

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL D. SIMS,

Defendant-Appellant.

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UNPUBLISHED

October 22, 2002

No. 234934

Wayne Circuit Court

LC No. 00-012814

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count each of armed robbery, MCL 750.529, and carjacking, MCL 750.529a. He was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of seven to twenty-four years' imprisonment for each offense. He appeals as of right. We affirm.

Defendant contends that his convictions for both offenses violated his constitutional right to not receive multiple punishments for the same offense. Indeed, both the "United States and the Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15." *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1999). However, in *Parker*, we opined that a person could be convicted of both armed robbery and carjacking, resulting from the same criminal transaction, without violating either the state or federal constitutional prohibitions against double jeopardy. *Id.* at 344-345. Thus, we must conclude that defendant's double jeopardy challenge to his convictions is without merit. MCR 7.215(I)(1).<sup>1</sup>

Next, defendant contends that the presentence investigation report ("PSIR") contained inaccurate and potentially prejudicial information. During the sentencing hearing, defense

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<sup>1</sup> We also reject defendant's contention that the instant matter can be distinguished from *Parker*. The *Parker* panel analyzed general factors, such as the Legislative intent behind both statutes and the elements for both crimes, rather than relying on the facts unique to that case. See *Parker, supra* at 342-345. In fact, the panel noted that its analysis was applicable where the convictions resulted from the same criminal transaction. *Id.* at 344-345. Regardless, even if we were to consider the issue anew, we would simply adopt the *Parker* panel's analysis of the issue.

counsel indicated that neither he nor defendant had any corrections to the PSIR. Accordingly, defendant has waived appellate review of the accuracy of the PSIR. See *People v Carter*, 462 Mich 206, 213-214; 612 NW2d 144 (2000).

Defendant also contends that defense counsel's failure to challenge the accuracy of the PSIR deprived him of his constitutional right to effective assistance of counsel. In the absence of an evidentiary hearing on the issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424.

Here, as noted above, the record indicates that defense counsel reviewed the PSIR with defendant. In addition, defense counsel successfully objected to inaccuracies in calculating the sentencing guidelines. These facts suggest that defense counsel's performance was not deficient. See *People v Bailey (On Remand)*, 218 Mich App 645, 647-648; 554 NW2d 391 (1996). Regardless, there is no indication that the trial court relied on the allegedly inaccurate information in sentencing defendant. Accordingly, we cannot conclude that, but for defense counsel's failure to challenge the information, defendant's sentence would have changed. *Snider, supra* at 423-424. Consequently, we do not believe that defendant was deprived of his constitutional right to effective assistance of counsel.

Finally, defendant challenges the sufficiency of the evidence supporting both convictions. A challenge to the sufficiency of the evidence in a bench trial requires us to "view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Armed robbery contains three elements: "(1) an assault and (2) a felonious taking of property while (3) the defendant is armed with a weapon described in the statute [MCL 750.529]." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). MCL 750.529 provides that a defendant may be armed with either "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." An assault occurs where a defendant commits an unlawful act that places another person in reasonable apprehension of receiving an imminent battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996).

Here, the victim testified that defendant "gestured that he had a gun." Although the victim was not sure what kind of gun defendant had, she testified that it was a handgun. The victim also testified that she gave defendant the keys to her vehicle because defendant had the gun. Accordingly, viewing the evidence in a light most favorable to the prosecution, defendant certainly assaulted the victim with a dangerous weapon. The evidence also indicated that defendant was arrested near the victim's vehicle the day after the incident. As such, we believe there was circumstantial evidence establishing that defendant had the specific intent to permanently deprive the owner of the property. See *King, supra* at 428. As a result, we

conclude that there was sufficient evidence supporting defendant's armed robbery conviction. *Nunez, supra* at 615.

Carjacking also consists of three elements:

(1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear. [*People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998).]

Here, the victim's testimony established that defendant threatened her with a gun and took her vehicle. Obviously, she was present at the time of the taking. Accordingly, viewed in a light most favorable to the prosecution,<sup>2</sup> each element was satisfied; consequently, defendant's argument is without merit. *Nunez, supra* at 615.

Affirmed.

/s/ Henry William Saad  
/s/ Michael R. Smolenski  
/s/ Donald S. Owens

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<sup>2</sup> Defendant contends that the victim's testimony was not reliable; however, a challenge to the sufficiency of the evidence requires us to consider the evidence viewed in a light most favorable to the prosecution. *Nunez, supra* at 615.