STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2002
v	No. 227054 Kent Circuit Court
MICHAEL ALLEN BOLTON, Defendant-Appellant.	LC No. 99-012621-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was thereafter sentenced as a second-offense habitual offender, MCL 769.10, to ten to twenty-five years in prison. Defendant appeals as of right and we affirm.

This case arises out of an armed robbery that occurred on November 28, 1999, at a Clark gas station in the city of Wyoming. The gas station clerk identified codefendant Lewis Albert Head and another man, who had a gun, as the perpetrators. After the two men left the gas station, the clerk called the police, who apprehended the perpetrators about five minutes after the crime occurred. Although the clerk was able to positively identify codefendant Head as one of the perpetrators, he could not positively identify the man who had the gun. However, the police apprehended defendant and codefendant Head in the same car immediately after the robbery. Defendant and his codefendant were tried before the same jury and both were convicted of armed robbery.[1]

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict, which he made at the close of the prosecution's case. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged

[1] We note that codefendant Head's appeal is also being decided today by this panel. *People v Head*, unpublished opinion per curiam of the Court of Appeals, issued __/__/2002 (Docket No. 227053).

were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

The armed robbery statute, MCL 750.529, provides as follows:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being 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, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995).

Defendant argues that the prosecutor presented insufficient evidence to support his conviction of armed robbery because he was not identified as one of the two persons who committed the robbery. Defendant relies on this Court's decision in *People v Gordon*, 60 Mich App 412; 231 NW2d 409 (1975), for the proposition that mere possession of the fruits of the robbery approximately fifteen minutes after the robbery was committed is insufficient identification evidence. We note that defendant's theory at trial was that he was driving the car stopped by the police merely because he gave the codefendant a ride to "help out a friend."

In *Gordon, supra* at 418, where the defendant was discovered within fifteen minutes of the charged robbery in an automobile containing the fruits of the robbery on the floor near the front seat, this Court held that "[p]ossession of the fruits of a robbery plus certain other facts and circumstances permits the inference that the possessor is the thief." Considering the facts and circumstances before it, this Court in *Gordon* held that the evidence was insufficient to justify the defendant's armed robbery conviction.

Like the defendant in *Gordon,* defendant in this case was found within a short time after the robbery occurred in an automobile containing the fruits of the robbery. Specifically, the prosecutor presented evidence that cigarettes of the same brand and marked in the same manner as the cigarettes stolen from the gas station, with a felt marker stripe, were found in the vehicle in which defendant and the codefendant were stopped. Further, money in denominations similar to that taken from the gas station (one $20 bill, seven $10 bills, fourteen $5 bills, and fourteen $1 bills) and bound with paperclips in the manner money was bound by the gas station clerks was found in the codefendant's pocket.

However, this case is otherwise factually distinguishable from *Gordon.* In *Gordon, supra* at 417, the prosecutor did not contend that the defendant committed the act of the robbery or that he drove the automobile. In contrast, the prosecutor here contended that defendant pointed the gun at the gas station clerk in order to obtain cash and cigarettes from the clerk. The prosecutor presented evidence that defendant was driving the speeding vehicle in which the codefendant was a passenger within the immediate vicinity of the armed robbery.

Further, the prosecutor in *Gordon* was apparently unable to show that the defendant knew of his associates' wrongful purpose or took any action to further that purpose. The prosecutor here elicited testimony from the police officers following the vehicle that it was being driven suspiciously and that the front passenger threw a weapon from a window. The prosecutor also presented evidence that a black nylon stocking was found in the vehicle, which was consistent with testimony that the robbers wore hats. Leather gloves were also recovered from defendant's pants pocket, which was consistent with testimony that the robbers wore gloves and the prosecutor's explanation for the absence of identifiable fingerprints at the scene.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

II

In a supplemental brief filed in propria persona, defendant presents four additional issues.

First, again relying on *Gordon, supra*, defendant argues there was insufficient evidence produced at the preliminary examination to bind him over on the charge of armed robbery. Specifically, defendant contends that there was no evidence linking him to the contraband found in the car. Even if there was an evidentiary deficiency at defendant's preliminary examination, such deficiency would not be grounds for reversing defendant's conviction because sufficient evidence was presented at trial to sustain defendant's conviction. *People v Hall,* 435 Mich 599; 460 NW2d 520 (1990).

III

Defendant also argues that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell below an objective standard of reasonableness and that the representation was so prejudicial that defendant was denied a fair trial. *People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000).

A

Defendant asserts that trial counsel was ineffective for failing to make a pretrial motion challenging the legality of his arrest for lack of probable cause.

Our review of the record indicates that probable cause to arrest defendant existed. It is well established that a police officer who has received by radio the details of the commission of a felony, including a description of the perpetrators, has probable cause to arrest persons matching that description who are traveling on a possible escape route from the scene of the crime shortly after its commission and who engage in some other overt action, such as throwing the weapon out of the vehicle's window, as occurred in this case. See *People v Coward,* 111 Mich App 55, 61-62; 315 NW2d 144 (1981); *People v Knight,* 41 Mich App 293, 294; 199 NW2d 861 (1972). Accordingly, defendant's warrantless arrest was not improper. Therefore, defendant was not denied the effective assistance of counsel by his attorney's failure to challenge the arrest.

B

Defendant also asserts that trial counsel was also ineffective for failing to investigate and offer evidence that could have supported the defense theory of the case that the police officers could not have seen defendant in a speeding car in the dark and positively identify him as one of the suspects described by the gas station clerk. Specifically, defendant complains of the fact that defense counsel did not investigate and introduce (1) evidence at trial that defendant's car has tinted windows, and (2) the 911 tapes to underscore that the police had only a limited description of the robbers.

During closing argument, defense counsel effectively made the point from the testimony elicited at trial that the police officers speeding to the scene in the dark could not have identified who was in defendant's car or whether the occupants matched the limited description of the suspects given to the officers. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Therefore, there is no need to remand this case for an evidentiary hearing on defendant's claims of ineffective assistance of counsel. See *People v Hernandez*, 443 Mich 1, 15-17; 503 NW2d 629 (1993).

Accordingly, defendant has not shown that his trial counsel was either deficient in his representation or that the deficient representation was prejudicial.

IV

Defendant next argues that several instances of alleged misconduct by the prosecutor occurred. In this regard, defendant also argues that trial counsel was ineffective for failing to object to the instances of alleged misconduct.

A

Defendant argues that the prosecutor committed misconduct by suggesting that defendant altered his appearance to avoid later being identified by the gas station clerk in a lineup. Defendant claims that his appearance at trial was the same as it was at the time of his arrest.

The prosecutor did not commit misconduct by asking the gas station clerk whether defendant looked different at trial than he did in the lineup. A finding of misconduct may not be based upon a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Accordingly, defense counsel was not ineffective for failing to object to this line of questioning. Further, defendant's photograph had been admitted into evidence, and the jury was able to draw its own conclusion about whether defendant had changed his appearance before trial. Indeed, the trial court instructed the jury that it was the only judge of the evidence presented.

B

Defendant claims that the prosecutor also committed misconduct by stating during opening statement that defendant and the codefendant were caught by the police "approximately

two minutes" after the robbery occurred, because this fact was not borne out by the evidence at trial.

Although defense counsel did not object to the prosecutor's opening statement, he responded during his opening statement by querying whether it was "two minutes or more like ten." Similarly, defense counsel returned to the topic during closing argument to emphasize repeatedly that there was no testimony supporting the prosecutor's "two minutes" statement and that the testimony instead supported the defense theory of seven to nine minutes. During rebuttal, the prosecutor seemed to concede defense counsel's point and changed his argument by stating that defendant and the codefendant were caught "within minutes" of the armed robbery.

When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Considering the manner in which defense counsel argued against the prosecutor's factual assertion and the prosecutor's apparent concession of the point, we find that defendant was not prejudiced by the prosecutor's statements. Reversal is therefore not required.

C

Defendant complains of the prosecutor's inference during closing argument that the fact that no fingerprints were found at the scene of the robbery was due to the fact that gloves were found in defendant's possession. Defendant alleges that the inference was improper because the evidence technician found fingerprints, albeit not prints of good quality, and that the gas station clerk did not testify that the robbers were wearing gloves.

The prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor was permitted to infer from the testimony at trial that the robbers wore gloves. The gas station clerk testified that he could not recall whether either of the suspects were wearing gloves, not that they were *not* wearing gloves. Further, the investigating police officer testified that the gas station clerk told her that the robbers in fact wore gloves. Lastly, the crime scene technician specifically testified that she was unable to obtain any *identifiable* prints. Therefore, the prosecutor's argument was based on reasonable inferences arising from the evidence.

Further, defense counsel was not ineffective for failing to object to the prosecutor's statement during closing argument. Indeed, defense counsel made the point that defendant desired in his closing argument, stating that there was no testimony from the gas station clerk that the robbers wore gloves.

D

Defendant also complains of the prosecutor's inflammatory suggestion that defendant's acquaintance ran a drug house. However, defense counsel successfully objected to the prosecutor's line of questioning. Accordingly, there is no merit to defendant's claim that he was

deprived of a fair trial as a result of this testimony. Further, the trial court instructed the jury not to consider any testimony that the court had ordered excluded or stricken.

V

Lastly, defendant argues that the trial court abused its discretion by denying his pretrial motion for severance of his trial from the codefendant's trial.[2] Defendant argues that his defense, which was that he was driving the car stopped by the police merely because he gave the codefendant a ride to "help out a friend," was a defense antagonistic with the codefendant's focus on weakening the credibility of the gas station clerk who identified him. Further, defendant asserts that joinder permitted the prosecution to sidestep the identification issue in defendant's trial.

Pursuant to MCL 768.5 and MCR 6.121(D), the decision to sever or join defendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Severance is mandated under MCR 6.121(C) 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. *Id.* The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. *Id.* at 346-347.

Our Supreme Court in *Hana*, while recognizing that a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, *id.* at 347, nonetheless rejected the proposition that inconsistency of defenses is enough to mandate severance. The Court held that a defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the codefendant that the defenses are "mutually exclusive." *Id.* at 350. Defenses 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 codefendant. *Id.*

Here, the evidence admitted at trial in support of defendant's theory consisted of his statements to the police. Specifically, the prosecutor elicited testimony from a police officer that, after arresting defendant, defendant said that he had a new baby and had no reason to "pull any shit." Further, the officer testified that when he asked defendant whether he had been at the gas station in question, defendant was crying and replied "can you help me" but then refused to talk anymore with the officer. Lastly, the officer testified that when he returned to the police car, defendant was lying in the back seat, crying loudly and saying, "No, no, no; I can't do this; I'm just trying to help people out. . . . Can you help me."

Defendant's ambiguous statements were not necessarily exculpatory. Indeed, the prosecutor argued that defendant's statements were inculpatory, arguing that defendant would have no need to "ask for help" if he were innocent. Further, defendant's theory was not

[2] The trial court denied defendant's pretrial motion but agreed to return to the issue if necessary. Apparently, defense counsel did not again raise the severance issue.

irreconcilable with the codefendant's attempt at trial to weaken the credibility of the gas station clerk who identified him. The jury could have believed the gas station clerk's identification of the codefendant and found the codefendant guilty while still accepting defendant's theory of the case and finding him not guilty. Further, defendant proffers no reason to find that if the codefendant was tried separately for his participation in the joint crime, then the jury would not have learned of the gas station clerk's identification of the passenger in defendant's car. Therefore, the trial court did not abuse its discretion in denying defendant's motion for severance.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder