

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYANT FROST,

Defendant-Appellant.

UNPUBLISHED

May 29, 1998

No. 192240

Oakland Circuit Court

LC No. 94-134938 FC

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797. As an habitual offender, fourth offense, MCL 769.13; MSA 28.1085, he was sentenced to serve an enhanced prison term of five to twenty years. He appeals as of right.

Defendant first argues that the court erred in failing to instruct the jury sua sponte on the defense of misidentification pursuant to CJI2d 7.8. Because defendant did not request the trial court to give CJI2d 7.8, our review of the issue is limited to whether manifest injustice occurred. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). A trial court is under no duty to instruct sua sponte on a defendant's theory of the case when no request has been made for the instruction. MCR 2.516(B)(3); *People v Walker*, 167 Mich App 377, 380 n 1; 422 NW2d 8 (1988); *People v Peery*, 119 Mich App 207, 216-218; 326 NW2d 451 (1982). Further, when read in their entirety, the instructions given, particularly the instruction regarding the credibility of witnesses, adequately covered the issue of misidentification to prevent manifest injustice.

Next, defendant argues that he was denied his Sixth Amendment right to counsel of his choice at the line-up conducted by police. We disagree. Under Michigan law, a defendant is entitled to counsel at pretrial identification procedures. *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973).¹ The dictates of *Anderson* were satisfied in this case because defendant was represented by appointed counsel during his line-up. Defendant has failed to provide this Court with any persuasive authority for his theory that he had a right to counsel of his choice at the line-up under the circumstances presented

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

here. Moreover, the trial court's findings that retained counsel arrived after the line-up, the line-up was adjourned once so that defendant could retain counsel, defendant had expressed that he did not want to be represented by the lawyer retained, and appointed counsel's performance was adequate were not clearly erroneous. Accordingly, defendant has not established a violation of his right to counsel.

Defendant next claims that his Fourth Amendment rights were violated when he was arrested without a warrant or a showing of probable cause, and that the trial court erred in denying his motion to suppress the evidence seized as a result of his illegal arrest. We disagree. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Id.*; MCL 764.15; MSA 28.874. Here, probable cause to arrest was established where the physical description of the robbery suspect given by the victim and the other witnesses closely matched that of defendant, a silver toy gun and nylons were found in the car defendant was driving, and \$483 in cash folded over was found on defendant's person. Accordingly, defendant's arrest for armed robbery did not lack probable cause, and, consequently, we find no merit to his additional claim that the evidence seized by the police, defendant's post-arrest statement, and the lineup identification should have been suppressed as fruit of an illegal arrest.

Defendant next claims that the court erred in failing to properly instruct the jury on assault, an essential element of the charge of armed robbery, pursuant to CJI2d 18.1(2). Because defendant failed to object to the allegedly improper jury instruction, this Court will review this issue only to avoid manifest injustice. *Van Dorsten, supra*. Although the trial court may have misread one word in the instruction on armed robbery, we note that the jury was given written copies of the correct instruction to follow along with the court's verbal instruction and the jury was permitted to take this into the deliberation room. Accordingly, on these facts, we find no manifest injustice because of the court's slight misstatement.

Next, defendant argues that the court erred in allowing him to be impeached with evidence of two prior convictions. We find no error requiring reversal. Contrary to defendant's argument, his 1986 conviction of receiving and concealing stolen property over \$100 was not outside the ten-year time limit in MRE 609(c), and the trial court did not abuse its discretion in concluding that the probative value outweighed the prejudicial impact. Accordingly, this conviction was properly admitted as impeachment evidence under MRE 609(a)(2). With regard to defendant's 1989 conviction of second-degree retail fraud, we find that admission of this conviction was erroneous. A misdemeanor retail-fraud conviction is not admissible under MRE 609(a)(1) because it does not contain an element of dishonesty or false statement. *People v Parcha*, 227 Mich App 236, 246; 575 NW2d 316 (1997). However, in this case, we find the error to be harmless because the prosecution's case against defendant was a strong one and two of defendant's other prior convictions were properly admitted as impeachment evidence. Thus, we do not believe that a single juror would have voted to acquit had defendant not been impeached with evidence of his second-degree retail fraud conviction. *Id.*

Next, we agree with defendant that the trial court abused its discretion in admitting evidence of defendant's past use of aliases. A defendant's use of an alias at the time of arrest is relevant to the issue of credibility, but if the prosecutor knows only that on some past occasion the defendant has used an alias, such evidence may not be admitted for impeachment purposes. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); *People v Thompson*, 101 Mich App 609, 614; 300 NW2d 645 (1980). Here, defendant was questioned on recross-examination by the prosecutor about his past use of three different aliases. Admission of this evidence was erroneous, but we find the error to be harmless in this case. The prosecutor's questions were not asked in a highly inflammatory manner and this evidence was not referred to in the prosecutor's closing argument. Moreover, there was strong evidence of defendant's guilt and we do not believe that the admission of this evidence was outcome determinative. *Id.* See also *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996).

Next, defendant argues that he was denied effective assistance of counsel. To establish this claim, defendant must show that counsel's performance was so deficient that counsel was not functioning as guaranteed by the Sixth Amendment, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). After reviewing the record, we conclude that, even considering the cumulative effect of the numerous professional errors alleged by defendant, he has not established that a reasonable probability exists that the outcome of his trial would have been different but for the alleged errors. Thus, defendant has not established entitlement to appellate relief on this basis.

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct. Because defendant failed to object to certain allegedly improper questions by the prosecutor, we will reverse his otherwise valid conviction only if a curative instruction could not have eliminated the prejudicial effect of the questions or where failure to review the issue would result in a miscarriage of justice. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). After reviewing the alleged instances in context of the whole record, we find no miscarriage of justice.

Defendant next argues that the trial court considered two invalid prior convictions in imposing sentence and that he is entitled to be resentenced or to have this matter remanded for an evidentiary hearing. Although defendant failed to raise this issue during sentencing, this Court may nonetheless review the claim because the alleged defect involves defendant's constitutional right to counsel. *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994); *People v Zinn*, 217 Mich App 340, 343; 551 NW2d 704 (1996). When asserting a collateral challenge to the constitutional validity of a prior conviction, the defendant bears the initial burden of presenting prima facie evidence that the challenged prior conviction was obtained without counsel or a proper waiver of counsel. *Id.* at 343; *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Moore*, 391 Mich 426, 436-438; 216 NW2d 770 (1974). Here, we find that defendant has met this initial burden for remand for a *Tucker-Moore* hearing because the documentary evidence presented indicates in each case that defendant was neither represented by counsel nor did he waive counsel. On remand, the burden shall be upon the prosecutor to establish the constitutional validity of the prior convictions. *Carpentier*, *supra* at 31. In the event that the prosecutor meets this burden, the trial court shall deny resentencing. However, if the prosecutor is unable to meet this burden, the trial court shall direct that an

amended presentence report be prepared, striking the invalid prior conviction(s), and defendant shall be resentenced accordingly.

Next, we agree with defendant that the trial court, having agreed that the Macomb County presentence report was irrelevant and would not be considered, erred in failing to strike the report from defendant's presentence report. MCL 771.14(5); MSA 28.1144(5); MCR 6.425(D)(3)(a); *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995). Accordingly, on remand, we direct the trial court either to strike the report, or to review its contents for relevance and strike any material deemed irrelevant or inaccurate.

Lastly, we note that defendant's judgment of sentence indicates that he was convicted by a guilty plea of habitual offender, fourth offense. This is plain error. We exercise our authority under MCR 7.216(A)(4) and direct the trial court on remand to correct the judgment of sentence to reflect that defendant was convicted of a *single* offense, armed robbery, and that his sentence for this offense was enhanced as a result of his status as an habitual offender, fourth offense, MCL 769.13; MSA 28.1085 (as amended), MCL 769.12; MSA 1084. No *conviction* as an habitual offender shall be entered. See 1994 PA 110; *Zinn, supra* at 344-345.

Defendant's conviction is affirmed, but the matter is remanded to the trial court for a *Tucker-Moore* hearing, and for correction of the judgment of sentence and presentence report as directed. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ The right exists in Michigan independent of the Sixth Amendment. *People v Winters*, 225 Mich App 718, 721-722; 571 NW2d 764 (1997).