

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY ALEXANDER,

Defendant-Appellant.

UNPUBLISHED

September 29, 1998

No. 191015

Ingham Circuit Court

LC No. 95-068860 FC

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of armed robbery, MCL 750.529; MSA 28.797, and sentenced to fifteen to forty years' imprisonment. The trial court granted defendant's motion for resentencing, but again sentenced him to fifteen to forty years' imprisonment. Defendant appeals as of right. We affirm.

I.

First, defendant contends that his trial counsel was ineffective because he failed to move for suppression of the victim's on-the-scene identification, and that the trial court erred in failing to grant him a new trial on this basis. To establish ineffective assistance, defendant must show both that counsel performed below an objective level of reasonableness, and that the prejudice resulting from counsel's errors was so serious as to deprive defendant of a fair trial. *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996).

Defense counsel's failure to object to the on-the-scene identification was reasonable because the identification was properly made. Police conduct of on-the-scene identifications promptly after the occurrence of a crime does not violate the suspect's right to counsel. *People v Winters*, 225 Mich App 718, 726-728; 571 NW2d 764 (1997). Like the counselless on-the-scene identification upheld in *Winters* that occurred within minutes of the crime, *id.* at 728-729, the instant robbery victim testified that within approximately thirty to forty minutes of the robbery, the police transported her to a police cruiser where she identified defendant. Because the victim's on-the-scene identification was proper, defense counsel did not err in failing to object to the introduction at trial of testimony regarding this

identification. Thus, we conclude that the trial court correctly denied defendant's motion for new trial based on this alleged error by defense counsel.

Defendant also argues that defense counsel rendered ineffective assistance by failing to object to several acts of misconduct alleged to have been committed by the prosecutor and witnesses, and by failing to object to the introduction of various items of physical evidence.

Defendant alleges that defense counsel should have objected to the prosecutor's improper attempt during closing argument to shift the burden of proving his innocence onto defendant. In reviewing claims of prosecutorial misconduct, the test is whether the remarks denied defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial arguments must be considered in light of defense arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

In explaining his whereabouts on the night of the robbery and how he happened to be within several blocks of the robbery site when the police picked him up and found over \$500 in cash in his pocket, defendant testified that he had arrived there on his way home from his nephew's house, where he had just collected on a \$100 loan. Viewing in context the prosecutor's statement during closing argument that she found it interesting that defendant's nephew did not corroborate the story at trial, this statement properly addressed defendant's account of his whereabouts and did not improperly shift the burden of proof to defendant. Once the defendant presents an alibi defense, the prosecution is permitted to attack the alibi by commenting on the weakness of the alibi testimony. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). Because the prosecutor's statements were not improper, defense counsel's failure to object to them did not constitute ineffective assistance.

Defendant also claims that the prosecutor engaged in misconduct by offering into evidence a silver ring found by police, and by suborning perjurious testimony regarding the discovery of the ring. Defendant further alleges that defense counsel was ineffective for failing to object to these actions by the prosecutor. The robbery victim testified that the robber wore a silver ring, and that the ring introduced as evidence at trial could be the same ring the robber wore. The police officers who transported defendant to the police station both testified to the discovery of a silver ring in the back of the squad car where defendant had been sitting. Our review of the record reveals nothing supporting defendant's assertion that these police officers committed perjury or that the prosecutor knowingly elicited perjured testimony from the officers. Therefore, we conclude that the trial court did not abuse its discretion in admitting the ring into evidence, *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), and that defense counsel was not ineffective for failing to object to either the admissibility of the ring or the police officers' testimony regarding their discovery of the ring.

Defendant next suggests that defense counsel ineffectively failed to object to the prosecutor's improper introduction of false identification testimony by the robbery victim. The trial testimony regarding the victim's on-the-scene identification of defendant differed only to the extent that the victim stated that an officer removed defendant from a squad car and placed him in a different police car, while the officers at the scene testified that they did not transfer defendant to a different car. None of the details of the victim's description of defendant varied from her original descriptions of defendant to

police, to her descriptions at the preliminary examination and at trial. Our review of the record has failed to uncover any substantiation for defendant's claim that the robbery victim had previously identified another man as the robber and therefore lied at trial, or that the prosecutor knowingly solicited the victim's false testimony. We conclude that defense counsel was not ineffective for failing to object to this identification testimony. Because the victim properly and clearly identified defendant in the back of a squad car within minutes of the robbery, we need not address defendant's further argument that a subsequent, impermissibly suggestive in-court identification procedure at his preliminary examination allowed the victim to identify defendant for the first time and incorporate details of defendant's personal appearance into her false description of him as the robbery suspect.

Defendant's penultimate claim of ineffective assistance involves defense counsel's failure to object to the admission of a piece of nylon mesh found by the police near the scene of the robbery. Specifically, defendant argues that defense counsel should have objected because the prosecutor failed to establish a sufficient foundation for introduction of the nylon mesh. However, our review of the record indicates that defense counsel did object to the admission of the nylon mesh. Our review of the record also leads us to conclude that defense counsel's objection was groundless. The robbery victim testified that the nylon shown to her at trial resembled that worn by defendant during the robbery, and an investigating officer testified that the nylon introduced at trial appeared to be the same piece of cloth he discovered shortly after the robbery between the robbery site and the location where the police picked up defendant. Therefore, the trial court did not abuse its discretion in admitting the nylon mesh, *Smith, supra*, and defendant's argument that defense counsel erred by failing to object to its admission is without merit.

As his final ineffective assistance argument, defendant claims that defense counsel should have objected to false police testimony regarding discovery of a BB gun that defendant utilized in committing the robbery. Defendant argues that inconsistencies in police officers' statements regarding the discovery of the gun suggest that the officers lied. The officer who found the gun testified that he discovered it next to some trash bags near a curb where another officer had first sighted defendant, and near where defendant was apprehended. The robbery victim also testified that she saw the police discover a gun next to some trash bags, and that the gun looked like the same one defendant had used. Based on our review of the record, we conclude that the trial court did not abuse its discretion in admitting the gun, and defense counsel's failure to object to its admission does not qualify as ineffective assistance.

II.

Next, defendant contends that the trial court erred by failing to *sua sponte* read to the jury CJI2d 4.14. Because defendant failed to object to the trial court's jury instructions, appellate review of this issue is waived absent manifest injustice. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). Manifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case. *Id.* Although this Court has held that a trial court has a duty, even absent a request by counsel, to inform the jury that tracking dog evidence must be considered with caution, is of slight probative value, and cannot support a conviction in the absence of other direct evidence of guilt, *People v McMillen*, 126 Mich App 211, 214; 336 NW2d 895 (1983), the instant trial court's failure to read the instruction did not result in manifest injustice. Although a police officer

testified at trial that a tracking dog was used to follow defendant's trail from the site of the robbery, the tracking dog did not lead to the police discovery of defendant or to their discovery of any of the physical evidence introduced at trial. Because our review of the record indicates that the testimony regarding the tracking dog added little or nothing to the prosecutor's case, we conclude that no manifest injustice occurred, and that defendant's failure to object below waived further review of this issue. *Johnson, supra*.

III.

Defendant argues that he must be resentenced because of the trial court's consideration at his original sentencing of erroneous information regarding his prior convictions. Defendant's brief on appeal to this Court containing these arguments was filed before this Court remanded the case to the trial court so that defendant could file a motion for resentencing. The trial court granted defendant's motion, and resentenced him. Because defendant has received the relief he requested before the circuit court, this issue is moot and will not be addressed. *People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989). Furthermore, because defendant has not alleged that the trial judge considered any improper information at the resentencing and has failed to provide this Court with a copy of the resentencing transcript, defendant has waived our review of any resentencing issues. *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994).

IV.

Defendant alleges that the prosecutor improperly utilized a police report at trial to refresh the robbery victim's memory. When the victim had trouble recalling exactly how she had described to police the ankle areas of the boots defendant wore during the robbery, the prosecutor refreshed the victim's recollection by showing her a copy of the police report regarding the robbery. Defense counsel admitted at trial that this report had been made available to him. We conclude based on our review of the record that the prosecutor's actions were proper under MRE 612.

V.

Finally, defendant insists that the trial court erred by refusing to permit him to try on the boots that the victim testified defendant wore during the robbery. Defendant wanted the opportunity to try on the pair of boots in front of the jury for the purpose of determining whether the emblem near the ankle areas of the boots would be visible. In denying defendant's request, the trial judge noted that the boots had been admitted into evidence and could be examined by the jury, and thus there was no need for defendant's proposed demonstration. We conclude that the trial judge acted within her discretion in denying defendant's request. *Smith, supra*.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gibbs
/s/ Hilda R. Gage