

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

THOMAS ANDREW FERGUSON,

Defendant- Appellant.

UNPUBLISHED

April 11, 1997

No. 189236

Saginaw Circuit Court

LC No. 91-005731-FC

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit forgery, MCL 750.157a; MSA 28.354(1), MCL 750.248; MSA 28.445, and assault with intent to rob while armed, MCL 750.89; MSA 28.284. He was sentenced to concurrent terms of seventeen to forty years' imprisonment for the armed robbery conviction, five to fourteen years' imprisonment for the conspiracy conviction, and seventeen to forty years' imprisonment for the assault with intent to rob conviction. We affirm.

Defendant was accused of robbing a woman and of attempting to rob her father with the aid of a toy gun. He was also accused of conspiring with his girlfriend to use the female victim's bank card to purchase items at a local store by having his girlfriend forge the female victim's signature on the charge slip. Defendant initially pleaded guilty to several charges, was sentenced, and his plea-based convictions were affirmed by this Court. The Michigan Supreme Court, however, permitted withdrawal of the guilty plea and remanded the case to the circuit court for trial. 445 Mich 863 (1994). Defendant was then convicted as indicated.

Defendant first argues that the trial court erred by denying his motion for a directed verdict of acquittal on the charges of armed robbery and assault with intent to rob while armed because there was insufficient evidence that he intended to communicate that he was armed with a dangerous weapon. We disagree.

An essential element of armed robbery is "being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous

weapon.” MCL 750.529; MSA 28.797; see also MCL 750.89; MSA 28.284 (assault with intent to rob while armed, containing almost identical language). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the feigned weapon element of armed robbery. *People v Jury*, 3 Mich App 427, 429-432; 142 NW2d 910 (1966) (there was sufficient evidence of armed robbery where the perpetrator’s hand was concealed leading the shopkeeper to believe that he had a gun, even though the perpetrator did not verbally claim to be armed). The victims’ inability to describe the object in more detail does not render their testimony incompetent. *People v Myers*, 16 Mich App 618, 619; 168 NW2d 386 (1969) (specific identification of an object that the victim believed to be a knife was unnecessary where a sharp object was held to the victim’s throat). Moreover, use of a toy gun fashioned or used in a manner that leads the victim to believe that the object is a dangerous weapon will suffice. See, *People v Jolly*, 442 Mich 458, 469; 502 NW2d 177 (1993) (citing the use of a toy gun as an example that satisfies the feigned weapon element of armed robbery). Viewing the victims’ and the officer’s testimony in a light most favorable to the prosecution, there was sufficient evidence from which a reasonable jury could have concluded that defendant used the toy gun in a manner intended to make the victims believe that it was real. See *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Not only did the victims believe that a weapon existed, but both victims saw an object in defendant’s hand and there was police testimony that defendant admitted using a toy gun in the robbery that was later found hidden in his girlfriend’s car. Accordingly, the evidence was sufficient.

The other cases cited by defendant are inapplicable because they do not indicate that the perpetrator possessed an object that could be a weapon. *People v Krist*, 93 Mich App 425, 430; 287 NW2d 251 (1979) (one of the perpetrators claimed to have a gun and threatened to harm the store clerk, but the clerk never saw a gun or anything that looked like a gun); *People v Parker*, 417 Mich 556, 565-566; 339 NW2d 455 (1983) (the victim testified that the perpetrator claimed to have a knife and would stab her, but she never saw a knife or similar object); *People v Saenz*, 411 Mich 454, 458; 307 NW2d 675 (1981) (the victim believed that the perpetrator had a weapon because his hand was concealed, but saw no weapon, saw no article that resembled a weapon, and did not observe any visible bulge under the perpetrator’s coat).

Defendant next argues that the trial court abused its discretion in sentencing him to two concurrent terms of seventeen to forty years’ imprisonment for his convictions of armed robbery and assault with intent to rob while armed. Defendant claims the lengthy sentences were not warranted by the nature of the offenses, his background or the sentencing guidelines. We disagree.

A trial court abuses its discretion when the sentence imposed is disproportionate to the seriousness of the crime and the defendant’s prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The minimum sentence of seventeen years fell within the recommended range of the armed robbery sentencing guidelines and is therefore “presumptively not excessively severe or unfairly disparate.” *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). However, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn*, *supra* at 661. Defendant’s drug dependency at the time of his convictions and his attempt to

combat his addictions in prison are not unusual circumstances. Defendant's argument that the crime was not a violent one conflicts with the jury's finding that defendant committed armed robbery. We further note that defendant had several prior felony convictions and was on parole when he committed the instant offenses. Finally, there is no evidence to suggest that the trial court's offhand comment recognizing that this was the second time that defendant was being sentenced was prejudicial to defendant. Therefore, defendant fails to present any unusual circumstances to overcome the presumption of proportionality or otherwise indicate that the armed robbery sentence constituted an abuse of discretion.

With respect to the concurrent sentence for assault with intent to rob while armed, the trial court was not required to compute a recommended sentencing range. *People v Eberhardt*, 205 Mich App 587, 590-591; 518 NW2d 511 (1994). It should be noted, however, that this offense falls under the same grid in the sentencing guidelines as armed robbery. Therefore, particularly in light of the finding of proportionality above, the trial court's imposition of a concurrent sentence of seventeen to forty years for the conspiracy conviction was not disproportionate.

Defendant next argues that he is entitled to resentencing because the trial court incorrectly sentenced him for the crime of forgery when, in fact, he had been acquitted of that count and was convicted of conspiracy to commit forgery. We disagree.

Defendant correctly notes that the presentence information report and the court's comments on the record indicate that a five to fourteen year sentence was imposed for forgery, MCL 750.248; MSA 28.445, of which defendant was acquitted. The judgment of sentence, however, reflects the proper conviction of conspiracy to commit forgery. MCL 750.157a; MSA 28.354(1). Defendant failed to challenge the accuracy of the information in the presentence information report at sentencing and the issue, therefore, is not properly preserved for appeal. MCR 6.429(C);¹ *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). There is also no reason to disregard the issue preservation requirements because no manifest injustice resulted from the court's error and because the error was not outcome determinative. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Because the conspiracy statute indicates that the imposed sentence should be equal to the sentence for commission of the offense, any confusion regarding sentencing was not prejudicial as defendant would have received the same five to fourteen year sentence under the conspiracy statute as he did under the forgery statute. Therefore, there is no need to remand for resentencing as the end result would be the same sentence and because the judgment of sentence correctly lists the proper crime and statutory section. *People v Ristich*, 169 Mich App 754, 759; 426 NW2d 801 (1988).

Defendant also claims that his trial counsel was ineffective for failing to address this error at sentencing. The issue was not properly identified in the statement of questions presented and therefore does not have to be addressed on appeal. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Even if addressed, however, defendant's claim would fail for lack of proof that there was "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d

557 (1994), and that the result was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Affirmed.

/s/ Clifford W. Taylor

/s/ Harold Hood

/s/ Roman S. Gibbs

¹ Although MCR 6.429(C) was amended to allow the defendant to claim error upon a showing that the challenge was brought as soon as the inaccuracy reasonably could have been discovered, the distinction does not matter because counsel could have discovered the error at least by sentencing.