

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORMAN GRAY,

Defendant-Appellant.

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UNPUBLISHED

June 29, 2001

No. 220815

Livingston Circuit Court

LC No. 99-010877-FC

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to life imprisonment and appeals as of right. We affirm.

On November 15, 1998, Michael Abbo was working in his family-owned convenience store. The store was monitored by four video cameras, three located inside the store and one located outside the store. The inside cameras were directed at the door, the location behind the cash register, and the location of the paying customer. At 3:00 p.m., a man with a “heavy mustache” entered the store. Abbo could not describe the man’s facial features, but he described the man as six feet tall, two hundred pounds, and African-American. The man was wearing a hat and an “Ideal Steel” jacket. Ideal Steel is a company located several miles from the convenience store. The man purchased items that were located at the back of the store, then returned to the back of the store. Abbo was not afraid of the man because he had seen him before. Abbo waited on other customers. When the store was empty, the man returned to the counter, pulled out a gun, and demanded “all the money.” The man instructed Abbo to lock himself in the restroom. Approximately five to fifteen seconds later, Abbo heard someone outside the restroom door. A female was trying to enter the restroom. Abbo told her that he had been robbed. She tried to get the license plate number of a vehicle leaving the parking lot, but police were unable to correlate the number to a vehicle. Abbo called the police, but continued to serve customers without locking the store. Therefore, any potential evidence was compromised. The cameras videotaped the robbery, and the tape was turned over to the police. Abbo viewed a line-up on January 14, 1999, but was unable to identify the perpetrator of the crime from the line-up. The men in the line-up were not wearing hats, and all of the men had beards.

Frank Venegas, the owner of Ideal Steel, testified that thirty percent of his workforce were minorities. Venegas testified that he had known defendant for fourteen years as an employee of Ideal Steel, but the employment had not been for a continuous period. Instead, defendant worked for Venegas on two separate occasions. Venegas “guessed” that the first employment period lasted two to three years. During this time, Venegas had contact and spoke with defendant every other day. The conversations ranged in duration from minutes to two hours. The second employment period lasted six to nine months in 1997. Contact between defendant and Venegas during this second employment period occurred once a week or every two weeks. In November 1998, police brought the videotape of the store robbery to Venegas. Venegas had “no doubt” that defendant was the man in the videotape robbing the convenience store. Additionally, Venegas testified that there was “no doubt” that defendant’s voice was on the videotape.

Faye Walker, vice president of Ideal Steel, began working for the company in 1986. Each week, Walker would deliver paychecks to the employees, including defendant. Walker knew defendant by name and spoke to him in the shop. Walker acknowledged that defendant worked for Ideal Steel on two different occasions. The second time that he was employed by Ideal Steel, defendant worked from January 1997 to June 1997. Walker identified a photograph of defendant wearing a hat while he was working for Ideal Steel. Walker viewed the videotape of the robbery and identified defendant and his voice as the person she observed on the tape. Walker believed that defendant worked for Ideal Steel for four or five years, but could not identify exact dates.

Defendant relied on three witnesses to support his alibi defense. Defendant’s next door neighbor, Richard Stull, testified that between 2:15 and 2:45 p.m., he helped defendant check the fluids in a vehicle. While Stull was previously uncertain of the exact date that he had aided defendant, he was now certain that it was the day of the robbery. Defendant’s daughter testified that she saw him on the day of the robbery at his home in Detroit. Defendant’s wife testified that defendant picked her up from work and could not have driven from Detroit to the location of the robbery. Defendant’s witnesses saw the videotape and determined that he was not the man who had robbed the convenience store.

Defendant first argues that the trial court erred in allowing the testimony of defendant’s former employers. We disagree. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). The challenged testimony was admissible because it was “rationally based” on the witnesses’ perceptions and was helpful to “the determination of a fact in issue.” MRE 701. The fact that identification was the “ultimate” issue at trial did not preclude the testimony. Otherwise admissible opinion evidence is not objectionable merely because it embraces an ultimate issue to be determined by the trier of fact. MRE 704. A lay witness may express an opinion regarding the ultimate issue if the facts and circumstances indicate that the opinion is based on the witness’ own knowledge. See *People v Drossart*, 99 Mich App 66, 73; 297 NW2d 863 (1980). Furthermore, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403; *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000). The witnesses’ testimony, relating to their knowledge of defendant and the length and

nature of the relationship, could be explored without revealing that defendant was first employed as part of a work-release program from Camp Brighton, a Department of Corrections facility.<sup>1</sup>

Defendant next argues that the trial court erred in denying his motion for a directed verdict when there was insufficient evidence of identification to support the charge. We disagree. The evidence, viewed in the light most favorable to the prosecution, was sufficient to identify defendant as the perpetrator beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). The credibility of the identification testimony presented a question for the jury as the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). We do not resolve credibility assessments anew. *Id.*

