

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE DYSON,

Defendant-Appellant.

UNPUBLISHED

December 13, 2005

No. 256300

Kalamazoo Circuit Court

LC No. 03-001012-FC

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant was charged with two counts of armed robbery, MCL 750.529; assault with intent to rob while armed, MCL 750.89; conspiracy to commit armed robbery, MCL 750.157a; four counts of possessing a firearm during a felony, MCL 750.227b; felonious assault, MCL 750.82; receiving and concealing stolen property, MCL 750.535(3)(a); fleeing a police officer—4th degree, MCL 750.479a(2); assaulting/resisting/obstructing a police officer, MCL 750.81d(1); operating a motor vehicle without a license, MCL 257.904(3)(a); and felon in possession of a firearm, MCL 750.224f; for the robbery of a tobacco store in Kalamazoo. We vacate in part, affirm in part, and remand for correction of the judgment of sentence.

Following a jury trial, defendant was acquitted of felonious assault, the four felony-firearm counts and the felon in possession of a firearm count, and convicted of all other counts charged. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of 375 months' to 60 years' imprisonment for the armed robbery, assault with intent to rob while armed, and conspiracy to commit armed robbery convictions, two to five years' imprisonment for the receiving stolen property conviction, one to two years' imprisonment for the fleeing and eluding and assaulting, resisting, or obstructing a police officer conviction, and 93 days' imprisonment for the operating without a valid license conviction. Defendant appeals as of right.

I. Basic Facts and Proceedings

Two men entered the store, forced the store clerk, Terry Dowdy, to lie on his stomach on the floor, bound his hands, and robbed the store of cash and merchandise. Dowdy testified that one of the men placed what he thought was a gun into the middle of his back and patted his back pockets, looking for money, but his money was not taken because he keeps it in his front pocket. Two women entered the store at different times during the robbery, and were taken to a back

room and forced to lie down. One of the women was robbed of her money. The two men left the store in a stolen GMC Jimmy, which was seen by a police officer shortly thereafter and identified based upon a partial license plate number given to police by a man who had been in the store's parking lot, waiting for one of the women. Following a high-speed chase, the Jimmy jumped the curb, and hit a telephone pole. Defendant got out and fled on foot, but police apprehended him in the lobby of an apartment building shortly thereafter. Defendant was transported to a hospital for treatment of a cut hand and a heroin overdose. Police collected his clothing at the hospital, including "reddish-brownish" Timberland boots, and \$472 was found in his possession. Dowdy testified that one of the robbers wore "maroonish" Timberland boots, and the storeowner testified that \$470 was missing from the cash register, and Newport cigarettes and Winchester cigars were also stolen. A "Newport" cardboard box was found inside the Jimmy, and police later recovered other stolen merchandise at an old paper mill near where the police officer first saw the Jimmy following the robbery and report of a stolen vehicle.

Defendant testified and admitted that he was the man driving the Jimmy and apprehended by police that day. Defendant claimed that he was selling drugs that day, in part so that he could buy heroin for his mother, who he characterized as a heroin addict. Defendant stated that he "rented" the Jimmy from a guy named "Scanless," and his cousin "Dude," as part of a drug sale, and that he obtained the boots from Scanless as well. Defendant explained that after he realized that "they just played me for my dope," he was driving to the drug house where Scanless indicated he would be, when he encountered the police. He explained that he fled from police because he had drugs in his possession, and a prior felony conviction, and further stated that he swallowed the heroin because he had to get rid of it. Defendant denied any participation in the robbery at Smokes.

II. Prosecutorial Misconduct

Defendant claims the prosecutor cross-examined him without a good faith belief that evidence supporting the questions would be admitted, specifically in regard to questions whether defendant's mother was a block watch captain and whether his mother gave his name to the police.

A. Standard of Review

This Court reviews de novo preserved claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

B. Analysis

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "Prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), citing *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). Thus, if the prosecutor had a good faith belief that her questions would lead to the introduction of admissible evidence, there is no prosecutorial misconduct.

At trial, defendant testified that he sold drugs to support his mother's heroin habit, so that she did not have to prostitute herself to support it. He also testified that his mother is sometimes delusional, although not necessarily crazy, and that he had to hide his drug money or his mother would steal it so that she could buy drugs. That testimony was offered by defendant in support of his testimony that he was selling drugs that day, accepted the "rental" of the GMC Jimmy as payment for some drugs from "Scanless" and "Dude," switched shoes with Scanless, and was on his way to find Scanless and Dude at a drug house on Bryant Street when he was first seen by Hemingway and subsequently chased. On cross-examination, the prosecutor asked defendant whether his mother was a block watch captain and whether his mother gave his name to the police.

The prosecutor's cross-examination questions were not improper. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. MRE 611(b); *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). Outside of the jury's presence, the prosecutor indicated that she believed defendant's testimony was inappropriate based on her knowledge of defendant's mother. The prosecutor further noted that defendant had seen the police report, and knew what evidence there was against his co-offender, and that it involved his mother's cooperation. Defendant's testimony on direct examination "opened the door" to the prosecutor's questions on cross-examination because his alibi defense was based on his testimony that mother was a delusional heroin addict. The record indicates that prosecutor had a good faith belief that allowed the prosecutor to ask defendant questions, if answered honestly, would establish that defendant's mother was not a delusional heroin addict, and that defendant was not worthy of belief. Accordingly, defendant has not shown that the prosecutor acted in bad faith.

Moreover, even if any of the prosecutor's questions were improper, any error was cured by the trial court's instruction to the jury that the evidence is supplied by the witnesses' answers, and not the questions posed by the parties' counsel. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, defendant has not demonstrated error requiring reversal.

III. Double Jeopardy

Defendant next argues that his convictions for armed robbery and for the assault with intent to rob while armed violate double jeopardy. We agree.

A. Standard of Review

This Court reviews de novo a constitutional double jeopardy challenge. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002).

B. Analysis

The United States and Michigan Constitutions prohibit placing a defendant in jeopardy twice for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004). The Double

Jeopardy Clause protects against multiple punishments for the same offense in order to protect the defendant from being sentenced to more punishment than the Legislature intended. *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004).

At the outset, we note that the prosecution acknowledges that assault with intent to rob while armed is a lesser-included offense of armed robbery, see *People v Yarbrough*, 107 Mich App 332, 336; 309 NW2d 602 (1981), and thus, does not argue that the Legislature intended multiple punishments for armed robbery and assault with intent to rob while armed for a single armed robbery offense. Indeed, this Court has stated that, “an assault should be punished as an offense separate from armed robbery only where it can clearly be established that the offenses occurred at separate times.” *Id.*

Rather, the prosecution argues that the armed robbery was completed before defendant committed a separate assault with intent to rob while armed. “There is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.” *People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986).

However, the evidence did not show that the armed robbery was completed at the time defendant attempted to rob Dowdy. Contrary to the prosecution’s claim, the record does not show that defendant and his accomplice had finished taking the cash and cigarettes and then proceeded to attempt to rob Dowdy. Rather, Dowdy testified that while he was on the ground, one of the robbers, *at some point*, placed a gun to his back and tapped his back pocket, presumably to locate money. In other words, besides that Dowdy was on the ground with his hands tied behind his back, there is no evidence showing when one of the robbers attempted to take his money. Thus, there is no evidence to demarcate the assault of the armed robbery from the purported separate assault that occurred when defendant attempted to take Dowdy’s money.

The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge. *Meshell, supra* at 633-634, citing *Herron, supra* at 609. We vacate defendant’s conviction of assault with intent to rob while armed, and remand for correction of the judgment of sentence.

IV. Sentencing Issues

Defendant next argues that the trial court erred in scoring offense variable (OV) 8 and OV 17.

A. Standard of Review

The scoring of a particular sentencing factor is a question of fact that is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). A sentencing court has discretion in determining the number of points to be scored under an offense variable. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision that lacks supporting evidence will not be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

B. Analysis

Defendant argues that the trial court erred in scoring OV 8 at fifteen points. MCL 777.38(1)(a) provides that a trial court can score OV 8 at fifteen points if a “victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” Defendant contends that the two female victims were moved away from a situation of greater danger, and that the trial court erred in concluding that isolation increased the danger to the victim.¹ We conclude that the environment in the back room constituted a situation of greater danger. The victims in the back room were threatened with a gun, one was robbed of her money, and they were isolated from the other victims of the crime, and further secluded from any possible intervention. Because the record contains evidence to support the trial court’s decision to score OV 8 at fifteen points, we find no clear error.

Defendant next argues, and plaintiff concedes, that the trial court erred in scoring OV 17 at ten points because the sentencing guidelines in effect on June 6, 2003 required that the use of a vehicle be an element of the offense for OV 17 to be scored.² We agree. However, an error in scoring the sentencing guidelines that does not affect the total OV score enough to change the applicable sentencing guidelines’ range is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1994). Because a ten-point reduction of defendant’s OV score would not change the applicable sentencing guidelines’ range, the trial court’s error is harmless, and resentencing is not required.³

We vacate defendant’s conviction and sentence for assault with intent to rob while armed and remand for correction of the judgment of sentence. We affirm in all other respects. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

¹ We note that the movement of victim Payton is not presently at issue, as defendant was acquitted of the charge of felonious assault against her. However, defendant was convicted of the armed robbery of victim Comstock.

² We address defendant’s argument only for his armed robbery convictions because of our decision to vacate defendant’s assault with intent to rob while armed conviction, and because OV 17 was not scored for defendant’s conspiracy to commit armed robbery conviction.

³ Vacating defendant’s conviction and sentence for assault with intent to rob while armed does not change the scoring of any offense variables to the applicable sentencing guidelines’ range.