

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL LYNN PORTER,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 195233

Recorder's Court

LC No. 95-005977

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by the trial court of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to an enhanced sentence of six to fifteen years' imprisonment based on defendant's status as an habitual offender, MCL 769.13; MSA 28.1085. Defendant appeals as of right. We affirm.

The complainant went with defendant's brother ostensibly to purchase automobile parts. Upon arriving at their destination, defendant approached the complainant with what the complainant believed to be a gun and ordered the complainant onto the ground. Defendant's brother then took the complainant's money.

Defendant first argues that the trial court did not secure a valid waiver of defendant's right to a jury trial. We disagree. MCR 6.402(B) requires that before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury and that the court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. This Court has held that this requirement is satisfied where it is clear from the record that the defendant understood his right to trial by jury and where the defendant voluntarily waived that right. *People v Reddick*, 187 Mich App 547, 550; 468 NW2d 278 (1991). In this case, the trial court held a personal discussion with defendant during which it expressly informed defendant of his right to a trial by jury. The trial court determined that based upon that discussion and defendant's signature on the waiver form that defendant's waiver was knowing, voluntary, and understanding. Based on the record, we conclude that

the trial court's findings were not clearly erroneous. *People v James (After Remand)*, 192 Mich App 568, 570; 481 NW2d 715 (1992); see also *Reddick*, *supra*.

Next, defendant argues that certain testimony elicited from defendant's brother on cross-examination and from a police officer on rebuttal was admitted in violation of MRE 404(b). However, we decline to address this issue because defendant did not object to his brother's cross-examination and objected to the officer's rebuttal testimony on a ground different from the ground he asserts on appeal. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Next, defendant argues that the trial court reached an inconsistent verdict when it found him guilty of armed robbery, but not guilty of felony-firearm. We disagree. A conviction of armed robbery does not require a finding that a defendant was armed with a firearm, but rather requires a finding that the defendant was armed either with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery. *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993). In this case, the victim could not affirmatively testify whether the object pointed at him by defendant was a gun because defendant covered it with a towel. However, the victim thought the object was a gun based upon the manner in which defendant used the article and defendant's threat to kill the victim if he did not hand over his money. The trial court was not convinced beyond a reasonable doubt that defendant was armed with a firearm, but specifically found that defendant was armed with a dangerous weapon or an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon. The trial court's verdict that defendant was guilty of armed robbery but not guilty of felony-firearm was not inconsistent.

Finally, defendant argues that he is entitled to resentencing because the trial court failed to exercise its discretion and operated under a misconception of the law at sentencing. We disagree. In this case, the prosecutor filed a notice of intent to enhance defendant's sentence due to his status as a fourth habitual offender. At sentencing, the court initially assumed that the prosecutor was proceeding on a supplemental information, but the prosecutor then handed a copy of the notice to the court. Upon receiving this information, the record indicates that the court understood that the 1994 amendment to MCL 769.13; MSA 28.1085 governed defendant's sentencing. It is also apparent from our review of the record that the trial court indicated it could sentence defendant up to a term of life imprisonment, but only enhanced defendant's armed robbery sentence from a term of four to ten years' imprisonment to a term of six to fifteen years' imprisonment. We believe that this indicates that the trial court properly exercised its sentencing discretion. Although the record indicates that the trial court vacated the former sentence and then imposed the latter, defendant's judgment of sentence reflects only one conviction. We do not think it necessary for defendant to be resentenced because we find no error.

Affirmed.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski