

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PERRIOD VERSER,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 229918

Ingham Circuit Court

LC No. 00-075423-FC

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

The jury convicted defendant of armed robbery, MCL 750.529, and the court sentenced defendant to 45 months' to 25 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant argues that the trial court erred in admitting testimony regarding a witness' identification of him in a photographic lineup while he was in custody. Because defendant did not raise this error at trial, we review it only if our failure to do so would result in manifest injustice. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). Manifest injustice requires that identification be a significantly contested issue at trial. *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Defendant was identified as one of the robbers not only by the photographic lineup, but also by one of the other robbers. Therefore, identification was not significantly contested, and we decline to review this issue.

Defendant also makes two allegations of prosecutorial misconduct. Prosecutorial misconduct is generally reviewed de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), but appellate review is foreclosed if a defendant fails to timely and specifically object unless an objection could not have cured the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant argues that prosecutorial questions and comments regarding a witness' out-of-court remarks and testimony at trial constituted improper vouching for the witness' truthfulness. Defendant did not object to this conduct at trial, and we find that a timely objection would have vitiated any harm this alleged misconduct might have caused. Therefore, appellate review is foreclosed.

Also, defendant alleges his due process rights under the Fifth and Fourteenth Amendments were infringed when the prosecution commented on his refusal to stand in a corporeal lineup. A defendant's Fifth Amendment right not to be a witness against himself is

applicable to state law prosecutions by virtue of the Due Process Clause of the Fourteenth Amendment. *Rochin v California*, 342 US 165, 173; 72 S Ct 205; 96 L Ed 183 (1952); *People v Jones*, 416 Mich 354, 359; 331 NW2d 406 (1982) (Kavanagh, J). However, Fifth Amendment rights are testimonial only, and requiring an accused to stand in a lineup does not violate or implicate those rights. *United States v Wade*, 388 US 218, 221-222; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *People v Benson*, 180 Mich App 433, 437; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). Further, were we to find that comment on a defendant's refusal to participate in a corporeal lineup is error, it is not an error requiring reversal. *Benson*, *supra* at 438-439. Therefore, the prosecution's interrupted and incomplete comment on defendant's refusal is not grounds for reversal.

Further, defendant says that the court erred in failing, sua sponte, to instruct the jury on the necessarily included lesser offense of unarmed robbery. Jury instructions are reviewed de novo, as a whole. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, when a defendant fails to make a timely objection, as here, we decline to review errors in jury instructions absent manifest injustice. MCL 768.29; *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Manifest injustice is not found if the instructions included the elements of the offense and did not omit material issues, defenses, and theories supported by the evidence. See, e.g., *People v Lee*, 243 Mich App 163, 183-184; 622 NW2d 71 (2000); *People v Joseph*, 237 Mich App 18, 25; 601 NW2d 882 (1999). The omission of an unrequested instruction on unarmed robbery did not implicate a basic and controlling issue because defendant never contended he was unarmed during the robbery and admitted in his closing that a gun was used in the robbery. Therefore, we decline to review this issue.

Defendant maintains that he was deprived of effective assistance of counsel because his attorney failed to object to a photographic lineup and to prosecutorial vouching, failed to demand a *Wade*¹ hearing, and failed to request a jury instruction on unarmed robbery. Whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, but questions of constitutional law are reviewed de novo. *Id.* at 4-5. However, when no testimonial record has been created in the trial court, the defendant must show plain error affecting substantial rights on the existing record. *Carines*, *supra*, 460 Mich at 774. If a defendant meets this burden, the reviewing court should reverse only if the defendant was actually innocent or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The focus of any inquiry must be

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

on the actual assistance received by a defendant. *Pubrat, supra* at 596. There is a presumption that counsel was effective. *Stanaway, supra* at 687.

To prevail, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; ___ NW2d ___ (2001), citing *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). With respect to the first prong of this test, there is a strong presumption that counsel's assistance was sound trial strategy. *Stanaway, supra* at 687. Moreover, counsel cannot be considered ineffective for failure to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

The failure of defendant's attorney to object to the photographic lineup and the prosecution's remarks cannot constitute ineffective assistance because, as noted, those events were proper, and objection would have been futile. *Snider, supra* at 425. The decision whether to move for a *Wade* hearing is a matter of trial strategy that this Court will, in general, not disturb. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). The facts here support this presumption because the witness who was shown the photographic lineup effectively impeached her own identification of defendant by admitting that she initially chose another photograph.

A decision not to request instruction on a lesser included offense is likewise presumed sound trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). Further, defendant fails to overcome this presumption because he pursued an all or nothing strategy of innocence by claiming he was out of town on the day of the robbery. Counsel's decision not to request an instruction on unarmed robbery was consistent with his theory of defense.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Jessica R. Cooper