STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 1999
v	No. 199769 Berrien Circuit Court
ANTHONY LEE ARRINGTON, Defendant-Appellant.	LC No. 96001574

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; MSA 28.797, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), in connection with the robbery of complainant as she was walking home from the store one evening with her niece. Defendant appeals as of right, arguing that he was denied effective assistance of counsel, that the trial court erred when it denied his motion for a *Ginther*[1] hearing, that the trial court erred when it denied his motion for a new trial, that the jury's verdict rested on insufficient evidence, that the prosecutor committed several prejudicial acts of misconduct, and that the trial court imposed a disproportionate sentence. We affirm.

I

Defendant first argues that he was denied effective assistance of counsel and that the trial court erred when it refused to grant his motion for a *Ginther* hearing. Defendant claims his trial counsel was ineffective for two reasons. First, trial counsel failed to call two witnesses, defendant's girlfriend and her sister. Defendant contends that these witnesses would have testified that he was on the phone when the crime was committed. Defense counsel had placed the two names on the subpoena list, but the list indicates the subpoenas were never served. Nothing in the record reflects why the witnesses were not called. Second, trial counsel failed to introduce phone records that defendant claims show he was on the phone with his girlfriend when complainant was robbed. However, defendant offered no proof that such records were helpful to his case or even existed when he filed his motion for a new trial. In sum, the record contains no reason to suspect that defense counsel's conduct amounts to anything more than

sound trial strategy. We will not second guess trial counsel's strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant claims he was denied the opportunity to expand the record for appellate review when the trial court refused to grant his motion for *Ginther* hearing. Presumably, it is at this hearing that he would have tried to create a record from which he could argue ineffective assistance. This is in accord with *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), in which our Supreme Court held:

> If the record made before a defendant is convicted does not factually support claims he wishes to urge on appeal, he should move in the trial court for a new trial or, where the conviction is on a plea of guilty, to set aside the plea, and seek to make a separate record factually supporting the claims. See *People v Taylor*, 387 Mich 209, 218; 195 NW2d 856 (1972). Without record evidence supporting the claims, neither the Court of Appeals nor we have a basis for considering them. [*Id*. at 443.]

The trial court denied the hearing because it believed defense counsel probably had a good reason for not calling the witnesses or introducing the phone records. However, the purpose of the hearing is to establish a record from which one can then argue that counsel was ineffective. It was premature for the trial court to declare counsel effective before allowing defendant the opportunity to create a record. The record does not reflect the reasons for defense counsel's decision, and the trial court's inference that trial counsel was competent, while perhaps reasonable, is not logically required.

However, while we disagree with the trial court's expressed reasons for denying the motion, we agree with its decision to deny defendant's motion for the *Ginther* hearing. Defendant was obligated to make some showing that a hearing was necessary at the motion for a new trial. *Ginther*, *supra*, at 443. He should have filed affidavits regarding the testimony of the omitted witnesses and produced the phone records, or at least stated on the record why they could not be produced. The trial court was not obliged to hold an evidentiary hearing when defendant supplied no offer of proof.

II

Defendant next argues that the trial court erred when it denied his motion to set aside the verdict as against the great weight of the evidence. We review the trial court's grant or denial of a motion for new trial on this ground for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). The trial court can grant a new trial if, after reviewing all the evidence, a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). The court must review all the evidence and determine whether the verdict is against the overwhelming weight of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). However, "a judge may not repudiate a jury verdict on the ground that 'he disbelieves the testimony of witnesses for the prevailing party.'" *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998) (internal citation omitted). If there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id*. at 643.

The evidence suggests that this trial was essentially a credibility contest. While the complainant's identification testimony was problematic, there was other evidence linking defendant to the conviction. In short, the jury had to decide whom it believed, and it chose to believe complainant and the other prosecution witnesses. This is the type of verdict we will not overturn on an appeal from the trial court's refusal to find that the verdict was against the great weight of the evidence.

III

Defendant next argues that the jury's verdict is based on insufficient evidence. When reviewing for sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

This case centers on identity, which is always an essential element of the crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). As discussed above, the jury's decision in this case was primarily one of credibility. Plaintiff presented eyewitnesses who put defendant at the scene and in possession of goods similar to those stolen, while defendant asserted an alibi defense. Viewed in a light most favorable to the prosecution, there was sufficient evidence to support the conviction.

IV

Defendant alleges several instances of prosecutorial misconduct. We will not review allegedly improper conduct if a defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The goal of a defense objection to prosecutorial remarks is a curative instruction. *Id*. A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). In this case, none of the alleged instances of error were properly preserved or beyond the scope of a curative instruction. Therefore, we will not review them.

V

Finally, defendant argues that his sentence was disproportionate. While defendant acknowledges that the sentencing guidelines do not apply when a sentence is issued under the habitual offender statute, MCL 769.10 *et seq*.; MSA 28.1082 *et seq*., he urges us to use the sentencing guidelines as a yardstick in determining whether his sentence was proportional to the crime committed. However, we only review sentences imposed on habitual offenders for abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). Whether to impose an increased sentence as authorized by the habitual offender act is within the sentencing court's discretion. *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991). We will not consider the sentencing guidelines on appeal when reviewing sentences under the habitual offender statute. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Defendant argues that he is entitled to a lesser sentence because he can be, and needs to be, rehabilitated. However, defendant's presentencing investigation report lists a history of criminal activity starting from his days as a juvenile. In addition to his current conviction for armed robbery, defendant has three prior felonies and has violated his probation on numerous occasions. That history belies defendant's assertion that the trial court should have given more consideration to defendant's rehabilitative potential. Nor is there any support in the record for defendant's contention that the trial court extended his sentence because he refused to admit guilt. In short, we find no abuse of discretion by the trial court.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jane E. Markey

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).