay. The court overruled this objection, finding the evidence admissible to show its effect on Johnson's state of mind. Johnson went on to say that the victim told him that he had been robbed at gunpoint by two black males and one Arabic male. Because Johnson's state of mind did not represent a fact of

consequence at trial, however, the evidence was improperly admitted, even though it was not admitted to prove the matters asserted. *People v Cadle*, 204 Mich App 646, 652; 516 NW2d 520, remanded on other grounds 447 Mich 1009 (1994).

Even though the admission of this evidence was improper, the trial court's error in admitting it was harmless. The improper introduction of evidence will not be grounds for reversal unless it affects the substantial rights of a party. MRE 103(a). In instances of preserved, nonconstitutional error, this Court will reverse unless it is highly probable that the error did not contribute to the verdict. *People v Gearns*, 457 Mich 170, 203-204; 577 NW2d 422 (1998). Here, Johnson's testimony, which relates what the victim told him about the offense, is largely the same as the victim's earlier testimony describing the robbery. It was not contested at trial that a robbery occurred; the only issue was the degree of defendant's participation. In addition, Johnson's testimony did not point to defendant as a guilty party. His testimony recounting what the victim had said only indicated that the victim had been robbed by two black men and an Arabic man. Given that the same evidence had already come in through the victim's own testimony and that the evidence did not inculcate defendant, we find it highly probable that this error did not contribute to the verdict. *Id.*

Defendant further alleges that the trial court committed error when, after sustaining two hearsay objections, it failed to properly instruct the jury to disregard the testimony. In one instance about which defendant complains, the trial court had sustained defendant's objection to a police officer's testimony that another suspect in the robbery had told the officer, "I'm not the one who did it . . . but it's my gun." Because defendant did not request an instruction to disregard, we will not review the trial court's alleged failure to instruct. *People v Brown*, 21 Mich App 579, 580-581; 175 NW2d 782 (1970). In the other instance, the court had again sustained defendant's objection to a different police officer's testimony regarding information provided by three other robbery suspects during their police interviews. Before the officer could answer, defendant requested "a cautionary instruction to the jury then that they are not to take this as truth," which instruction the court provided.<sup>3</sup> Defendant did not object at trial to the form of the instruction, and has thus failed to preserve this claim of error. *People v Timmons*, 34 Mich App 643, 645; 192 NW2d 75 (1971). Review of this alleged error is therefore foreclosed unless our failure to do so would result in manifest injustice. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). In light of the other testimony at trial, including the victim's description of the offense and defendant's statements to the police, we discern no manifest injustice that would result from our refusal to further review defendant's argument.

Defendant next alleges that the prosecutor committed eight acts of misconduct, four in the introduction of evidence and four during closing argument. Regarding five of the eight alleged acts of misconduct, defendant either failed to object to these or objected and received his requested relief. Two of these five allegations of misconduct revolve around defendant's hearsay arguments that we discussed and rejected in the previous paragraph.<sup>4</sup> Another of these five allegations, that the prosecutor improperly introduced evidence that defendant had used an alias, is without merit. *People v Cutchall*, 200 Mich App 396, 400-401; 504 NW2d 666 (1993) (Use of an alias is admissible to show consciousness of guilt). Defendant's unpreserved allegation that the prosecutor improperly vouched for the victim's credibility is likewise without merit. See *People v Launsbury*, 217 Mich App 358, 361;

551 NW2d 460 (1996) (A prosecutor may argue from the facts that a witness is or is not worthy of belief). Finally, to the extent defendant challenges the prosecutor's closing argument summary of police officer testimony concerning defendant's police interview statements, we note that the prosecutor simply and properly summarized the relevant trial testimony. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Because no miscarriage of justice would result from our refusal to review any of these claims, we decline to consider them further. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We also find defendant's preserved claims of misconduct to be without merit. On review, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Defendant contends that the prosecutor improperly elicited hearsay testimony from Johnson regarding the victim's description of the robbery. We have already discussed this issue and concluded that the introduction of this evidence, while erroneous, was harmless. Defendant also argues that the prosecutor invited the jury to sympathize with the victim. The argument defendant complains of consisted of the prosecutor summarizing what occurred during the robbery, taking the incident from the victim's perspective. The victim had testified that he was scared for his life. The prosecutor's argument constituted a proper summation of the victim's testimony. *Kelly*, *supra*. Furthermore, defendant failed to indicate any prejudice arising from the prosecutor's simple misstatement that the victim had testified defendant wore a Fila jacket at the time of the robbery. In light of defendant's own statement, introduced through the interviewing officer's testimony, that he wore a Fila jacket on the night of the robbery, we find that no such prejudice existed. We cannot conclude that the prosecutor's conduct deprived defendant of a fair trial.

Lastly, defendant contends that even if no one error entitles him to reversal, reversal is nonetheless warranted due to cumulative error in the proceedings. Because we have found only one error in the trial court, the harmless introduction of hearsay evidence, we conclude that no cumulative error requiring reversal exists. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra  
/s/ Hilda R. Gage

<sup>1</sup> Although some doubt exists regarding whether defendant properly preserved this issue for our review, we will assume so.

<sup>2</sup> To the extent defendant suggests that we reevaluate witness credibility, we must reject this invitation. *Gadomski*, *supra* (It is well settled that this Court may not attempt to resolve credibility questions anew.).

<sup>3</sup> On the record, the trial court stated as follows:

Yes, I sustained the objection. They are not to accept what has been stated previously as truth, but it was only offered apparently for the purpose of explaining what [sic] the officer did what he did.

<sup>4</sup> In one instance the trial court provided the limiting instruction requested by defendant, and in the other defendant failed to request a limiting instruction that could have cured any error.