STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMBERT BERRY,

Defendant-Appellant.

UNPUBLISHED
October 24, 1997

No. 196828
Kent Circuit Court
LC No. 95-002441-FH

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Defendant was convicted by jury of larceny from a person in contravention of MCL 750.357; MSA 28.589. He was sentenced as an habitual offender, MCL 769.12; MSA 28.1084, to a term of imprisonment of six to twenty-five years. He now appeals as of right, and we affirm.

Defendant first argues that the prosecution presented insufficient evidence at his preliminary examination to justify his being bound over for trial. However, assuming for the purpose of argument that defendant is correct, defendant has here failed to advance an argument upon which relief may be predicated. A magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). Therefore, because defendant does not now argue that the evidence presented at his trial was insufficient to support his conviction, any error occurring at the preliminary examination was harmless.

Defendant next contends that the trial court abused its discretion, *People v Griffis*, 218 Mich App 95, 98; 553 NW2d 642 (1996), in allowing a police officer to relate a statement made by defendant's cousin where the statement allegedly constituted hearsay and fell within none of the exceptions to the rule barring the introduction of hearsay testimony. However, the rule barring the introduction of hearsay does not purport to exclude all words uttered by one other than the person testifying, but bars only those statements constituting an "assertion." MRE 801(a). Here, the statement of defendant's cousin presently in issue was a question, not an assertion. While it is conceivable that certain questions could contain assertions, merely asking a police officer whether one's cousin has been

apprehended is not an example of such a situation. Therefore, because the challenged statement was not hearsay, we find no abuse of discretion in its admission into evidence.

Defendant also argues that he is entitled to a new trial because the verdict was against the great weight of the evidence. As explained in *People v Gonzalez*, 178 Mich App 526, 532; 444 NW2d 228 (1989), we review a court's denial of a motion for new trial for an abuse of discretion, finding one only where the court's denial is manifestly contrary to the clear weight of the evidence.

In the present case, the ninety-four year old victim testified that the perpetrator of the crime was a white man. Defendant is black. The record contains no indication that the victim suffered poor eyesight or was otherwise incompetent to testify on this issue. While the prosecution presented numerous witnesses who testified that they saw a Hispanic or black man fleeing the scene of the crime, this does not alter the fact that the victim herself claimed to have been robbed by a white man.

However, in reviewing the trial court's decision to deny defendant's motion for new trial, we consider the weight of *all* the evidence, not merely the testimony given by one witness, even if that witness is the complainant. It has long been the rule in Michigan that while a party may not impeach its own witness, a party "may contradict his own witness for, if he could not do so, he would be at the mercy of the first witness who was sworn and testified." *Ritchie v Reo Sales Corp*, 272 Mich 684, 688; 262 NW 321 (1935). The prosecution presented the testimony of several witnesses describing the perpetrator as being Hispanic or black, thereby contradicting the victim's testimony. This tactic is proper,[1] and considering that the witness herself admitted that she "just didn't get a good look at" the perpetrator, we cannot conclude that the verdict was against the clear weight of the evidence. *Gonzalez*, *supra*.

Further, we would emphasize that, obviously, the trial court and the jury had the opportunity to view defendant and to determine whether the victim could have been mistaken with respect to his appearance.

Defendant also challenges the propriety of the prosecution's closing argument. However, contrary to defendant's contention, it is not improper to refer to a defendant's refusal to participate in a lineup where the evidence demonstrates that the defendant did, in fact, refuse to so participate. *People v Benson*, 180 Mich App 433, 437-438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). Similarly, our review of the prosecution's closing argument fails to reveal support for defendant's position that the prosecution improperly vouched for the credibility of its witnesses or engaged in an improper "civic duty" argument.

With respect to defendant's argument that he is entitled to a new trial because the court improperly instructed the jury, defendant has failed to preserve this issue for review by failing to object to the alleged instructionary deficiencies below. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). While this Court will address such unpreserved allegations of error where manifest injustice would result, *id*., we find none here. Further, we do not find defendant's trial counsel to have been ineffective in this regard because the alleged shortcomings were not sufficiently significant so as to

deny defendant his right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Finally, we find the sentence imposed to be proportionate to the offense and the offender, see *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and also find that the sentencing court sufficiently articulated its rationale for imposing the sentence. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage

[1] The prosecution also contradicted the elderly victim's testimony in another respect. The victim was not convinced that the wallet that was recovered was, in fact, her wallet that had been stolen. The prosecution contradicted this statement by presenting testimony that, when found, the wallet contained items belonging to the victim.