Defendant next argues that the trial court erred in allowing the testimony of Walker because it was tainted by the previous identification by Venegas. Defendant did not attack Walker's testimony on this basis in the trial court. Therefore, this issue is not preserved for appellate review. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Based on our review of the record, we cannot conclude that Walker's identification of defendant as a former employee and the man depicted in the videotape was tainted. Walker testified at the preliminary examination because Venegas was unavailable. The extent of Walker's knowledge regarding Venegas' interaction with the police and any potential testimony was not preserved in the record. However, the record does indicate that Walker had a personal knowledge and familiarity with defendant based on the prior working relationship that presented a basis for an independent identification. *People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998). In any event, we note that the testimony of defendant's former employers also established voice identification. MRE 901(5); *People v Berkey*, 437 Mich 40, 48-50; 467 NW2d 6 (1991).

Defendant next argues that the prosecutor's questioning of the alibi witnesses' failure to come forward before trial was erroneous. We disagree. The questioning by the prosecutor was proper. *People v Phillips*, 217 Mich App 489, 496; 552 NW2d 487 (1996).

Defendant next argues that the prosecutor improperly vouched for the credibility of witnesses Venegas and Walker. We disagree. This issue was not preserved for appellate review because there was no objection to the prosecutor's closing argument. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In any event, review of the statement reveals that the argument did not improperly vouch for the credibility of the witnesses. Rather, the prosecutor stated that the witnesses had no motivation to lie about their identification of defendant and their identification appeared to be "confident". The prosecutor was free to argue the evidence and all reasonable inferences arising from the evidence. *Id.* at 721.

Defendant next argues that the trial court erred in failing to grant his motion for a mistrial after the prosecution injected defendant's criminal record into the trial. We disagree. The trial

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<sup>1</sup> Defendant's reliance on *United States v Calhoun*, 544 F2d 291 (CA 6, 1976), is misplaced. In the present case, defendant's parole officer was not called as a witness.

court's decision regarding a motion for a mistrial is reviewed for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). In the present case, Venegas stated that defendant came to work for him through a work release program out of Camp Brighton, a prison related program. "A voluntary and unresponsive statement does not ordinarily constitute error" warranting a mistrial. *People v Kelsey*, 303 Mich 715, 717; 7 NW2d 120 (1942). The reference to the work release program was isolated and, unlike the situation in *People v Greenway*, 365 Mich 547, 549; 114 NW2d 188 (1962), it was unsolicited by the prosecutor. We cannot conclude that the trial court abused its discretion by denying the motion for a mistrial. *Griffin, supra*.

Defendant next argues that trial counsel was ineffective for failing to impeach the testimony of Walker, failing to require an independent basis for Walker's identification, failing to have Venegas' improper statement stricken from the record, and failing to object to improper prosecutorial statements. We disagree. Defendant has failed to meet his burden of proving ineffective assistance of counsel. Defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or that the representation deprived him of a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Defense counsel did not have the ability to impeach Walker's testimony because it was based on her recollection and she could not recall exact dates. Additionally, there was no indication that Walker's identification was tainted by Venegas' identification. Trial counsel's failure to request that Venegas' statement be stricken may have been trial strategy that we will not second guess. *Id.* at 331-332. Lastly, we cannot conclude that the prosecutor engaged in improper conduct.<sup>2</sup>

Defendant next argues that the trial court committed reversible error by failing to provide the jury with a larger television to review the videotape of the armed robbery. We disagree. Pursuant to MCR 6.414(H), the court must exercise discretion to honor reasonable requests by the jury to review evidence. In the present case, the jury requested enhancement equipment to view the videotape on a large screen television. The court did not have the means to honor the request, but allowed the jury to review the videotape through the use of the equipment that was available. Defense counsel did not object to this course of action, *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), and we cannot conclude that the trial court abused its discretion when the court did not have the means to fulfill the request.

Defendant next argues that the cumulative effect of errors requires a new trial. Having found no single prejudicial error, defendant's request must be denied. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

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<sup>2</sup> In a related issue, defendant argues that the prosecutor improperly allowed Walker to give false testimony. Again, Walker testified that defendant worked for the company on two occasions. Walker testified that she began in 1986, and defendant worked there for a five year period. There is no indication that Walker believed that the five year period commenced in 1986 and was continuous until 1991. Rather, Walker indicated that she was relying on her recollection and could not give exact dates. Defendant's characterization of the testimony is not supported by the record.

Finally, considering defendant's lengthy criminal history, including several assaultive offenses, his life sentence is proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Harold Hood

/s/ William C. Whitbeck

/s/ Patrick M. Meter