STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2001
v	No. 221726 Saginaw Circuit Court
BIANCA LATRICE FOSTER, Defendant-Appellant.	LC No. 99-017109-FJ

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. The prosecutor had charged defendant, who was fourteen years old at the time of the offense, as an adult under the automatic-waiver provision of MCL 764.1f. Upon conviction, the trial court sentenced defendant as an adult, pursuant to MCL 769.1, to concurrent terms of 4 ½ to 15 years' imprisonment for each conviction. Defendant appeals as of right. We affirm, but remand for the limited purpose of correcting the judgment of sentence.

I

Defendant first argues that the prosecutor failed to present evidence that she was guilty beyond a reasonable doubt. When reviewing the sufficiency of the evidence presented at trial, the evidence is viewed in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000). We conclude that defendant's convictions are supported by sufficient evidence.

A

"The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon described in the statute." *People v Norris,* 236 Mich App 411, 414; 600 NW2d 658 (1999). Defendant argues that the prosecutor presented insufficient evidence that she was armed. The

statute requires proof that the defendant was "armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.29.

Defendant argues that the victim never saw a weapon and that she (defendant) never threatened the victim. Relying on *People v Banks*, 454 Mich 469; 563 NW2d 200 (1997), defendant argues that these circumstances preclude a finding that she was armed. In *Banks*, our Supreme Court held that there was insufficient evidence that the defendant's accomplice was armed, where the victim did not see a weapon or any article fashioned as a weapon and where the victim was not threatened. *Id*. at 480-481. However, in *Banks*, "[t]here was no objective evidence that defendant's accomplice was 'armed.'" *Id*. at 472. Thus, far from imposing a universal requirement that the victim must see a weapon or be threatened, the holding in *Banks* simply stands for the proposition that some objective evidence that the defendant was armed is required before a defendant may be convicted of armed robbery.

In this case, there was ample objective evidence that defendant was armed. The victim testified that defendant pressed a sharp-tipped object to her neck. The victim reasonably believed that this object was a knife. The victim had more than a subjective belief that defendant was armed. Moreover, defendant later directed police officers to a house, where they found a knife in the kitchen sink. The owner of that house testified that she did not recognize the knife and that defendant and her boyfriend (also a codefendant in this case) stopped by on the night of the robbery and went into the kitchen briefly. From this evidence, the jury could infer that defendant was in fact armed with a dangerous weapon—a knife. Viewing the evidence in the light most favorable to the prosecutor, sufficient evidence existed that defendant was armed.

B

Defendant's conviction of conspiracy to commit armed robbery is also supported by sufficient evidence. "A conspiracy is an agreement, express or implied, between two or more persons to commit an unlawful or criminal act." *People v Weathersby*, 204 Mich App 98, 111; 514 NW2d 493 (1994). Defendant argues that there was insufficient evidence of an agreement between herself and her boyfriend, Wilson Gaines, III, to rob the victim. However, direct evidence of an agreement is not required. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997); *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). "The rule has long been recognized that a conspiracy may, and generally is, established by circumstantial evidence." *People v Brynski*, 347 Mich 599, 605; 81 NW2d 374 (1957). In this case, there was evidence from which the jury could infer that defendant and Gaines agreed to rob the victim. They visited the victim's house together several times on the day of the robbery. On the third visit, Gaines pretended to use the telephone, while defendant positioned herself behind the victim. The victim testified that Gaines nodded his head to defendant, at which point defendant wrapped her arms around the victim and placed a sharp object to the victim's neck. While defendant was restraining the victim, Gaines stole a jewelry box and money from the victim's bedroom. Defendant and Gaines then left the house together. This evidence was sufficient to prove that defendant had conspired with codefendant Gaines to rob the victim.

II

Next, defendant argues that the trial court erred by denying her motion to sever her trial from her codefendant's (Wilson Gaines). We review the trial court's decision in this regard for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Public policy favors joint trials, and a defendant does not have an absolute right to a separate trial. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Where two defendants are charged with the same or related offenses, the prosecutor may charge them jointly, and the trial court must sever the trials "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, *supra* at 346. Where the defendant fails to make this showing, reversal is precluded, "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial." *Id*. at 346-347.

Here, defendant moved for severance, arguing that Gaines' statements to the police would inculpate her, rendering their defenses antagonistic. To warrant severance for antagonistic defenses, the defendant seeking severance must still show that his or her substantial rights would be prejudiced by a joint trial. *Id*. at 347-348. The defenses must be more than simply inconsistent—they must be mutually exclusive or irreconcilable. *Id*. at 349. "[D]efenses are mutually exclusive . . . if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant." *Id*. at 350, quoting *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801 (1984). The danger to be avoided is where one defendant will exculpate himself or herself, while inculpating the other defendant. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976).

Gaines told police officers that defendant held a knife to the victim and that the robbery was defendant's idea. Although this statement did indeed inculpate defendant, it also inculpated Gaines. He admitted that, while defendant held a knife on the victim, he stole the victim's money. Gaines did not exculpate himself at the expense of defendant. In her pretrial motion, defendant failed to specify how this was antagonistic to her defense. Moreover, although Gaines' statements were admitted at trial, the jury was instructed to only consider the statements against him. The risk of prejudice from a joint trial may be allayed by a proper cautionary instruction, such as the one given in this case. *Hana*, *supra* at 351. Because juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we conclude that the jury did not consider the challenged statements when deciding defendant's case. Thus, defendant has failed to show that she was prejudiced by a joint trial. The trial court did not abuse its discretion by denying defendant's motion for severance.

III

Next, defendant argues that the trial court erred by denying her motion for a mistrial when some of the jurors saw her in shackles in the courthouse corridor. We review this decision for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion exists only where denial of the motion deprived the defendant of a fair and impartial trial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

Where a jury inadvertently sees a defendant in shackles, the defendant must show that he or she was prejudiced in order to obtain relief. *People v Moore*, 164 Mich App 378, 385; 417 NW2d 508 (1987), modified 433 Mich 851 (1989). In this case, defendant failed to request an evidentiary hearing to determine whether any of the jurors were prejudiced against her from seeing her in shackles. Absent a showing of prejudice, "this Court will not reverse a defendant's criminal conviction merely because the jury may have seen the defendant in handcuffs." *People v Herndon*, 98 Mich App 668, 672; 296 NW2d 333 (1980). Moreover, not every procedural irregularity warrants a mistrial. "A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Here, any prejudice could have been cured by a cautionary instruction, which defense counsel specifically declined. Thus, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

IV

Lastly, defendant argues that the statute under which she was sentenced as an adult, MCL 769.1, is unconstitutional because it violates the doctrine of separation of powers. Const 1963, art 3, § 2. Under MCL 764.1f, the prosecutor may charge a juvenile as an adult if the juvenile is at least fourteen years old and commits a crime specified in the statute. The circuit court is vested with jurisdiction to hear the case under MCL 600.606(1). This process is commonly referred to as "automatic waiver." *People v Thenghkam*, 240 Mich App 29, 39; 610 NW2d 571 (2000). Under MCL 769.1, upon conviction of certain specified crimes (including armed robbery), the circuit court is required to sentence the juvenile as an adult. Defendant argues that this essentially transfers judicial sentencing discretion to the prosecutor's charging decision, thus violating the doctrine of separation of powers.

Defendant acknowledges that this Court has specifically rejected this argument in *People v Conat*, 238 Mich App 134, 146-153; 605 NW2d 49 (1999). The decision in *Conat* constitutes binding authority under MCR 7.215(I). We decline defendant's invitation to invoke the conflict-resolution provisions of MCR 7.215(I). We find the majority opinion in *Conat* to be well-reasoned and correctly decided. Prosecutorial charging decisions routinely impact the sentencing options available to the trial court upon a defendant's conviction. The current automatic-waiver system is another manifestation of this interaction between the branches of government. Defendant argues that this case illustrates the shortfalls of the automatic-waiver system, since she was only fourteen years old with no criminal history and would have benefited from the juvenile justice system, which places a greater emphasis on rehabilitation. However, the wisdom of legislation is not a matter for this Court to decide. See *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). Rather, our task is to exercise the power of judicial review—to determine whether legislation is constitutional. We agree with the panel in *Conat* in concluding that MCL 769.1 does not violate the constitutional doctrine of separation of powers.

V

We also note that, although not raised by the parties, the judgment of sentence contains an incorrect statutory citation for defendant's conviction of conspiracy to commit armed robbery. Rather than repeating the statutory citation for armed robbery (MCL 750.529), the judgment of sentence should contain the statutory citation for conspiracy (MCL 750.157a). Accordingly, we

remand for the limited purpose of correcting the judgment of sentence. See, e.g., *People v Mass*, 238 Mich App 333, 342; 605 NW2d 322 (1999), lv gtd on other grounds 462 Mich 877 (2000).

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Kathleen Jansen