STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ERIC CARPENTER,

Defendant-Appellant.

UNPUBLISHED
June 3, 1997

No. 183575
Ingham Circuit Court
LC No. 94-067965-FC

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of armed robbery, MCL 750.529; MSA 28.727, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), stemming from the robbery of a gas station on July 22, 1994. Defendant was sentenced to two years in prison for the felony-firearm conviction and a consecutive term of twenty to thirty years for the armed robbery conviction. We affirm.

Defendant argues that he was denied a fair trial by having to wear physical restraints during the trial. We disagree. The prosecutor in the instant case advised the trial court that defendant might not cooperate during trial because he had "struggled" with the lockup officers the last time he had appeared in court in this matter. The trial court was also advised that defendant might attempt to escape. Defendant had earlier told a police lieutenant that he would run if he had the chance and he would "take an officer out to do it" if necessary. This Court reviews a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Although the trial court did not expressly find that defendant presented an escape or safety risk, that finding was implied where the court ruled immediately after the prosecution presented its rationale for restraining defendant during trial. Because defendant did not dispute the prosecutor's allegations, this colloquy was sufficient to support a finding that such restraint was "reasonably necessary to maintain order." *People v Dunn*, 446 Mich 409, 425-426; 521 NW2d 225 (1994).

Defendant argues that he was prejudiced when several of the jurors likely saw him in handcuffs and leg restraints, apparently in the hallway during a recess. The trial court acknowledged the likelihood of such an occurrence, given the physical set up of the court facility. The court offered to give a contemporaneous curative instruction, which defendant's counsel rejected in favor of an instruction later in the trial. The trial court did instruct the jury at the close of trial that the fact that "defendant may be in physical restraint while in formal custody is no evidence against him." *Dunn, supra* at 427, n 28. Given the testimony identifying defendant as the robber in the gas station surveillance videotape, as well as other compelling circumstantial evidence, we conclude that defendant's right to a fair trial was not compromised and any error was therefore harmless. *People v Mateo*, 453 Mich 203, 210; 551 NW2d 891 (1996). Moreover, the curative instruction was adequate.

Defendant next argues that the trial court abused its discretion in allowing defendant's impeachment with evidence of a prior conviction for a nontheft offense of receiving and concealing stolen goods over $100. MCL 750.535; MSA 28.803. We disagree. Defendant testified in his own defense at trial. Where a crime contains either an element of dishonesty or false statement or an element of theft, evidence of a previous conviction may be admitted for the purpose of attacking a witness' credibility, provided the trial court balances its probative value against its prejudicial effect. MRE 609(a)(1) and (a)(2)(B); *People v Allen*, 429 Mich 558, 593-593; 420 NW2d 499 (1988). Absent an abuse of discretion, this Court should not reverse a trial court's decision to allow impeachment by a prior conviction. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). Here, the trial court performed the requisite balancing test and ruled that the probative value outweighed its prejudicial effect after finding that a theft element could be inferred from the elements of the crime. While the stated elements of the offense of receiving and concealing stolen goods over $100 do not contain theft or larceny, *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993), the trial court's decision to admit evidence of the prior conviction is supported by the fact that possession of stolen property by a thief can serve as the basis for a charge of *either* larceny or receiving and concealing stolen goods. *People v Johnson*, 176 Mich App 312, 315; 439 NW2d 345 (1989). While there was no evidence presented that defendant stole the property he was convicted of possessing, the holding in *Johnson* supports the trial court's inference of a theft element, and this Court will not reverse the trial court's decision to allow impeachment by the prior conviction. *Bartlett, supra* at 19.

Defendant also argues that the trial court abused its discretion by admitting into evidence a handgun, bandanas, and nylon stockings as other bad acts evidence. MRE 404(b)(1). We disagree. This evidence was not offered to prove that defendant acted in conformity with bad character, MRE 404(b)(1), but came in as circumstantial evidence from which the jury could infer that the items seized were the same handgun, stockings, and bandanas that were observed by the victim during the robbery and as seen on the surveillance video.

Defendant also argues that he was denied a fair trial because the prosecutor committed misconduct during the examination of Detective Michael Debnar and during closing argument by arguing facts not in evidence and by making prejudicial remarks about defense counsel's veracity. We disagree. Because defendant failed to object, this issue is unpreserved for appeal absent manifest injustice or if a curative instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643,

687; 521 NW2d 557 (1994). The prosecutor unsuccessfully tried to introduce into evidence photographs of defendant taken before his arrest. In seeking to lay a foundation for these photographs, Detective Debnar referred to one photograph as being in the "police computer." Defendant claims this testimony permitted the jury to infer that the photograph was a mug shot. Where a defendant has not taken the stand, testimony concerning a defendant's mug shot will impermissibly place his criminal record before the jury. *People v Embry*, 68 Mich App 667, 670; 243 NW2d 711 (1976). However, the prosecutor's questioning of Debnar was not calculated to elicit inadmissible evidence. Rather, the prosecutor was attempting to show that defendant's appearance had changed between the time of the robbery and a subsequent lineup. A curative instruction, had one been requested, would have been sufficient to cure any innuendo that the photograph was indicative of a criminal record. Notably, the prosecutor made no impermissible arguments based on that testimony. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996); *People v Haisha*, 111 Mich App 165, 169-170; 314 NW2d 465 (1981). Further, any error was harmless because defendant testified at trial that he had a prior record. *Mateo, supra* at 210; *Embry, supra* at 670.

The prosecutor asserted during closing that defendant had testified to using "greasy stuff" on his hair when in fact defendant had testified only that his hair had been "wet curly." The prosecutor also argued that the victim made an "honest mistake" when she said the gun used in the robbery looked different and bigger than the gun that was introduced into evidence. While a prosecutor may not argue facts not in evidence, she may argue all reasonable inferences from the evidence as it relates to her theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Any error could have easily been remedied with a curative instruction, had one been requested, and was thus harmless. *Mateo, supra* at 210-212.

Defendant claims that during closing arguments the prosecutor attacked the veracity of defendant's counsel and argued that he was intentionally trying to mislead the jury. The record does not support this claim. While it is not clear what the prosecutor meant by her warning to the jury not to be misled, there is nothing to indicate that she was arguing that defendant's counsel was attempting to deliberately mislead the jury. Nor can it be said from the record that the prosecutor personally attacked defense counsel or shifted the jury's focus from the evidence to defense counsel's personality. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). On the whole, plaintiff's remarks were fair and any error that may have occurred did not rise to the level of manifest injustice necessary to reverse.

Defendant next argues that he was denied effective assistance of counsel because his attorney failed to object to the prosecutor's examination of Debnar, referred to the inadmissible photographs as mug shots, failed to impeach a witness, Brandy Zakora, with a prior misidentification of defendant, and failed to object to the prosecutor's closing arguments. The record does not support defendant's claim. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). At no time did defense counsel refer to the photographs as "mug shots." There is no indication that the prosecutor's direct examination of Debnar and defense counsel's failure to object to it affected the outcome of defendant's trial where defendant himself admitted to having a prior record. With regard to defense counsel's alleged failure to impeach Zakora, defendant's claim is misplaced and he argues facts not in evidence.

Defendant claims that at defendant's preliminary examination in an unrelated robbery, Zakora recanted her previous identification of defendant and the charges were dismissed. There is nothing on the record to corroborate defendant's claim and, assuming it was true, there is nothing therein that is inconsistent with Zakora's testimony in the instant case. Nor were there any inconsistencies between Zakora's testimony at the preliminary examination in the instant case and her trial testimony. Finally, there is nothing in the record to indicate that defense counsel's failure to object to the few minor misstatements during the prosecutor's closing argument or to request curative instructions affected the outcome of defendant's trial where the prosecutor's arguments centered on inferences that could reasonably have been made by the jury. Effective assistance of counsel is presumed. *Stanaway, supra* at 687. The existing record does not warrant a belief that but for these few alleged deficiencies, the outcome would have been different or that defendant did not receive a fair trial. Defendant failed to meet his burden of proof on this issue. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996); *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988).

Defendant also argues that the cumulative effect of the claimed errors denied him a fair trial. We disagree. The record in this case shows that defendant received a fair trial and that there was no cumulative prejudicial effect from the few minor errors that may have occurred. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant also argues that his sentence was disproportionate to the offense and this offender. We disagree. This Court reviews a sentence to determine whether the sentence was in fact proportionate to the seriousness of the crime and to the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-654; 461 NW2d 1 (1990). Provided that a sentencing court considers permissible factors, it is granted broad discretion and a sentence will not be overturned on appeal absent an abuse of discretion. *Id*. Defendant's sentence was within the guidelines' range and is thus presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). The court did not abuse its discretion by sentencing defendant to the maximum recommended sentence under the guidelines where defendant was convicted of a serious offense and had an extensive criminal record. Also, the court ranked defendant as one of the worst offenders it had seen in twenty-five years as a lawyer and judge and considered defendant to be a serious threat to society.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor

I concur in the result only.

/s/ Janet T. Neff