

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DEMOND ELLISON,

Defendant-Appellant.

UNPUBLISHED

June 27, 1997

No. 185285

Recorder's Court

LC No. 93-009126

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and was sentenced to six-and-a-half to fifteen years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred when it ruled that the lineup procedures were not unduly suggestive. Defendant argues that the two identifying witnesses had an opportunity to talk with each other and compare descriptions. We note that defendant never asserted below that the witnesses had an opportunity to discuss their descriptions. Defendant's assertions that it is "hard to believe" the drivers did not compare descriptions or that "[i]t is possible" one of the drivers had his recollection wrongly refreshed by the other driver are speculative. The record indicates that the drivers did not discuss the identification of the robber(s). Thus, there is no factual support for defendant's contention, and his argument that the court committed clear error must be rejected. *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973).

II

Defendant next challenges the use of "similar acts" evidence — namely, the second robbery of a UPS driver. We agree with the trial court's conclusion that the "similarities are so great, it is almost like a signature." The pattern was so strong that the trial court did not abuse its discretion in concluding that it presented defendant's "signature." The time of day, the location, the targets, the manner in which the robber entered the trucks, the way the robber put a gun to the drivers and asked for money, and the

way the robber made the drivers drive to similar locations are all peculiar or distinctive characteristics. An additional factor not noted below was that the perpetrators in both robberies were bold enough to leave their faces uncovered, leading to quick identification by the victims. The only notable difference was that one robbery was committed by three persons, and the second robbery was committed by a lone gunman. The evidence was properly admitted to show the crime was committed by defendant and was relevant to the issue of identification. MRE 402; MRE 404(b); *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The evidence was used exclusively for that proper purpose; there was no hint that the prosecution was using the evidence to show that defendant had a propensity to commit crimes. *Id.*

Further, the prejudicial or confusing effect of the evidence did not substantially outweigh its probative value. MRE 403. There was nothing inflammatory about the other similar robbery. There may have been some initial jury confusion, as suggested by the jurors' note to the trial judge, but the court's response appropriately answered the question raised regarding whether defendant was being tried for the other robbery. Although defendant now claims the court erred by failing to provide the jury a limiting instruction, defendant never requested such an instruction. There is no sua sponte duty to instruct. *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973); MRE 105.¹

III

Defendant argues that the prosecution improperly used hearsay evidence that defendant was seen by unnamed neighbors getting off a UPS truck at the time of the robbery. Any improper use of hearsay was the product of defense questioning.

Initially, the prosecutor asked a police officer what happened during his investigation, and the officer responded that a young man stuck his head in the car's window and said that "Demond" was down the street. The specific objection lodged was that the statement was hearsay. Even if defendant is correct that the evidence was offered to prove the truth of the matter asserted, that would mean the evidence was offered to prove that Demond was down the street when the officer was talking to the young man. No prejudice resulted from such an innocuous statement. MRE 103(a).

During defense counsel's later cross-examination, the police officer testified that defendant had been seen by his neighbors exiting the UPS truck. Because this revelation came as a result of defense counsel's questioning, it does not create error requiring reversal. *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996). Although defendant objected that the officer's earlier attempt to answer the question was "non-responsive," the court overruled the objection simply because counsel had not let the officer finish what he was saying. The objection was not renewed when the officer finished answering the question. Therefore, any objection to the answers received on cross-examination must be deemed waived. MRE 103(a)(1).

We reject defendant's argument that the court erred when it did not tell the jury the basis for admitting the evidence. Defendant has cited no authority requiring a court to advise the jury of the basis for the admission of evidence. In any event, this evidence was not admitted for a limited purpose but was a wide-open inquiry into what other unnamed people knew.

Finally, once the door was opened to testimony about defendant having been seen stepping off the UPS truck, the prosecutor was free to argue that evidence. *People v Roberson*, 167 Mich App 501, 509; 423 NW2d 245 (1988). The prosecutor's brief mischaracterization of the evidence was cured by defendant's timely objection and the prosecutor's reminder to the jury that they were to decide the facts. Cf *People v Gonzalez*, 178 Mich App 526, 535-536; 444 NW2d 228 (1989) (court instructed jury that lawyers' arguments were not evidence). The misstatement does not rise to the level of prosecutorial misconduct that would entitle defendant to relief. See *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995).

IV

Defendant argues that offense variables were improperly scored. An allegation that guidelines were scored based on an erroneous interpretation of uncontroverted facts does not state a cause for relief. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Thus, defendant is not entitled to relief.

Defendant's argument that "double counting" is prohibited has been previously rejected by this Court. The same conduct may form a basis for the scoring of two separate variables. *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996); *People v Maben*, 208 Mich App 652; 528 NW2d 850 (1995).

We affirm.

/s/ Helene N. White

/s/ Richard A. Bandstra

/s/ Michael R. Smolenski

¹ Trial counsel may well have concluded, as a matter of strategy, that the trial judge's explanation to the jury, without a further limiting instruction suggesting how the evidence of the other crime could be used to prove the charged offense, presented the issue in the best possible way for the benefit of defendant.