STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 1999
v	No. 205394 Kent Circuit Court
DONALD LEE SWACKHAMMER, Defendant-Appellant.	LC No. 96 013223 FC

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of bank robbery, MCL 750.531; MSA 28.799, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a firearm by a person convicted of a felony, MCL 750.224f; MSA 28.421(6). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to twenty to forty years' imprisonment for the bank robbery conviction, a mandatory two years' consecutive imprisonment for the felony firearm conviction, and four to seven and one-half years' imprisonment for the felon in possession of a firearm conviction. We affirm.

I

Defendant alleges that the trial court erroneously instructed the jury that his prior conviction of receiving or concealing stolen property with a value in excess of $100, MCL 750.535; MSA 28.803, was a felony and thus directed the jury to find this essential element of the felon in possession charge proved. Defendant failed to object to this instruction at trial. However, where an erroneous jury instruction pertains to an essential element of an offense, a contemporaneous objection to the instruction is not required to preserve the issue for appeal. *People v Vaughn*, 447 Mich 217, 228; 524 NW2d 217 (1994). We review jury instructions in their entirety to determine if there is error requiring reversal; even if they are imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

Defendant asserts that the trial court erred by instructing the jury as follows: "I instruct you that that conviction of receiving and concealing [property with a value] over a hundred dollars was a felony." Defendant relies on *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996), in which this Court held that "[w]hen a trial court instructs that an essential element of a criminal offense exists as a matter of law, error requiring reversal will be found."

Tice, however, is distinguishable from the instant case because in that case the defendant argued that his prior conviction was a misdemeanor, not a felony. See *id*. Thus, in that case the trial court's instruction undermined the jury's fact-finding role and freed the prosecutor from having to prove each element of the charged crime. Here, defendant did not argue that his previous conviction was of a misdemeanor. Indeed, MCL 750.535(1); MSA 28.803(1) classifies receiving and concealing stolen property over $100 as a felony. Although it would have been preferable if the trial court had said that "the *crime* of receiving and concealing property with a value over $100 is a felony," when the disputed instruction is read in context, it is clear that the trial court was simply conveying this fact to the jurors. The instructions, considered in their entirety, fairly presented the issues to be tried and sufficiently protected defendant's rights. See *Whitney*, *supra* at 252. Contrary to defendant's assertion, the determination whether defendant had been convicted of the felony remained in the jury's province.

Moreover, pursuant to *Vaughn*, erroneous instructions regarding essential elements may be reviewed for harmless error. In determining whether the error was harmless, the reviewing court should assess whether the jury, properly instructed, could have reached a different verdict had the error not occurred. *Vaughn*, *supra* at 238. Here, given the introduction of the certified records of defendant's conviction, we conclude that a reasonable jury could not have reached a different verdict.

II

Defendant next claims he was denied a fair trial by the trial court's refusal to sever the felon in possession of a firearm charge from the other charges against him. A trial court's decision on a motion to sever is reviewed for an abuse of discretion. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

When multiple charges arise from the same transaction, separate trials are to be avoided if a single fair trial is possible. *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997). Where an element of one charge is the defendant's status as a convicted felon, adequate safeguards are available to limit unfair prejudice from the necessary introduction of a prior felony. *Id*. Among these safeguards are introducing the fact of the defendant's conviction by a stipulation, emphasizing to the jury that it must give separate consideration to each count of the indictment, and providing a limiting instruction that the jury may only consider the prior conviction as it relates to the count requiring as an element that the defendant be a convicted felon. See *id*. at 660.

In the present case, defendant has failed to articulate how he was unfairly prejudiced by the introduction of evidence of his felony conviction. Accordingly, we cannot find that the trial court abused its discretion in denying defendant's motion to sever. See *Duranseau*, *supra*.

Defendant also complains because the trial court did not caution the jury regarding the proper use of the evidence. However, despite the fact that the trial court explicitly relied on *Mayfield* in denying defendant's motion to sever, defendant failed to request any of the means of minimizing the prejudice set forth in that decision. See *id*. This Court will not allow a defendant to harbor error as an appellate parachute. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996). Under the circumstances, we conclude that relief is not required.

III

Defendant contends that he was denied a fair trial by prosecutorial misconduct during closing argument. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

Defendant first argues that he was prejudiced when the prosecutor repeatedly characterized him as "wicked." However, the comments came in response to defense counsel's characterization of the majority of the prosecution's witnesses, defendant's friends and peers, as "wicked" and "nefarious." A prosecutor's comments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Furthermore, prosecutors may use "hard language" when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). While the prosecutor did incorrectly state that defense counsel had called his client wicked, he withdrew the statement after defense counsel objected. Under the circumstances, defendant's right to a fair and impartial trial was not compromised. See *Green*, *supra*.

Next, defendant claims that the prosecutor improperly referenced his right not to testify when commenting on the change in defendant's appearance between the robbery and the time of his arrest. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

A prosecutor is accorded much latitude in constructing his arguments and is free to comment on the evidence and the inferences to be drawn from the evidence. *People v Bahoda*, 448 Mich 261, 309; 531 NW2d 659 (1995). The prosecutor may observe that the evidence against the defendant is "uncontroverted" or "undisputed," even if defendant is the only one who could have contradicted the evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). After reviewing the prosecutor's argument, we conclude that relief is not required. Any improper prejudice could have been eliminated with a curative instruction. See *Nantelle*, *supra*. In fact, the prosecutor himself contemporaneously noted that defendant was not required to prove anything.

Finally, defendant claims that the prosecutor denigrated the defense and vouched for the prestige of his office and credibility of his witnesses. Because defendant did not object to the comments below, our review is again limited. See *id*. After examining both parties' arguments, we are satisfied that the prosecutor's comments were in direct response to the remarks made by defense counsel. We find no error requiring reversal. See *Messenger*, *supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin