

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LEE SMITH,

Defendant-Appellant.

UNPUBLISHED

January 14, 1997

No. 172625

LC No. 91-005166

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

Following a jury trial, in the circuit court for Lenawee County, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit robbery while unarmed, MCL 750.157(a); MSA 28.354(1), MCL 750.530; MSA 28.798. Defendant subsequently pleaded guilty to being a second habitual felony offender, subjecting him to the sentencing enhancement provisions of MCL 769.10; MSA 28.1082. Defendant was sentenced to seven to fifteen years imprisonment for the conviction of conspiracy to commit unarmed robbery and twelve to thirty years imprisonment for the armed robbery conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied a fair trial because the trial court improperly instructed the jury. A criminal defendant is entitled to a properly instructed jury. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995).

Defendant claims the trial court failed to instruct the jury on the alibi defense although defendant presented sufficient evidence to support such an instruction. The record reveals that defense counsel was asked whether instructions regarding defenses or defendant's theories of the case should be given and counsel declined such instructions. A defendant may not claim as error a decision of the trial court to which his counsel explicitly acquiesced. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Defendant argues that the failure to instruct on a defense which is supported by the evidence is error, despite the failure to request the instruction. However the evidence presented in this case relating to defendant's alibi was indirect and related to the time period before and after the

* Circuit judge, sitting on the Court of Appeals by assignment.

robbery. Since the evidence supporting an alibi defense was not clear nor uncontested, the trial court's failure to give this instruction without a specific request was not error requiring reversal. *People v. Curry* 175 Mich App 33, 41; 437 NW2d 310 (1989).

Although the court did not specifically instruct the jury on the use of alibi evidence, it did instruct the jury that defendant was presumed innocent; that the prosecution had the burden of proving each element of the charge beyond a reasonable doubt and that defendant was not required to prove his innocence. This instruction emphasized that a reasonable doubt, regarding defendant's presence at the crime scene precluded conviction and therefore protected defendant's right to a fair trial and due process.

Defendant next claims error in the trial court's failure to instruct the jury on the evaluation of accomplice testimony, despite defendant's failure to request the instruction. Defendant argues that the trial court may be required to give a cautionary instruction on the testimony of an accomplice without request, if the case is closely drawn. *People v McCoy*, 392 Mich 231, 238-240; 220 NW2d 456 (1974). This instruction requirement is an exception and the trial court retains some discretion with respect to this instruction, where it has not been specifically requested by the defendant. This Court has found that this rule, "should be narrowly applied and the circumstances under which it is applied should be closely scrutinized", *People v. Wilson*, 119 Mich 606, 623; 326 NW2d 576 (1982). Defendant's extensive cross-examination of the accomplice and his cogent, well executed argument to the jury, underscored his belief that he would be able to convince the jury that the accomplice was lying about defendant's involvement and that defendant was home in bed at the time of the holdup. Defendant's counsel argued that the accomplice was the leader of the robbery and the one that threatened the victim. The argument was directed at the accomplice's motives for testifying that defendant was involved in the robbery. The accomplice's light sentence was a compelling factor supporting defendant's argument. However, the jury determined credibility of the accomplice adversely to defendant as is its right.

A trial is "closely drawn" when there is a credibility contest between the accomplice and the defendant with no independent witnesses and no corroborating physical evidence. *People v Buck*, 197 Mich App 404, 415; 496 NW2d 321 (1992). In this case defendant did not testify, however several alibi witnesses were called by defendant and testified that defendant was elsewhere at relevant times on the night of the crime. They also disputed the accomplice's testimony that he was at the same places with the defendant on the night in question. The credibility contest is between the accomplice and the alibi witnesses, not the defendant. Defendant claimed he went to a party before the crime was committed and was home in bed, asleep at the time of the robbery. This was defendant's theory of the case and the accomplice instruction would undermine that theory. Defense counsel twice declined the court's inquiry as to instructions and remained silent, at least on the record, when the court concluded the conference on the instructions to be given. The record persuades this Court that defense counsel was avoiding this and possibly other instructions, that would tip his hand as to his final argument to the jury. Under these circumstances, the court's failure to give an instruction on the evaluation of accomplice testimony was not error and defendant was not denied a fair trial.

