STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAMES MULHOLLAND,

Defendant-Appellant.

UNPUBLISHED
February 19, 2004

No. 244318
Oakland Circuit Court
LC No. 02-184213-FH

Before: Neff, P.J., and Wilder, and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with intent to rob while unarmed (AWIR-U), MCL 750.88. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to five to thirty years' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. In reviewing a claim of insufficient evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). We will not interfere with the jury's role in determining the weight of evidence or the credibility of a witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Questions of intent and credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Intent may be inferred from all the facts and circumstances. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Because proving an actor's state of mind is difficult, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Further, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of AWIR-U, MCL 750.88, are "(1) an assault with force or violence, (2) an intent to rob and steal, and (3) defendant being unarmed." *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). Defendant argues that there was insufficient evidence to

convict as to the second element, an intent to rob or steal. Defendant does not contest the sufficiency of the evidence as to elements one and three.

The victim stated that defendant said, "I want your money," and tried to grab the pocket where the victim's money was located. This statement by the victim, if credible, is sufficient to find that defendant had the intent to rob beyond a reasonable doubt. As noted, it is for the jury to decide credibility. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that sufficient evidence existed to support defendant's conviction.

Defendant next argues that the trial court erred in overruling the defense's objection to the admission of the prior consistent statements made by the victim. We disagree. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McCray*, 245 Mich App 631, 634-635; 630 NW2d 633 (2001).

In *People v Jones*, 240 Mich App 704, 707-708; 613 NW2d 411 (2000), quoting *US v Bao*, 189 F3d 860, 864 (CA 9, 1999), the Court explained that, to establish admissibility of prior consistent statements under MRE 801(d)(1)(B), four elements must be shown:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

Here, defendant only challenges the second and fourth elements.

Under the second element, there was an express or implied charge of recent fabrication. Defense counsel's opening statement implicitly questioned the victim's credibility:

> What you are going to have to determine was whether any kind of a robbery attempt took place. What I expect the evidence is going to show that [the victim] did his handicaps (sic) and all that is also going to be shown to have said one thing to the officers who came to the scene about when he first encountered the Defendant. Those officers he told on the night of the 24th of February that he had seen the Defendant for the first time out in the parking lot after he left the store.
>
> Couple of weeks after that he was interviewed by the Detective who is in charge of this case, Detective Ryner. Detective Ryner's report, I expect is going to show that he said --- that [the victim] said the first time he saw Mr. Mulholland when he had his money out of his pocket getting ready to make his purchase.
>
> Now, during the Jury selection process [the prosecutor] and I both talked about using your common sense and the life experiences in order to determine the credibility of a witness.

* * *

> And, the key witness to this whole thing is going to be [the victim.] And, you are going to have to determine whether he is a credible person, whether you believe him. And how come it was that he told two different things to two different investigating officers at two different times. And that is going to be the key to the whole thing.

During the victim's testimony, defense counsel questioned the victim on the discrepancies which appeared in his story at the interview a few weeks after the incident. The discrepancies included whether he saw defendant in the store or only in the parking lot after exiting the store, and whether the victim was standing or laying on the ground when defendant hit him with the cinder block.

Defense counsel then implied that because the victim had previously been in a fight where police were called and took the other party's side, the victim was changing some of the details to make this incident appear to be a robbery attempt rather than a fist fight. Defense counsel tried to develop this theory during the victim's cross-examination.

Officer Ross later testified about the victim's statement at the time of the incident, indicating that the important aspects had not changed. The prior consistent statements were used to establish that the elements of AWIR-U were consistent from the time of the incident through the testimony in court.

Under MRE 801(d)(1)(B), a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Prior consistent statements are also admissible through a third party if the requirements of MRE 801(d)(1)(B) are satisfied. The trial court did not abuse its discretion in admitting this testimony when the defense had implied that the victim's testimony may have been altered to make the situation look less like a mutual fight, where the police may not side with the victim, and more like an assault with attempt to rob, where the victim is the victim rather than a participant.

It was implied by the defense's questioning that the victim had changed his story to make the incident look more like an attack than a mutual fight. This was done through the questioning of Detective Ryner, where Ryner was asked about inconsistencies in the victim's statement, as well as defendant's opening statement and the defense's questions to the victim and Ross who initially responded to the incident, The victim testified at trial and was subject to cross-examination. The prior consistent statement was made directly after the assault, before the victim's story was re-examined by the police. All of the elements of MRE 801(d)(1)(B) were met, and it was not an abuse of discretion for the trial court to admit this testimony.

Defendant next argues that he was denied the effective assistance of trial counsel. We disagree. Defendant has not fully preserved this issue for review. To fully preserve the issue for review, a defendant should move for a new trial or evidentiary hearing. *People v Sabin (On Sec Rem)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not move for a new trial or a *Ginther*[1] hearing, therefore our review is limited to the mistakes apparent on the record. *Id*. at 658-659.

To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *Id*.

Defendant claims that counsel was ineffective by failing to object to Ryner's testimony as leading and inadmissible hearsay. As discussed, *supra*, it was not error to admit the testimony and counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court erred in overruling the defense request for jury instructions on aggravated assault and assault and battery. We disagree.

A lesser included offense is cognate if it is in the same class or category as the greater offense, sharing some of its elements, but it is possible to commit the greater offense without necessarily committing all the elements of the lesser offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). Under MCL 768.32, the statute that permits the consideration of offenses lesser to the offenses charged in the indictment, a cognate lesser offense instruction is not permitted to be given by the court. *People v Cornell*, 466 Mich 335, 353-354; 646 NW2d 127 (2002).

Aggravated assault is a cognate offense of AWIR-U. AWIR-U is a felony punishable by imprisonment for up to fifteen years. MCL 750.88. Its elements are "(1) an assault with force or violence, (2) an intent to rob and steal, and (3) defendant being unarmed." *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). The "force and violence" may be actual or constructive, and the assault may be of either the attempted-battery or reasonable-apprehension-of-imminent-battery types. *People v Reeves*, 458 Mich 236, 243-245; 580 NW2d 433 (1998). By contrast, aggravated assault is a misdemeanor punishable by imprisonment for not more than one year. It is comprised of (1) an unarmed assault that (2) results in the infliction of a serious or aggravated injury, that (3) is perpetrated without the intent to commit murder or to inflict great

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

bodily harm less than murder. MCL 750.81a. Consequently, one may commit an AWIR-U without inflicting a serious or aggravated injury.

Assault and battery, MCL 750.81, is also a cognate offense of AWIR-U. Assault and battery is a misdemeanor punishable by imprisonment for not more than ninety-three days. It consists of both an assault and a battery. A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person. *Reeves, supra*, 458 Mich 240 n 4. One may commit AWIR-U without committing a battery, and therefore, assault and battery is a cognate offense of AWIR-U.

Because aggravated assault and assault and battery are both cognate offenses of AWIR-U, the court is not permitted to instruct on these charges, even when requested. *Cornell, supra*, 446 Mich 357. The court did not err in refusing to give the requested instructions.

Last, defendant argues that the trial court violated the United States and Michigan Constitutions in sentencing defendant to five to thirty years' imprisonment on a habitual offender 4th supplement arising out of the AWIR-U conviction. We disagree.

Our review of a sentence where the sentencing court imposed a minimum sentence within the guideline range is limited to cases where the sentencing court erred in the scoring of the guidelines or relied on inaccurate information in determining defendant's sentence. MCL 769.34(2); *People v McLaughlin*, 258 Mich App 635, 669-671; 672 NW2d 860 (2003). The trial court sentenced defendant to a minimum sentence of sixty months in prison which is at the lower end of the guidelines' minimum range of 43 to 172 months.[2] Defendant does not argue that the court relied on inaccurate information in imposing sentence on defendant. Under these circumstances, defendant's sentence must be affirmed.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly

[2] The sentence of a maximum thirty years' imprisonment was also proper. MCL 769.12