

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON J. GORDON,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 185288

Recorder's Court

LC No. 93-013883

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right his conviction by jury of armed robbery, MCL 750.529; MSA 28.797. The court sentenced defendant to sixty to ninety months' imprisonment and credited him with 336 days served. We affirm defendant's conviction and remand for entry of an amended judgment of sentence.

In the early morning hours of November 25, 1993, John Payne and Susie Brown were sitting in Payne's car in the parking lot adjacent to a Detroit park when an older model Chevrolet Citation stopped beside them. A man, whom they identified as defendant, exited the car and walked around their car while repeatedly peering in the windows. Defendant ordered Payne to exit the car, and Payne, seeing an object in defendant's hand which he believed was an automatic pistol, complied. A second man then exited the Citation and approached Brown, who had remained in the car. As defendant leaned into the car, the second man ordered Brown to exit. She complied, and the man joined defendant in searching the car. After removing Payne's wallet from a jacket left in the car, the second man returned to the Citation and drove away. Defendant started Payne's car and likewise drove away.

Later that morning, Brown and Payne arrived at the police station and separately viewed a book containing approximately 100 photographs. Brown positively identified defendant as the man who approached them and drove away in Payne's car. Payne narrowed his selection to two photographs, and eventually chose defendant's photo, indicating that he thought defendant was one of the robbers. Defendant was subsequently arrested. A search of defendant's Chevrolet Citation revealed a BB gun which officers initially believed was a real handgun.

Defendant contends that the trial court abused its discretion in denying his motion for a mistrial on the basis of a police officer's reference to his refusal to participate in a corporeal lineup. We disagree. Absent an abuse of discretion, we will not reverse the court's denial of a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). In this case, the officer merely answered the question asked, albeit apparently not the question defense counsel, in hindsight, desired to ask. Although it appears that the officer did not have personal knowledge of defendant's refusal to participate in the lineup, defendant cannot assert the absence of foundation as error because his counsel deemed the question proper. *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988). The evidence was admissible and did not violate defendant's right against self-incrimination. *People v Benson*, 180 Mich App 433, 437; 477 NW2d 755 (1989), modified 434 Mich 903 (1990). Accordingly, the trial court appropriately denied defendant's motion because the reference did not justify a mistrial.

Next, defendant contends that he was denied a fair trial by a police officer's testimony that he responded to a radio report about an armed robbery and other officers' references to the instant offense as an armed robbery. This issue, however, is not preserved because defendant failed to object to the introduction of the evidence. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Our failure to review would not result in manifest injustice because there was no error that would require reversal. *People v Lewis*, 168 Mich App 255, 266-268; 423 NW2d 637 (1988). Defendant was not prejudiced by evidence that he was arrested for armed robbery because he was, in fact, charged with that offense.

Defendant asserts that he was denied the effective assistance of counsel by trial counsel's failure to object to the introduction of evidence that a BB gun was seized during a search of defendant's car. We disagree. Because defendant failed to preserve this issue by moving in the lower court for an evidentiary hearing or new trial, review is foreclosed unless detail of the deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In order to demonstrate that a criminal defendant was denied the effective assistance of counsel, counsel's performance must fall below an objective standard of reasonableness, and the defendant must have been prejudiced by the representation. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Under the circumstances of this case, evidence of defendant's possession of a BB gun fitting John Payne's general description of the perpetrator's gun was direct, relevant evidence that defendant committed the instant offense. *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). The evidence was also probative of an element of the charged offense -- the actual possession of a dangerous weapon or an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon. *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993). Therefore, defendant was not denied the effective assistance of counsel because any objection would have been futile. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

Defendant argues that he was denied a fair trial by the prosecutor's remarks during closing argument. Again, we disagree. Upon review of the prosecutor's remarks in context, we conclude that

defendant was not denied a fair trial. The prosecutor permissibly commented on properly admitted evidence of defendant's refusal to participate in a lineup, *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995), and her references to Payne's honesty do not constitute error requiring reversal. *People v Rosales*, 160 Mich App 304, 309; 408 NW2d 140 (1987). Although the prosecutor improperly suggested that defense counsel was trying to mislead the jury, *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), this isolated remark in an otherwise proper discussion of the evidence and witness credibility did not deny defendant a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

With respect to defendant's remaining issue, we agree that an amended judgment must be entered. The judgment lists a maximum term of eight years, four months, rather than the ninety months actually imposed by the court. We therefore remand this matter for entry of an amended judgment which accurately reflects defendant's sentence of sixty to ninety months.

Affirmed and remanded for entry of an amended judgment of sentence. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell