

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DEMOND HOOKS,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 190431

Recorder's Court

LC No. 94-011260

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for 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). Defendant was sentenced to 2 ½ to 10 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that he was denied a fair trial due to the introduction of identification testimony obtained as a result of improper pretrial identification procedures. Defendant claims that the complainant's identification was unduly suggestive because of the police officers' assertions to the complainant that the man she described was defendant and that they were going to apprehend him, and because the lineup did not contain members with the same degree of facial disfigurement (burn scars) as defendant. We disagree.

A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Here, the complainant testified that she did not know defendant prior to the robbery and did not anticipate him being in the lineup she was asked to view. The police officers' assertions to the complainant that defendant matched the description she gave of the perpetrator were not therefore unduly suggestive. See *People v Brady Smith*, 108 Mich App 338, 343-344; 310 NW2d 235 (1981). Further, because the record indicates that other members of the lineup had facial scars and distinguishing marks on their faces, we hold that, under the totality of the circumstances, the lineup was not unduly suggestive. See

Kurylczyk, supra, pp 302-303. Therefore, the trial court did not clearly err in admitting the identification evidence.

Next, defendant claims that he was denied his right to a fair trial due to the prosecutor's misconduct. Defendant first argues that the prosecutor improperly questioned defendant about his alleged drug involvement and about arrests which did not result in convictions. Defendant failed to object to this allegation of prosecutorial misconduct. Therefore, absent manifest injustice, appellate review is precluded. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Because a cautionary instruction from the court would have cured any resulting prejudice from the alleged misconduct, we find that manifest injustice will not result from our failure to review this claim. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Defendant also argues that the prosecutor improperly shifted the burden of proof during closing argument when he commented on defendant's failure to produce certain witnesses. We disagree. Defendant testified that he was shooting dice with some other people at the time the robbery occurred. Therefore, it was proper for the prosecutor to comment on defendant's failure to produce the individuals he was shooting dice with as exculpatory witnesses. See *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). Accordingly, defendant was not denied his right to a fair trial by the prosecutor's remarks. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy