

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLETON RAMONE PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

December 9, 1997

No. 191092

Muskegon Circuit Court

LC No. 95-038039 FC

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of armed robbery, MCL 750.529; MSA 28.797, three counts of felony-firearm, MCL 750.227b; MSA 28.424(2), and one count of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty-five to fifty years' imprisonment for the armed robbery convictions, six to ten years' imprisonment for the felon in possession of a firearm conviction, and the mandatory two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

This case arises out of an incident in which two men, armed with handguns, robbed the West Side Bar in Muskegon. Codefendant Christopher Ramsey, who was identified by several witnesses at the scene, committed suicide in jail, while awaiting trial. The prosecution's theory was that defendant was the second robber, who was wearing a mask during the commission of the robbery. Defendant, who was later caught fleeing from the police with Ramsey, claimed that the prosecution failed to sufficiently identify him as the person with Ramsey at the scene of the robbery.

Defendant first contends that there was insufficient evidence to sustain his armed robbery convictions. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's

person or presence, and (3) the defendant must be armed with a

weapon described in the statute. *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

In this case, although defendant argues that many other people could have the same physical characteristics as defendant's, which matched the description given by the witnesses, defendant's physical attributes were not the only circumstantial evidence connecting him to the armed robbery. Shortly after the crime was committed, the police found the getaway car at the home of codefendant Ramsey's mother, to whom the car was registered; defendant was fleeing from the home where the getaway car was located; defendant was with Ramsey, who was identified by several witnesses; defendant's clothing and physical size and height matched witness descriptions; he was carrying a substantial amount of cash; he was carrying a gun matching the description of the gun carried by the second robber; and when arrested, he was wearing shoes that had a tread consistent with the footprint left at the scene of the crime. Further, witnesses testified that while Ramsey's face was almost entirely uncovered and identifiable, the other robber was wearing a dark blue or black ski mask and black gloves. Gloves and a mask matching witness descriptions were found on the couch in the home from which defendant fled. Finally, defendant's association with Ramsey, the identified robber, combined with the other proofs, provided a reasonable inference that defendant was also one of the robbers. See *People v Scott*, 65 Mich App 657, 661; 237 NW2d 602 (1975); *People v Evans*, 115 Mich App 711, 717; 321 NW2d 686 (1982), overruled on other grounds sub nom *People v Carpentier*, 446 Mich 19, 33; 521 NW2d 195 (1994). While each of these factors would be insufficient when viewed separately, in combination, they establish defendant's identity as one of the robbers with sufficient certainty to justify the jury's guilty verdict. See *People v Bottany*, 43 Mich App 375, 377-378; 204 NW2d 230 (1972).

Next, defendant argues that he was denied a fair trial because the court improperly allowed evidence of codefendant Ramsey's guilt in the case against defendant. Defendant did not object to the admission of the evidence at trial, and this Court will not consider a plain, unpreserved error on appeal unless the error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Here, it would not. As stated above, it is proper for the trial court to allow admission of a defendant's association with an identified robber to prove the defendant's identity as another person involved in the robbery. *Evans, supra*, p 717; *Scott, supra*, p 661. Because defendant's identity was at issue in this case, and Ramsey was identified by several witnesses as one of the robbers, defendant's association with Ramsey was important in addition to the other circumstantial evidence presented against him. The trial court was therefore justified in allowing the admission of evidence of Ramsey's involvement in the robbery.

Defendant further claims that the trial court should have granted his motion to sever the charge of felon in possession of a firearm from the armed robbery charges. We find no error requiring reversal. Any possible prejudice to defendant was cured by the fact that defendant's previous conviction was introduced by stipulation and by the court's limiting instruction. See *United States v Mebust*, 857 F

Supp 609, 613 (ND Ill, 1994), cited in *People v Mayfield*, 221 Mich App 656; 562 NW2d 272 (1997).

Defendant also argues that he was denied a fair trial as the result of prosecutorial misconduct. Defendant failed to object below to the alleged instances of misconduct; therefore, review is waived on appeal unless an objection and instruction could not have cured the error or failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, the prosecutor's statement, in closing argument, that two off-duty police officers in the bar at the time of the robbery were "trained observers," did not constitute improper vouching for the witnesses. Reviewing the prosecutor's comments in context, it appears that the prosecutor was merely acknowledging discrepancies in several witnesses' descriptions of the guns held by the robbers and pointing out that the officers were experienced in handling guns, whereas several witnesses testified that they did not have knowledge of different guns. Further, any impropriety in the prosecutor's statement was cured by the court's instruction to the jury that "the fact that they are police officers does not make their testimony any more or less believable than that of any other witnesses." There was no error requiring reversal. Defendant's remaining allegation of prosecutorial misconduct, regarding shifting the burden of proof, is unsupported by any authority and thus is unpreserved. *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996).

Next, defendant contends that the trial court erred in failing to instruct the jury under CJI2d 7.8 on the issue of identification. Defendant failed to object to the instructions as given, and therefore the issue is waived unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996). Relief is not necessary here. No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). Defense counsel argued the issue of identity throughout his closing argument, based on the inconsistencies in the witnesses' descriptions, and emphasized the importance of the dim lighting with which they observed the suspect, as well as the brief period of time that witnesses had to look at the suspects. Further, substantial instructions were given on the issue of the credibility of witnesses. The jury instructions given regarding credibility, combined with the instructions for the elements of armed robbery, fairly presented the issue of identification to the jury: the jurors were instructed that to find defendant guilty, they must find that defendant committed the crime, and that, in making that determination, they had the option of finding that the witnesses' testimony was unbelievable or inaccurate. Because jury instructions are to be read as a whole, *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995), no error occurred in failing to give an additional specific instruction on identity.

Defendant also argues that he was denied effective assistance of counsel at trial. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). This Court must decide whether counsel's performance was deficient, measured against prevailing professional norms and whether there is a reasonable probability that, but for counsel's error, the result of the

proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Stanaway*, *supra*, pp 687-688.

Defendant first argues that his trial counsel was ineffective for failing to request the jury instruction on identification, as discussed above. However, because we have concluded that no error resulted in the omission of the instruction, counsel should not be faulted for failing to request such an instruction. *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

Defendant next claims that counsel was ineffective for stipulating to defendant's previous felony in conjunction with the charge of felon in possession of a firearm. We disagree. It appears that defense counsel was conceding a point that he knew was sure to come out in order to show the jury that he was not trying to hide anything. A lawyer does not render ineffective assistance by conceding certain points at trial, *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988), and one way that a defendant charged with felon in possession of a firearm can prevent error and prevent the possibility of prejudice from the admission of a previous conviction is to introduce the previous conviction by means of stipulation. *Mayfield*, *supra*, p 660. Moreover, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Without the benefit of hindsight, therefore, it cannot be said that trial counsel's strategy was deficient.

Finally, defendant argues that the trial court erred at sentencing in failing to articulate valid reasons for defendant's sentence, and in violating the principle of proportionality in imposing defendant's sentence. We disagree.

First, regarding defendant's claim that the trial court's reasons for imposing sentence were invalid because they were already considered in the guidelines, appellate review of habitual offender sentences is limited to a review of the proportionality, without any consideration of, or reference to, the guidelines. *People v Hansford (On Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Further, the court's statements concerning the excessive violence of the crime, the psychological injury of the victims, and defendant's record were sufficient to satisfy the articulation requirement.

Defendant's contention, that the sentence imposed violated the principle of proportionality, is also without merit. Given the violence of the crime, the psychological injury to the victims, defendant's prior record, and defendant's probation status at the time the crime was committed, the trial court did not abuse its discretion in sentencing defendant. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff