

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL WATSON a/k/a DAMON WATSON,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 230715

Wayne Circuit Court

LC No. 90-005752

Before: Whitbeck, C.J., and O’Connell and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 25 to 40 years’ imprisonment for each of the armed robbery convictions, to run consecutively to the mandatory two-year term for the felony-firearm conviction. We affirm.

This cases arises from the armed robbery of two off-duty Wayne County Sheriff’s Department officers on May 23, 1998, in the city of Detroit. On appeal, defendant argues that the trial court erred in denying his motion for a mistrial. We review a trial court’s decision concerning a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Defendant sought a mistrial after the prosecutor questioned a police witness about the identification of codefendant Jamaal King, who was tried separately from defendant. Defendant maintains that this questioning was in violation of the trial court’s earlier order precluding the parties from addressing this subject during trial. We review claims of prosecutorial misconduct case by case to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, a prosecutor’s attempt to admit evidence in good faith will not support a claim of prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). In the instant case, defendant has not demonstrated bad faith on the part of the prosecutor in questioning the witness, or that he was prejudiced by the admission of the testimony. *Id.* at 661. For example, police officer Walter Epps, one of the complainants in this matter, also testified during direct examination by the

prosecutor without objection from defense counsel that he identified the other perpetrator as Jamaal King following the robbery.¹ Further, the trial court instructed the jury to disregard the reference to the identification of King. Jurors are presumed to follow instructions to disregard inadmissible evidence presented at trial. *Dennis, supra* at 581. Under the circumstances, we are satisfied that the trial court's instruction to the jury to disregard the challenged testimony was sufficient to cure the minimal prejudice defendant may have incurred. Therefore, the trial court did not abuse its discretion in denying defendant's request for a mistrial.

Defendant next argues that the trial court erred in failing to instruct the jury on specific intent in accordance with CJI2d 3.9. Because defendant did not request the omitted instruction at trial, this issue is not preserved. Accordingly, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After a review of the record, we are not persuaded that plain error occurred. We acknowledge that armed robbery is a specific intent crime that requires a showing that the defendant intended to permanently deprive the victim of possession of the property stolen. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998). However, the trial court in the instant case properly instructed the jurors regarding the specific intent element of armed robbery in the following manner in accordance with CJI2d 18.1.

[A]t the time that [defendant] took the money or property [from the complainants] the defendant intended to take it away from [the complainants] permanently.

Further, there is no indication in the record that defendant's intent was seriously disputed, or that the jury expressed confusion regarding this element.² See, e.g., *People v Curry*, 175 Mich App 33, 39-40; 437 NW2d 310 (1989). Accordingly, defendant has not demonstrated that the trial court's failure to instruct on specific intent in accordance with CJI2d 3.9 amounted to plain error that affected his substantial rights.

Finally, defendant argues that offense variable 2 of the judicial sentencing guidelines was improperly scored. Specifically, defendant contends that the record does not reflect that the complainants were subjected to terrorism during the commission of these offenses. Because defendant is not challenging the factual basis for the sentence, but rather, the court's discretionary determination that the facts constituted "terrorism" for purposes of offense variable 2, defendant has failed to state a cognizable claim for relief. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998), superseded by statute as stated in *People v Hegwood*, 465 Mich 432,

¹ During cross-examination, defense counsel also asked Epps about his prior identification of King.

² The contested issue at trial was identification. At trial, the defense theory was that defendant was not one of the two individuals who robbed the complainants.

439; 636 NW2d 137 (2001); *People v Schmitz*, 231 Mich App 521, 535; 586 NW2d 766 (1998).

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Patrick M. Meter