

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DEWAYNE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

December 21, 2001

No. 225659

Macomb Circuit Court

LC No. 99-000614-FC

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, on one count of armed robbery, MCL 750.529, one count of felony-firearm, MCL 750.227b, and one count of fourth-degree fleeing and eluding a police officer, MCL 750.479a(2). The trial court sentenced defendant to nine to fifteen years' imprisonment on the armed robbery conviction, twelve to twenty-four months' imprisonment on the fleeing and eluding conviction, and two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of the armed robbery of a McDonalds restaurant, in which defendant partially revealed a gun, hidden in his coat pocket, to the manager, and then forced the manager to open a safe located in a back office. Defendant ordered the manager to empty the money from the safe and give it to him, which she did, and defendant then fled the restaurant with the cash. At the time of the robbery there were between five to ten customers in the store and ten employees on duty; however, based on the discreet manner in which defendant carried out the robbery, apparently none of the customers or employees were aware of the robbery during the commission of the crime. After fleeing the restaurant, defendant's car was quickly approached and followed by two fully marked police cars after restaurant employees were able to flag down an officer who relayed information of the crime over the police radio. The two police cars activated their sirens and lights; however, defendant's car proceeded and accelerated slightly. Subsequently, defendant's car stopped after it became caught in traffic behind several other cars. One officer approached defendant's car and drew his pistol, but as the traffic cleared, defendant's car accelerated and sped away. Another fully marked police car quickly took over the pursuit, and soon thereafter, defendant's car crashed. Defendant fled on foot, and he entered an abandoned house, where police officers were able to apprehend him.

Defendant first asserts that the trial court erred by refusing his request for a specific intent jury instruction, CJI2d 3.9, in relation to the crime of fourth-degree fleeing and eluding. We disagree.

Instructional errors receive de novo review from this Court. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). “Further, it has been held that the failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.” *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). Jury instructions are reviewed in their entirety to determine if reversal is required. *Id.* at 159.

We find it unnecessary to determine whether fourth-degree fleeing and eluding is a specific intent or general intent crime because the issue of concern to defendant was substantially covered by the instruction on fourth-degree fleeing and eluding, CJI2d 13.6d. Defendant suggests in his brief that the jury, without a specific intent instruction, was unable to consider whether defendant was actually trying to flee and elude police. However, as part of CJI2d 13.6d, the jury was instructed that the prosecutor had to prove beyond a reasonable doubt that “defendant refused to obey the order by trying to flee or avoid being caught.” Therefore, the jury was instructed to consider whether defendant was trying to flee and elude police, thereby rendering harmless any error in failing to instruct on specific intent pursuant to CJI2d 3.9. Moreover, at trial, defendant failed to identify what particular language regarding intent he wished to be read as part of CJI2d 3.9.

Additionally, an instruction on specific intent did not concern an important point in the trial so that the failure to give it seriously impaired defendant's ability to effectively present a given defense. The defense asserted by defendant at trial was that he was not the person that committed the crime or fled the police. Therefore, specific intent as to fleeing and eluding was not an issue presented as part of defendant's case. Considering the overwhelming evidence indicating that defendant was intending to flee and elude the police, and considering the instructions actually given to the jury, we conclude, when reviewing the jury instructions in their entirety, that reversal is not warranted.

Defendant next asserts that the trial court, in sentencing defendant, erred in its scoring of offense variable nine (OV 9), concerning the number of victims involved in the crime. Defendant's position is that there was only one person, the manager, who was placed in danger; therefore, the trial court erred in finding that there were between two and nine victims. Again, we disagree.

The statutory guidelines apply to offenses committed on or after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). Because defendant's crime was committed on January 8, 1999, the statutory guidelines apply. This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

MCL 777.39(2)(a) directs the court to “[c]ount each person who was placed in danger of injury or loss of life as a victim.” In *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988), this Court concluded that victims are not limited to “those from whom the defendant takes property.” The *Day* panel also stated that “[h]ere, in the event of police or other third party apprehension intervention, each individual in the bank at the time of the robbery was a victim subject to possible injury or death.” *Id.* In *People v Chesebro*, 206 Mich App 468, 473; 522 NW2d 677 (1994), this Court stated that “in a robbery, the defendant may rob only one victim, but scoring Offense Variable 6 for multiple victims is nevertheless appropriate because there are other individuals present at the scene of the robbery who were, therefore, endangered.” The offense variables being discussed in *Day* and *Chesebro* were under the judicial guidelines; however, the language is analogous, and the decisions are appropriate to consider.

Here, based on *Day* and *Chesebro*, we conclude that others present in the restaurant at the time of the robbery were placed in danger, and were therefore victims. Accordingly, the trial court did not err in its scoring of OV 9.

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra