STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN JAMES O'DONNELL,

Defendant-Appellant.

UNPUBLISHED
March 13, 1998

No. 182699
Calhoun Circuit Court
LC No. 94-001864-FC

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, four counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count each of armed robbery, MCL 750.529; MSA 28.797, and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was sentenced to concurrent terms of 25 to 50 years' imprisonment for each of the assault convictions, 2 years' imprisonment for each of the felony-firearm convictions (to be served concurrent with each other but consecutive to the other sentences), 20 to 40 years' imprisonment for the armed robbery conviction, and 3½to 5 years' imprisonment for the concealed weapon conviction. We affirm.

Defendant first argues that he was denied his due process rights under the United States and Michigan Constitutions where a police officer failed to preserve a videotape of the store parking lot made by a surveillance camera at the time of the crimes. We disagree. Prior to June 1, 1995, the scope of discovery was in the trial court's discretion, *People v Wimberly*, 384 Mich 62, 69; 179 NW2d 623 (1970), and this Court reviewed the trial court's grant or denial of discovery under the abuse of discretion standard, *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994).

We first note that in the case at bar the police officer's decision to erase the videotape antedated the trial court's September 29, 1994, discovery order by several months. Thus, this is not a case where the police failed to preserve evidence that had been requested by defendant, or was the subject of a previous discovery order. Further, a store security officer testified that videotapes such as

the instant one are usually erased within two weeks of their creation. Also, two witnesses, who viewed the videotape, testified that they saw nothing of significance on the videotape.

The United States Supreme Court has held that where the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the police. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). We find that defendant has not shown bad faith on the part of the police and, thus, has not established that his due process rights were violated.

Defendant next argues that the trial court erred in failing to grant his motion to preclude the testimony of a prosecution witness, whose previous statements were recorded by the prosecution but not provided to defendant. Our review of the record, however, reveals that defense counsel received a transcript of the witness' statements, albeit untimely, and that defense counsel never adduced any evidence of prejudice to defendant's case resulting from plaintiff's delay in furnishing the statement. Absent such a showing, we are unable to conclude that error requiring reversal occurred. See *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

Defendant next argues that the trial court erred in denying his motion to dismiss the armed robbery charge. When a trial court's denial of a motion to quash turns on its interpretation of the law, our review is de novo. *People v Thomas*, 438 Mich 448, 552; 475 NW2d 288 (1991). Defendant specifically contends that the crime of retail fraud was completed when an accomplice of defendant took the merchandise from the store with intent to steal, and that defendant's subsequent brandishing of a handgun in the store parking lot constituted a crime separate and distinct from retail fraud and not usable to support the charge of armed robbery. We disagree.

The essential 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 MCL 750.529; MSA 28.797. *People v Newcomb*, 190 Mich App 424, 430; 476 NW2d 749 (1991). "Michigan has adopted the view that robbery is a continuous offense that is not complete until the perpetrator reaches a place of temporary safety . . . . This transactional approach to armed robbery provides that a taking is not considered complete until the assailant has accomplished his escape, because the victim is still considered to be in possession of his property." *Id*. at 430-431. Consequently, the use of force or intimidation to retain property or to escape with it is sufficient to supply the element of force or coercion essential to the offense of armed robbery. *People v Valesquez*, 189 Mich App 14, 16-17; 472 NW2d 289 (1991). Here, because defendant used force to accomplish his escape with the stolen property, the trial court's denial of defendant's motion to dismiss the charge of armed robbery was proper.

Defendant next argues that the trial court erred in denying his motion to dismiss the three charges of assault with intent to commit murder. We disagree. We review a circuit court's decision with respect to a motion to quash for whether the district court abused its discretion in binding the defendant over for trial. *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996).

Defendant contends that the testimony at the preliminary examination illustrated that Williams, an accomplice of defendant, "grabbed" the gun from defendant in the store parking lot and began shooting at security officers. Defendant submits that the word "grab" connotes a forcible seizure of the weapon by Williams, thereby negating the intent necessary to support the three charges of assault with intent to commit murder. We disagree. The word "grab" need not indicate a forcible taking contrary to the will of another, but, alternatively, it could signify a voluntary transfer. Further, the witness also testified at the preliminary examination that the gun was "exchanged" between defendant and Williams, thereby furnishing additional support for the magistrate's decision to bind defendant over. Accordingly, the district court did not abuse its discretion in binding defendant over for trial on the three charges of assault with intent to commit murder, and the circuit court did not err in denying defendant's motion to quash.

Defendant also argues, in propria persona, that his convictions of both armed robbery and assault with intent to commit murder violate the Double Jeopardy Clauses of the United States and Michigan Constitutions. Although defendant failed to raise this issue at trial, this Court may consider constitutional claims for the first time on appeal. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). Defendant's argument, however, is without merit because the prohibitions against double jeopardy do not bar a defendant's convictions of armed robbery and assault with intent to commit murder. See *People v Harding*, 443 Mich 693; 506 NW2d 482 (1993).

Defendant's remaining allegations have not been preserved for appellate review.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Hilda R. Gage