

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS BEVELYN BROWN,

Defendant-Appellant.

UNPUBLISHED

July 28, 2000

No. 217839

Kalamazoo Circuit Court

LC No. 98-000972-FC

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a; MSA 28.797(a), assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and three associated counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent prison terms of ten to twenty years on his conviction of carjacking, ten to thirty years on his conviction of assault with intent to rob, and five to fifteen years on his conviction of assault with intent to do great bodily harm, each to be preceded by three concurrent two-year terms for his felony-firearm convictions. Defendant appeals as of right. We affirm.

I

Defendant first argues that his trial counsel was ineffective for failing to seek a mistrial following the investigating detective's testimony concerning photographic lineups, which suggested that defendant had a prior arrest record. Defendant argues that despite the trial court's cautionary instruction to the jury, this impermissible suggestion of a prior criminal record was likely a determining factor in his conviction, given the relatively weak case against him. Therefore, counsel's failure to request a mistrial so prejudiced defendant as to warrant a new trial. We disagree.

Defense counsel is not required to make frivolous or meritless motions, and thus, the failure to do so cannot form the basis of a claim of ineffective assistance of counsel. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998). A mistrial is justified only where an irregularity in the proceedings prejudiced the defendant's rights and impaired his ability to receive a fair trial. *People v*

Lugo, 214 Mich App 699, 704; 542 NW2d 921 (1995). Here, while defendant correctly argues that the detective's statement was improper, in light of the testimony that preceded this statement and the trial court's cautionary instruction, we do not believe that the statement so prejudiced defendant as to warrant a mistrial.

Contrary to defendant's assertion that the evidence against him was not strong, the prosecutor offered identification testimony from both the victim and a second eyewitness. Despite the minor inconsistencies between these witnesses' testimony, each witness was acquainted with defendant, and each unequivocally identified defendant as the perpetrator. Any prejudice resulting from the vague implication that defendant possessed a prior arrest history was minimal and was sufficiently cured by the court's timely cautionary instruction. See, e.g., *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983). Accordingly, because we do not believe a mistrial was warranted, it cannot be said that counsel was ineffective for failing to move for a mistrial.

II

Defendant next argues that he was denied a fair and impartial trial as a result of the prosecutor's attempt to admit testimony of the investigating detective that threats were made against a key prosecution witness. Defendant claims that inasmuch as the prosecutor knew such evidence was inadmissible, this action was an improper attempt to inflame the jury, which denied him the right to a fair trial. Again, we disagree.

As this Court recently noted in *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), claims of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." A "prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661. In this case, defendant has not demonstrated bad faith on the part of the prosecutor or that he was prejudiced by elicitation of the challenged testimony.

Considering the strength of the evidence against defendant, i.e., two eyewitness identifications from persons acquainted with defendant, it is difficult to perceive any prejudice resulting from the challenged testimony. This is especially true where, as here, the jurors received a timely instruction from the trial court that they were not to consider such testimony "in any way." See *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997); *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983).

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra