STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC L. SHAW,

Defendant-Appellant.

UNPUBLISHED
April 20, 1999

No. 209248
Recorder's Court
LC No. 97-000838

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant Eric Shaw was convicted of carjacking, MCL 750.529a; MSA 28.797(a), armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of eight to twenty years' imprisonment for both carjacking and armed robbery, to be served after a consecutive sentence of two years' imprisonment for felony-firearm. Defendant appeals as of right. We affirm.

Defendant first argues that his convictions for both carjacking and armed robbery constitute multiple convictions for one offense in violation of the constitutional prohibitions of double jeopardy. US Const, Ams V, XIV; Const 1963, art 1, § 15. We disagree. This Court recently considered precisely this issue. *People v Parker*, 230 Mich App 337; 584 NW2d 336 (1998). The Court found no double jeopardy problem, recognizing that the inquiry was one of legislative intent, characterizing the two crimes as two substantially different offenses, and concluding that "the Legislature intended to separately punish a defendant convicted of both carjacking and armed robbery, even if the defendant committed the offenses in the same criminal transaction." *Id.* at 344-345. We have no reason to express any disagreement with *Parker*, and accordingly reject defendant's argument here.

Defendant's remaining argument on appeal is that he was denied a fair trial because the testimony of a prosecution witness touched upon defendant's having some criminal history. We disagree.

At trial, the prosecutor asked a police witness how he had come to know defendant, to which the witness replied, "I received a radio run, which gave me an address. I responded to that location to investigate an Eric Shaw, who at that time was wanted for a warrant from the Department of Corrections. I don't recall whether it was escape or parole violation." Shortly afterward, after conferring with counsel off the record, the trial court gave the jury a cautionary instruction, characterizing the statement as "something that was thrown in" by the witness "with no basis or foundation," emphasizing that the witness had not stated that he actually knew defendant to be wanted for escape or parole violation, and admonishing the jury to "ignore that completely."

Although defense counsel did not specifically ask for a mistrial on the record, the transcript reveals sufficient machinations on the part of counsel and the trial court regarding the improper testimony that we will deem this issue preserved for appeal. This Court reviews a lower court decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted). There is no dispute that the witness' remark was inappropriate. Evidence of other bad acts "can 'weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998), quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644, 651-652; 136 L Ed 2d 574 (1997). However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Haywood*, *supra* at 228.

In this case, there is no indication that the prosecutor was trying to elicit any mention of defendant's involvement in other criminal activity. The prosecutor did not repeatedly ask questions that had any obvious tendency to elicit improper answers. See *People v Springs*, 101 Mich App 118, 121-124; 300 NW2d 315 (1980). Instead, the statement complained of came in response a proper question concerning how defendant had been apprehended, the witness volunteering the inappropriate remark after answering the question asked. Further, the subject matter of the improper statement, which did not implicate defendant in any particular crime but instead only suggesting that defendant had been incarcerated, was not so prejudicial as to be irreparable. The trial court took pains to provide the jury with a curative instruction, and defense counsel expressed satisfaction with the way the trial court attempted to remedy the mishap. For these reasons, a mistrial was not warranted.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell