

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DAMON CAMBLE, a/k/a LITTLE WOLF,

Defendant-Appellant.

UNPUBLISHED

December 15, 1998

No. 204296

Kalamazoo Circuit Court

LC No. 97-000082 FC

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual-offender, MCL 769.10; MSA 28.1082, to a term of three to fifteen years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Viewed in a light most favorable to the prosecutor, the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant intended to commit great bodily harm upon the victim where he stepped from a place of concealment, pointed a loaded handgun at the victim's head as the victim sat behind the wheel of a parked vehicle, and fired multiple shots, causing one bullet to penetrate the vehicle's windshield, pass close enough to one of the victim's eyes for the victim to feel the bullet pass, pass through the hood of the victim's coat and shatter the rear window of the vehicle. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992); see *People v Harrington*, 194 Mich App 424, 428-430; 487 NW2d 479 (1992).

II

Additionally, our review of the record does not disclose that defendant was deprived of a fair and impartial trial when the prosecutor elicited hearsay testimony from witness Dalanda Fry.

People v Paquette, 214 Mich App 336, 342; 543 NW2d 342 (1992). Defendant sustained no prejudice in light of the trial court's cautionary instruction and the cumulative nature of the testimony. *Id.*; see *People v Foreman (On Remand)*, 179 Mich App 678, 682; 446 NW2d 534 (1989).

Similarly, in light of the overwhelming evidence of guilt, defendant was not deprived of a fair and impartial trial when the prosecutor placed before the jury evidence that had been seized pursuant to a search warrant, but was determined to be irrelevant to any issues to be resolved by the jury. *Paquette, supra* at 342; *People v Fuzi #1*, 116 Mich App 246, 253; 323 NW2d 354 (1982).

Defendant has failed to preserve for appellate review his challenges to the prosecutor's closing and rebuttal arguments. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). Moreover, defendant has failed to demonstrate the presence of a miscarriage of justice where most of the challenged comments constituted proper argument based on the evidence presented. *Messenger, supra* at 179-180; *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). To the extent that the prosecutor might have advanced an impermissible argument, no miscarriage of justice occurred in light of the overwhelming evidence against defendant. *Stanaway, supra* at 687.

III

The trial court did not abuse its discretion when it admitted the preliminary examination testimony of witness Edward Pattison. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995); *People v James (After Remand)*, 192 Mich App 568, 571-573; 481 NW2d 715 (1992). A prosecutor may use the prior testimony given at a preliminary examination consistent with the constitutional guarantee of the right of confrontation if the witness is "unavailable," MRE 804(b), and if an opportunity to cross-examine the witness was provided at the preliminary examination, MRE 804(b)(1). In the instant case, the trial court did not clearly err when it determined that the prosecutor had exercised due diligence in attempting to procure Pattison's testimony, *Briseno, supra*; *James, supra* at 571, and, therefore, Pattison was "unavailable" within the meaning of MRE 804(a)(5).

Moreover, our review of the record reveals that defense counsel was provided the free and unfettered opportunity to cross-examine Pattison without interference from the examining magistrate or the prosecutor. Based on this record, the admission of Pattison's preliminary examination testimony did not violate defendant's confrontation right. *People v Moore*, 78 Mich App 294, 298; 259 NW2d 351 (1977).

IV

Next, we reject defendant's claim that reversal is required because the trial court did not sua sponte give a limiting instruction concerning the use of bad acts evidence. A trial court is under no obligation to give a limiting instruction sua sponte and, therefore, error warranting reversal does not occur when the court fails to give a limiting instruction in the absence of a request and in the absence of a clear demonstration that the instruction would have been favorable to the defendant. *People v Morris*, 139 Mich App 550, 558; 362 NW2d 830 (1984). Here, the trial court's failure to give the limiting instruction did not constitute error warranting reversal because defendant failed to request the instruction and it is not clear on this record that defendant would have benefited from the instruction where the prosecutor argued the evidence for a proper purpose, MRE 404(b)(1), and presented overwhelming evidence of defendant's guilt.

Likewise, the trial court's failure to sua sponte instruct regarding flight did not constitute error. Contrary to defendant's assertion on appeal, the prosecutor did not argue to the jury that defendant's flight from the scene of the shooting evidenced consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Rather, the prosecutor merely argued that defendant's deliberate and thought-out actions before and during the shooting established defendant's intent to kill the victim. Because the prosecutor did not argue defendant's flight as evidence of consciousness of guilt, the trial court cannot be said to have failed to instruct the jury on a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

Defendant has neither shown that counsel made an error so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, nor that he sustained the requisite prejudice as a consequence of any error made on the part of counsel. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *Messenger, supra* at 181-182.

V

Finally, the trial court did not abuse its sentencing discretion in imposing a three-year minimum sentence for defendant's assault conviction where the court considered all of the information before it, recognized its discretion to enhance defendant's sentence under MCL 769.10; MSA 28.1082, and imposed an individualized and proportionate sentence. *People v Adams*, 430 Mich 679, 687; 425 NW2d 437 (1988); *People v Edgett*, 220 Mich App 686, 694-696; 560 NW2d 360 (1996).

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra