STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY LAMAR HAGEWOOD,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 200549
Genesee Circuit Court
LC No. 96-054341 FC

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of armed robbery, MCL 750.529; MSA 28.797, and two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The trial court sentenced defendant to concurrent terms of forty to sixty years' imprisonment on each count. We affirm defendant's convictions and sentences.

I

Defendant first challenges the process by which the jury was selected. He argues that the trial court's method of rotating the exercise of peremptory challenges violated MCR 2.511(E)(3)(a), which provides:

> First the plaintiff and then the defendant may exercise one or more peremptory challenges until each party successively waives further peremptory challenges or all the challenges have been exercised, at which point jury selection is complete.

Defendant was tried with a codefendant, and each was allotted ten peremptory challenges, pursuant to MCR 6.412(E)(1). Although the record is not clear regarding the number of peremptory challenges the trial court allowed the prosecutor, the same court rule provides that the prosecutor is entitled to "the total number of peremptory challenges to which all the defendants are entitled." During the jury selection process, the trial court first gave the

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

prosecutor an opportunity to exercise a peremptory challenge. After replacing the eliminated juror, the court then allowed the codefendant to exercise a peremptory challenge and replaced the juror thus eliminated. When the court called on defendant for a peremptory challenge, defendant's counsel objected and noted that he believed that the prosecutor should next exercise his second peremptory challenge because "otherwise I believe he'd have an unfair advantage based upon the number that he has versus what I have." The trial court overruled the objection and continued the described pattern of rotation until a jury was selected.

After defendant had exhausted his peremptory challenges, the court specifically asked if his counsel was satisfied with the jury, and counsel responded, "Yes, Judge, we're satisfied." The prosecutor passed on the next round and used no more peremptory challenges. Because the codefendant had passed on an earlier round, he then used his last peremptory challenge. There followed no challenges for cause and the jury selection process stood completed. At that point, the trial court again asked defendant's counsel if he was satisfied with the jury, and defendant's counsel responded affirmatively regarding the jury panel that then was sworn. In the process, defendant and the codefendant each had exhausted all ten of their peremptory challenges, and the prosecutor had exercised six challenges.

Defendant now argues that the trial court did not adhere to MCR 2.511(E)(3)(a) and that this failure constitutes reversible error. In support of his argument, defendant cites *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), in which three defendants were tried together. The applicable court rule in effect at the time, GCR 1963, 511.6, required that "[a]fter a challenge for cause is sustained or a peremptory challenge exercised, another juror shall be selected and examined before further challenges are made." *Id.* at 324. Five weeks before the trial was scheduled to start, the trial court had entered an order indicating that the "struck" jury method would be employed for jury selection. Using this method, a replacement was not immediately called when a potential juror was removed for cause or by peremptory challenge. Instead, the prosecutor and three defense attorneys exercised peremptory challenges until only eleven jurors out of an original pool of seventy-three potential jurors remained. Then thirty-seven replacements were called and questioned, and the peremptory challenge process continued. *Id.* at 323-324. Because the procedure employed by the trial court did not comply with the court rule, the Supreme Court reversed the defendant's conviction and remanded for a new trial. *Id.* at 326.

In *People v Russell*, 182 Mich App 314; 451 NW2d 625, rev 434 Mich 922; 456 NW2d 83 (1990), this Court reversed a defendant's conviction because he was required to use three peremptory challenges at once during the jury selection process in violation of the court rules. *Id.* at 318-320. The dissenting opinion noted that the trial court had recognized its error and changed the procedure early in the jury selection process, and the defendant had demonstrated his satisfaction with the jury by not exercising all of his peremptory challenges and explicitly stating to the trial court that he was satisfied with the impaneled jury. Moreover, concluded the dissent, the evidence presented established the defendant's guilt and defendant "announced that he was satisfied with the jury which was selected. . . . I am satisfied that defendant's guilt was determined by a fair and impartial jury." *Id.* at 326. The

Supreme Court reversed the Court of Appeals and reinstated the defendant's conviction "for the reasons stated in the dissenting opinion." *Russell, supra*, 434 Mich 922.

Like the present case, *People v Finney*, 113 Mich App 638; 318 NW2d 519 (1982), involved multiple defendants and a challenge to the trial court's method of rotating peremptory challenges. The trial court first called on the prosecutor for a peremptory challenge and then on each defendant in turn before returning to the prosecutor. *Id.* at 640. On appeal, the defendant argued that the trial court should have allowed one of the defendants to exercise a peremptory challenge "and then the prosecutor would have to exercise one of his, and go back and forth with each defendant in that manner." *Id.* at 641. In affirming the defendant's conviction, this Court held that GCR 1963, 511.5, which contained essentially the same language as MCR 2.511(E)(3), did not require the trial court to rotate peremptory challenges in the manner suggested by the defendant. *Id.* at 641.[1]

In the present case, defendant's counsel objected to the rotation method employed by the trial court and utilized all of the available peremptory challenges. However, he twice expressed to the trial court his satisfaction with the impaneled jury, which we believe waived any further objection to the trial court's method of rotating the exercise of peremptory challenges. More importantly, we agree with this Court's ruling in *Finney*, *supra* regarding the rotation of peremptory challenges in cases involving multiple defendants. We find that the method employed by the trial court of rotating the exercise of peremptory challenges from the prosecutor to each defendant in turn before returning to the prosecutor did not offend MCR 2.511(E)(3)(a) but was instead a reasonable interpretation of the rule. As in *Russell, supra*, the evidence established defendant's guilt of the charged offenses beyond a reasonable doubt, and defendant twice expressed satisfaction with the jury. We are satisfied that defendant was convicted by a fair and impartial jury. See *Russell*, *supra* at 326.

II

Defendant argues that the trial court committed reversible error in denying his motion for directed verdicts on the armed robbery counts. We review a trial court's denial of a motion for directed verdict to determine whether the evidence, viewed in the light most favorable to the prosecution, would permit a rational factfinder to find that the essential elements of the charged offense had been established. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The evidence presented at trial established that defendant drove an automobile into a vehicle owned by one of the victims and left his automobile carrying a beer bottle. All three victims testified that a beer bottle was thrown through the back window of the vehicle in which they were sitting with sufficient force to break the window and shatter the beer bottle. Following the shattering of the window, defendant and his two companions opened the doors of the victims' automobile and demanded that the victims empty their pockets. The victims gave defendant and his companions their possessions. After the robbery, the female victim was ordered to disrobe and forced to engage in sexual acts with the three perpetrators. Defendant penetrated the victim at least twice vaginally and forced her to perform oral sex on him. He also facilitated further assaults on the victim by driving her to a more secluded location.

For an offense to constitute armed robbery, "the robber must be armed with an article which is in fact a dangerous weapon—a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon." *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997), quoting *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). Defendant contends that no weapon was displayed when items were taken from the victims, and therefore the "armed" element of armed robbery was not established. Although Michigan courts have upheld many items to be dangerous weapons in the context of an armed robbery, including bottles, *People v Bart (On Remand)*, 220 Mich App 1, 14; 558 NW2d 449 (1996), and automobiles, *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991), defendant argues that the use of the automobile and bottle in the present case preceded the taking of the victims' property, and therefore the theft offenses were at most unarmed robberies or larcenies. We disagree.

This Court has previously recognized that the assault portion of a robbery sometimes occurs prior to taking the victim's property or after the taking is accomplished. *People v LeFlore*, 96 Mich App 557, 561-562; 293 NW2d 628 (1980). When an assault precedes the taking of a victim's property, the key factor for finding a robbery is analyzing the events as a transaction in order to determine whether "larcenous intent" was present throughout the events comprising the robbery. *Id.* at 562. For example, in *People v Yarbrough*, 107 Mich App 332; 309 NW2d 602 (1981), this Court determined that an assault with a gun that occurred prior to the actual taking of property was part of the offense of armed robbery because the defendant's intent throughout the entire transaction was to steal the victim's purse. *Id.* at 335-336. The requisite intent to commit armed robbery may be inferred by the jury from circumstantial evidence. *Jolly*, *supra* at 466, citing *People v Sharp*, 57 Mich App 624, 626; 226 NW2d 590 (1975).

In the present case, defendant utilized both an automobile and a bottle as dangerous weapons during the assaults that preceded the actual taking of the victims' property. We hold that a reasonable factfinder, viewing the evidence in the light most favorable to the prosecution, could conclude that the ramming of the victims' automobile with the defendants' vehicle, the smashing of the victims' rear window with a bottle, and the taking of the victims' property comprised a single transaction during which defendant displayed the intent to steal from the victims. As such, the takings were punishable as armed robberies, and the trial court did not err when it denied defendant's motion for a directed verdict on the armed robbery charges.

III

Finally, defendant argues that the trial court's sentences were disproportionate because the court failed to consider the fact that he did not have "a serious prior record," that he was "remorseful and cooperative after the offense," and that he was a high school graduate with military experience. The trial court exceeded the minimum recommended sentence for each of defendant's convictions. The sentencing guidelines' recommended range for each count was 180 months to 360 months or life imprisonment. The trial court sentenced defendant to 40 years (480 months) to 60 years (720 months).

We review a trial court's sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). The sentencing judge must take into account the nature of

the offense and the background of the offender. *Id.* at 651. Where the sentencing guidelines' recommended range differs from the trial court's intended sentence, the judge is alerted that the sentence falls outside a normative range and should be evaluated to assure that it is not unfairly disparate, has a rational basis, and is not disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). A sentencing court may depart from the guidelines when the ranges are an "inadequate reflection of the proportional seriousness of the matter at hand." *Milbourne*, *supra* at 661. When imposing a sentence that reflects an upward departure from the sentencing guidelines, the sentencing court must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-419; 410 NW2d 266 (1987).

In the present case, the trial court stated its reasons for departure in the sentencing information report departure evaluation, in which the court wrote: "The horrible nightmare deserves this punishment. The sexual assault described in detail at the time of sentencing gives more than adequate reason for this departure." At the sentencing hearing, the trial court reiterated the facts of the crime, announced the sentence, and stated that the circumstances of the offense justified an upward departure from the guidelines. We agree and find that the sentencing court did not abuse its discretion because the sentence imposed was proportionate to the seriousness of the offense and to this offender.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin

[1] In *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 147-148; 324 NW2d 782 (1982), this Court again held that the rotation of peremptory challenges from the prosecutor to each of multiple defendants before returning to the prosecutor did not violate GCR 1963, 511.5.