STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACEY POLLEY,

Defendant-Appellant.

UNPUBLISHED
August 15, 1997

No. 191255
Recorder's Court
LC No. 95-002918-FC

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree home invasion, MCL 750.110a; MSA 28.305(a), two counts of armed robbery, MCL 750.529; MSA 28.797, one count of carjacking, MCL 750.529a; MSA 28.797(a), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.549. He was sentenced to two years in prison for felony-firearm and concurrent sentences of eight to twenty years in prison for first-degree home invasion, fifteen to forty years in prison for each armed robbery count, and seven and one half to twenty years in prison for carjacking. Defendant now appeals as of right and we affirm.

This case arises from an armed robbery which occurred at the home of Carl Foxhall, Jr. On appeal, defendant argues that the trial court committed error requiring reversal in instructing the jury that carjacking is not a specific intent crime. We disagree. In *People v Terry*, ___Mich App ___; ___ NW2d ___ (Docket No. 194992, issued 7/11/97, slip op p 4), this Court held that "the plain language of the [carjacking] statute does not require an intent to permanently deprive, and we decline to infer such a requirement." *Terry, supra* at 4; see also, Senate Fiscal Bill Analysis, SB 773-781, February 17, 1993, pp 2-3. Accordingly, a person may be convicted of carjacking upon the mere taking of a vehicle. Therefore, the trial court correctly instructed the jury that carjacking is not a specific intent crime.

Next, defendant contends that he is entitled to a new trial based on the fact that the trial judge failed to inform the jury that he pleaded not guilty. Although such an instruction is set forth in CJI2d 1.8, the standard criminal jury instructions are not mandatory. *People v Buck*, 197 Mich App 404, 425-

426; 496 NW2d 321 (1992). Moreover, defense counsel did not object to the trial court's instructions. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). The trial judge told the jurors that defendant was presumed innocent and that this presumption "continues throughout the trial." In addition, the judge properly instructed the jury that the prosecutor had the burden of proving each element of the charged offenses beyond a reasonable doubt. Under such circumstances, defendant's rights were adequately protected.

Defendant further claims that the trial court erred in failing to give an alibi instruction to the jury. The failure to give an unrequested alibi instruction does not constitute error requiring reversal where the trial court properly instructs the jury on the elements of the offense and on the requirement that the prosecution prove each element beyond a reasonable doubt. *People v Duff*, 165 Mich App 530, 541-542; 419 NW2d 600 (1987). In the present case, the trial judge properly instructed the jurors on the prosecution's burden of proving every element of the offense. Accordingly, reversal is not warranted on this basis. Because no prejudice resulted from the fact that the jury was not instructed with regard to alibi, defendant has failed to establish that his trial counsel was ineffective in refusing the trial court's offer to give such an instruction. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant also contends that the trial court abused its discretion by admitting into evidence an alleged hearsay statement made by Robin Johnson to the police. However, defendant failed to object to Johnson's testimony at trial. Therefore, this issue is not preserved for review. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Moreover, any prejudice which may have resulted from the prosecutor's comment on Johnson's statement was eliminated by the lengthy and detailed cautionary instruction given by the trial judge after closing arguments.

Next, defendant argues that the trial court erred in admitting identification testimony into evidence because defense counsel was not present at the photographic show-up. We disagree. In the case of photographic identifications, the right of counsel attaches with custody. *People v Kurylczyk*, 443 Mich 289, 297-298, 302; 505 NW2d 528 (1993). Here, defendant was not in custody at the time of the photo identification. Nor is there any merit to defendant's contention that the show-up was unduly suggestive. Although Sergeant Forrest told Katina Harper that defendant was driving the van, he did so *after* Harper selected defendant's photograph.

Defendant also claims that reversal is warranted because the trial judge made inappropriate remarks. Once again, we disagree. In explaining to the jury why he dismissed one count of armed robbery, the judge did not create an inference that defendant was guilty. Rather, he merely explained to the jurors that the there was no evidence showing that defendant stole car keys from Arita Foxhall. This instruction was necessary in light of the fact that the jurors were told about the charge at the beginning of the case. Moreover, the trial judge was careful to explain to the jurors that they were still responsible for determining whether defendant was guilty of the remaining offenses. Further, the lower court gave proper instructions regarding the concepts of presumption of innocence and burden of proof.

Next, defendant argues that the trial judge "did not exercise appropriate caution and restraint to ensure the Defendant a fair trial." With one exception, however, defendant fails to cite specific

instances of alleged error. A mere statement of position without argument or citation of authority is insufficient to bring the issue before an appellate court. *People v Noble*, 152 Mich App 319, 327-328; 393 NW2d 619 (1986). Moreover, the sole example cited by defendant does not warrant reversal. According to defendant, the trial judge suggested to the jury that the light coming from the complainant's television was sufficient to enable her to identify defendant. We find that the judge made no such suggestion. Rather, he asked the witness whether the television was bright. A trial court may interrogate witnesses, whether called by itself or by a party. MRE 614(b).

Defendant also contends that the trial court abused its discretion in admitting evidence suggesting that defendant carried a handgun similar to that which was used in the robbery. We disagree. The mere fact that defendant was known to carry a gun, without more, did not tend to show that he committed other criminal acts. More importantly, testimonial evidence of a defendant's possession of a weapon of a kind used in the offense with which the defendant is charged is admissible under MRE 401, independently of MRE 404(b). Unlike the "exceptions" contained in MRE 404(b), in which relevancy rests on a circumstantial inference, the gun itself is direct evidence of defendant's commission of the charged offense. See *People v Hall*, 433 Mich 573, 580-581, 583; 447 NW2d 580 (1989).

Finally, defendant argues that the prosecutor committed error requiring reversal by explaining the concept of the presumption of innocence to the jurors during voir dire. Defendant failed to object to the prosecutor's remarks. Appellate review of allegedly improper remarks is generally precluded absent a timely objection by counsel unless a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the remark could have been cured by a timely request for a curative instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). In the present case, any alleged misconduct that may have occurred could have been cured by a prompt cautionary instruction. Accordingly, we do not find a miscarriage of justice.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin