

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELA A. WEST,

Defendant-Appellant.

UNPUBLISHED

February 24, 1998

No. 199752

Oakland Circuit Court

LC No. 96-147252 FH

Before: O’Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right her conviction of felonious assault, MCL 750.82; MSA 28.277. Following a one-day bench trial, defendant was sentenced to one year in jail with fourteen days’ credit. We affirm.

Defendant first argues that she was denied a fair trial because the prosecutor improperly shifted the burden of proof by questioning defendant concerning her failure to produce any corroborating witnesses to testify on her behalf at trial. Defendant contends that by doing so, the prosecution was suggesting that she was required to present evidence to support her innocence. We disagree, and find no error.

We first note that defendant did not object to the prosecution’s questions or comments during trial, thus precluding appellate review absent manifest injustice. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). We find no injustice because this Court, as well as our Supreme Court, has consistently held that when a defendant advances an alternate theory of the case or an alibi, a prosecutor can legitimately comment on the defendant’s failure to produce corroborating witnesses or evidence without shifting the burden of proof, so long as the comments do not burden the defendant’s right not to testify. See, *eg.*, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Gant*, 48 Mich App 5, 9-10; 209 NW2d 874 (1973).

Moreover, even if the prosecutor had engaged in improper conduct, we find that any error would be harmless considering the fact that defendant was tried by a judge rather than a jury. Unlike a jury, a judge is “presumed to possess an understanding of the law, which allows him to understand the

difference between admissible and inadmissible evidence or statements of counsel.” *People v Wofford*, 196 Mich App 275, 280; 492 NW2d 747 (1992). Therefore, given the nature of the prosecutorial comments and the circumstances surrounding defendant’s trial, we do not believe that defendant was denied a fair and impartial trial.

Defendant next argues that she was denied a fair trial because her counsel was ineffective. Defendant specifically claims that defense counsel failed to produce corroborating witnesses at trial, was unprepared for trial, failed to interview her, and neglected to object to the improper line of questioning advanced by the prosecutor. Defendant, however, failed to properly preserve this issue for appellate review by establishing a record of the facts pertaining to her allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Consequently, in the absence of any testimonial record or affidavit establishing that defense counsel did not in fact interview defendant, or proof as to who might have qualified as a corroborating witness (along with what they would have testified to at trial), this Court has no basis upon which to judge the propriety of defense counsel’s actions, and more importantly, whether defendant sustained any prejudice as a result of counsel’s actions. Hence, defendant’s claim must be denied because she has failed to establish that she was denied effective assistance of counsel.

Affirmed.

/s/ Peter D. O’Connell

/s/ Roman S. Gribbs

/s/ Michael R. Smolenski