The defendant next claims error in the trial court's failure to instruct the jury on the prior convictions of the accomplice witness. The trial court had stated that the instruction would be given, but neglected to do so. Defendant did not object to the instructions nor call the court's attention to the omission. Failure to object to improper jury instructions will be reviewed for manifest injustice. *People v. Johnson*, 215 Mich 658, 672; 547 NW2d 65 (1996). In light of the testimony developed by defense counsel, the jury knew that the witness had been convicted of unarmed robbery as a result of his plea bargain in this case and a juvenile conviction for shoplifting. The trial court gave extensive instructions on the evaluation of the credibility of witnesses and this court finds that the failure to include this instruction does not constitute manifest injustice.

Defendant claims error in the trial court's failure to instruct on the lesser included offense of assault with intent to commit unarmed robbery. The jury was properly instructed on both assault with intent to commit armed robbery and unarmed robbery, the failure to instruct on a necessarily included lesser offense is harmless error if the jury could have convicted on the intermediate charge but instead convicted on the greater offense. *People v. Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992). This Court finds no reversible error on this claim in view of the jury verdict of conviction on the principal charge of robbery armed.

Defendant next claims error of hearsay testimony that was interjected by the police officer who answered the radio run. In response to the prosecutor's question, the officer testified that the police radio report described an armed robbery. Defense counsel did not object to this testimony. As there was no objection to the evidence, on the same grounds raised on this appeal, the issue is not preserved. *People v. Stimage*, 202 Mich App 28, 30; 507 NW2d 778, (1993). This Court reviews unpreserved evidentiary objections for manifest injustice. *People v. Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). Here the officer responded to the prosecutor's question that it was reported to him that "[a]n armed robbery has just occurred". There was no objection to this hearsay and it was consequently not stricken. An erroneous admission of hearsay testimony can be harmless error where corroborated by other competent testimony. *People v. Van Tassel*, 197 Mich App 653, 655; 496 NW2d 388 (1992). There was competent testimony indicating the victims believed the robbers had a gun. However the prosecutor's accomplice witness testified that a weapon was not used nor did the robbers pretend to have weapons. Because of this contradictory testimony the introduction of the hearsay supporting the victims' story may have had some prejudicial effect. However the evidence of the radio report to the officer was not mentioned again by prosecution witnesses nor did the prosecutor rely on this statement in his closing argument. Further, this testimony is cumulative and depends entirely on the report which the police received from the victims, both of whom testified at trial. This Court is not convinced that manifest injustice requires reversal as we find this was harmless error.

Defendant further claims that he was denied a fair trial by prosecutorial misconduct in vouching for the credibility of the accomplice witness during closing arguments and the prosecutor's improper solicitation of hearsay testimony relative to the nature of the crime. The hearsay testimony was harmless as previously discussed. Defendant did not object to any of the alleged instances of prosecutorial misconduct and the issue is not preserved for appeal unless an objection could not cure the error or the denial of review would result in a miscarriage of justice. *People v. Stanaway*, 446 Mich

643, 687; 521 NW2d 557, (1994). This Court must evaluate the alleged improper prosecutorial comments in the light of the defense's arguments and the evidence at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810, (1992). Statements which would otherwise be improper may not constitute reversible error if they address issues raised by defense counsel. *People v Fields*, 450 Mich 94, 106-107; 538 NW2d 356 (1995). The record indicates that defense counsel opened the door by arguing and focusing on inconsistencies and implausibilities in the accomplice testimony, as well as previous untruthful statements to police and on the motivation to name someone as a co-conspirator. Thus the prosecutor's focus on the accomplices' truthfulness and candor can be an appropriate response to the issues raised by defense counsel. While this is a close issue, in light of defendants' arguments which opened the door to comments on the accomplice testimony being truthful, this Court finds that defendant was not denied a fair trial, on this issue, by the prosecutor's comments.

Defendant next claims he was denied effective assistance of counsel at trial. Defendant moved for a new trial on the issue of insufficient evidence that the perpetrators of the robbery were armed. The issue of ineffective assistance of counsel or a motion for hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 422 (1973), was not made and this Court is limited to a review of the record. *People v. Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). Claims of ineffective assistance of counsel are reviewed by this Court under an objective standard of reasonableness defendant must demonstrate that his counsel's error was so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830, (1994). Defendant must overcome the presumption that his attorney's actions were not part of a sound trial strategy. *People v LaVern*, 448 Mich 207, 216; 528 NW2d 721, (1995). This Court's review of this issue is limited to the errors apparent from the record. *People v Johnson*, 208 Mich App 137, 142; 526 NW2d 617 (1994).

The review of this record convinces this Court that defense counsel prepared for and tried this case with the strategy that defendant's best chance to be found not guilty was by attacking the credibility of the accomplice. Counsel was careful to not make objections that would sidetrack or be distasteful to the jury or that would possibly be overruled. Counsel tried to accomplish this result without success. Although this Court might now question this strategy, "absent the advantage of hindsight, we cannot say that defense counsel performed below the standard of a reasonably competent attorney". *Stanaway*, *supra* 446 Mich 688. Defendant was not denied effective assistance of counsel.

Defendant claims error in the trial courts denial of his motion to vacate his guilty plea to the charge of habitual offender. The trial court did not advise defendant of the maximum penalty for conviction as a second habitual offender on the underlying felonies of robbery and conspiracy to commit unarmed robbery. The trial court did not explicitly sentence on the underlying felonies, choosing instead to sentence defendant on each count as an habitual, making it a one step procedure instead of two. But it is clear that defendant's sentences were enhanced by his habitual guilty plea. A trial court is required to inform a defendant of the maximum possible sentence for the charge to which he is pleading guilty so that the defendant is aware of the most serious consequence of the guilty plea. *People v Borden*, 147 Mich App 470, 472; 382 NW2d 799 (1985). The court's failure to inform the defendant of the maximum possible sentence for his guilty plea is error. *People v Shannon*, 134 Mich App 35, 37; 349

NW2d 813 (1984). However, the failure to inform defendant of the maximum possible sentence does not require remand where ignorance of the statutory maximum does not prejudice the defendant. *Boden Supra*. As the maximum possible sentence for the robbery armed conviction is life imprisonment, the defendant was not prejudiced as the maximum possible sentence could not be increased by the supplemental habitual offender charge.

Defendant claims there are other consequences related to the habitual offender conviction, however the court is not required to inform defendant of all the possible consequences of a guilty plea, only the maximum sentence and any mandatory minimum required by law. As defendant's plea did not prejudice him, reversal is not required.

Defendant claims error in the sentence imposed, as he contends that the court sentenced him on the underlying convictions and the habitual offender statute as well. The review of the sentence transcript does not bear this out and defendant has misunderstood the sentence imposed. The court imposed an enhanced, habitual sentence on each of the underlying convictions, to be served concurrently, and did not first impose a separate sentence on the underlying convictions which would then have been set aside.

Defendant also claims the sentence imposed was not proportionate, however the sentence was within the guidelines for the underlying offenses. Defendant's sentences could not be disproportionate for the habitual offenses. *People v Gatewood*, 450 Mich 1021 (1996). Our review of the record satisfies this Court that the sentence imposed by the trial court was proportionate. *People v Milborn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed

/s/ Michael J. Kelly

Judges O'Connell and Schmidt concur in result only.