STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 215242 Kent Circuit Court
RYAN DEWAYNE WILLIAMS, Defendant-Appellant.	LC No. 97-012680-FC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of unarmed robbery, MCL 750.530; MSA 28.798. The trial court sentenced him to four to fifteen years' imprisonment. We affirm.

Defendant first argues that the trial court should have granted his motion for a new trial because his conviction was against the great weight of the evidence. We review a trial court's decision on a motion for a new trial based on the great weight of the evidence for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant argues that the verdict was against the great weight of the evidence because the prosecutor's witnesses were not credible. However, because the testimony by numerous witnesses regarding defendant's commission of the crime did not "contradict[] indisputable physical facts" and was not "so inherently implausible that it could not be believed by a reasonable juror," the trial court had no authority to substitute its judgment for the jurors' judgment with regard to the witnesses' credibility. *People v Lemmon*, 456 Mich 625, 643-647; 576 NW2d 129 (1998). Indeed, because the evidence was "'such that different minds would naturally and fairly come to different conclusions'" regarding defendant's guilt, the grant of a new trial would have been inappropriate. *Id*. at 644, citing *State v Kringstad*, 353 NW2d 302, 307 (ND, 1984). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant additionally argues that there was insufficient evidence to support his conviction. Defendant waived this issue, however, by failing to raise it in his statement of questions presented on appeal. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Price*, 214

Mich App 538, 548; 543 NW2d 49 (1995). Even if defendant *had* properly preserved this argument, it would provide no basis for reversal, given that (1) several witnesses testified to defendant's commission of the charged crime, and (2) the testimony of these witnesses could have caused a rational trier of fact to find defendant guilty beyond a reasonable doubt. See *People v Rodriguez*, 236 Mich App 568, 570; 601 NW2d 134 (1999).

Next, defendant argues that the prosecutor erred by interrupting the testimony of a defense witness, Robert Dykstra, to request that the trial court advise Dykstra and another defense witness, Angie Fisher – both of whom were allegedly going to testify about using marijuana with a main prosecution witness – about the Fifth Amendment right against self-incrimination. During Dykstra's testimony, the prosecutor requested a bench conference, after which the trial court advised the witnesses, outside of the jury's presence and without objection from defendant, of the Fifth Amendment right against self-incrimination. The witnesses then elected not to testify. Because defendant did not object to the prosecutor's actions at trial, appellate review of this issue is precluded 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).

Here, a timely objection could have cured any potential error, since during Dykstra's testimony the prosecutor did not mention any Fifth Amendment concerns before the jury but merely asked to "approach the bench," after which the Fifth Amendment issue was discussed outside of the jury's presence. Assuming, arguendo, that the prosecutor acted improperly by asking the court to consider the Fifth Amendment issue, any potential error resulting from the prosecutor's request could have been corrected during the bench conference, if defendant had timely objected.

Furthermore, the failure to review this issue will not result in a miscarriage of justice, given the lack of legal authority to support defendant's argument. Indeed, defendant cites no authority indicating that the prosecutor acted improperly by suggesting that the defense witnesses, who appeared to have been about to incriminate themselves while testifying, be informed of their Fifth Amendment rights.[1]

Because an objection by defendant could have cured any potential error and a failure to review this issue will not result in a miscarriage of justice, appellate review is inappropriate. *Stanaway, supra* at 687.

Finally, defendant argues that the trial court imposed a disproportionately harsh sentence. We review sentencing decisions for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). If the principle of proportionality – which dictates that a sentence be proportionate to the seriousness of the crime and the defendant's prior record – is violated, an abuse of discretion has occurred. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Here, defendant's four-year minimum sentence fell within the sentencing guidelines' range of 12 to 48 months. Accordingly, it is presumed to be proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Wybrecht*, 222 Mich App 160, 175; 564 NW2d 903 (1997). Defendant, without citing any authority, essentially contends that his cooperation with police

during their investigation and his amenability to rehabilitation are "unusual circumstances" that overcome the presumption of proportionality. See *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). We disagree that cooperating with police or being amenable to rehabilitation are sufficiently unusual, either individually or collectively, so as to overcome the presumptive proportionality of defendant's sentence, especially in light of the assaultive, threatening behavior defendant used while perpetrating the crime. *Id.*

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] The legal authority cited by defendant with regard to this issue stands for the proposition that it may be improper for a prosecutor to call a codefendant to testify when the prosecutor knows the codefendant will assert a Fifth Amendment privilege. See, e.g., *People v Giacalone*, 399 Mich 642, 646; 250 NW2d 492 (1977). The Court in *Giacalone* held that error requiring reversal occurred because a negative inference arose against the defendant when the witness, whom the jury knew to be a codefendant, took the stand and asserted his Fifth Amendment privilege. *Id.* at 646-648. The present case is not at all analogous to *Gearns*, since (1) the witnesses at issue were defense witnesses and were not called by the prosecutor, (2) the witnesses were not codefendants, and (3) the jury was informed that the cessation of Dykstra's testimony following the assertion of his Fifth Amendment privilege related to possible marijuana charges and thus was unrelated to the crime for which defendant was charged.