STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 31, 2007
v	No. 266893 Macomb Circuit Court
TIMOTHY KEITH GILLAM, Defendant-Appellant.	LC No. 05-002477-FH

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted assault with intent to rob while armed,[1] MCL 750.92 and MCL 750.89, and sentenced as an habitual offender, third offense, MCL 769.11, to 21 to 60 months' imprisonment.[2] (Amended Judgment of Sentence, 1/30/07.) He appeals as of right. We affirm.

I. Basic Facts And Procedure

On June 3, 2005, defendant entered a Speedway gas station on 13 Mile Road in Roseville. The complainant, who was the gas station clerk, testified that defendant approached the counter holding what appeared to be a handgun inside a glove. Defendant placed the glove on the counter and, with his hand on the glove, said: "[L]isten very carefully. This is a stick up. I want all of the money in the drawer now." When the complainant did not comply, defendant moved around the corner of the counter toward the register. At that point, the complainant concluded that the glove did not contain a gun. The complainant then intercepted defendant, shoved him, and demanded he leave the store. Defendant instead approached the register, the complainant blocked him, and defendant fled toward I-94.[3]

[1] Defendant was charged with assault with intent to rob while armed, MCL 750.89.

[2] Defendant was originally sentenced to a term of 24 to 60 months' imprisonment. After this Court granted defendant's motion to remand, he was resentenced to the lesser term of 21 to 60 months' imprisonment. Because defendant has already received the sentencing relief he requested, it is unnecessary to address defendant's sentencing issue on appeal.

[3] In-store surveillance video of the incident was played for the jury.

The complainant called the police and defendant was arrested shortly thereafter. Upon searching defendant, the police found a jersey work glove. Inside the glove was a crushed pop bottle twisted and fashioned in a way that looked similar to a gun. Part of the glove's fabric had been shoved into the mouth of the bottle made to look similar to the barrel of a gun. In a statement to the police, defendant denied attempting to rob the gas station. Defendant admitted going in the gas station, but claimed that he was waiting for a bus and went inside only to obtain change for the bus. He further claimed that the pop bottle was shoved inside the glove because he had drunk a beverage and was finished with the bottle. An arresting officer testified that when he searched defendant, defendant had $1.11, completely in change, and that defendant was found walking down the shoulder of I-94 instead of waiting for a bus.

II. Directed Verdict

Defendant first argues that the trial court erred by denying his motion for a directed verdict on the charge of assault with intent to rob while armed. Defendant contends that there was no credible evidence that he was armed, there was "no taking, so there was no intent that can be inferred from the taking," and the complainant's credibility was "suspect."

This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of the crime of assault with intent to rob while armed are: (1) that the actor was armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon; (2) that the actor committed an assault; and (3) that the assault was committed with the intent to rob and steal. MCL 750.89; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), lv den 470 Mich 880 (2004).

In order to establish the armed element, there must be "some objective evidence of the existence of a weapon or article." *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993). "The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one. Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article." *Id*. at 469-470. In order to prove the intent to rob element, the prosecution must show that at the time of the assault, the defendant intended to permanently take money or property from the complainant. *People v Garcia*, 448 Mich 442, 482; 531 NW2d 683 (1995). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, including the intent to steal. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), lv den 455 Mich 870 (1997). 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).

Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of assault with intent to rob while armed were proven beyond a reasonable doubt. Evidence was presented that defendant walked in the gas station holding what appeared to be a handgun shoved inside a glove. Defendant placed the object on the counter, leaving his

hand on it, and said: "[L]isten very carefully. This is a stick up. I want all of the money in the drawer now." The complainant believed defendant had a gun because of what defendant said, "the shape" of the object, and because the object appeared to have a "handle like a revolver" and "a barrel." According to police testimony, the article inside the glove "was twisted and fashioned in a way that looked similar to a gun," and part of the article was "shoved into the mouth of the bottle which made it looked similar to the barrel of a gun."

From this evidence, a jury could reasonably infer that defendant was armed and had the requisite intent to rob. Contrary to defendant's argument, it is not necessary for the defendant to actually take any money or property to establish the intent to rob. *Garcia*, *supra*. Further, although defendant claims that the complainant's testimony was not credible, the credibility of witnesses is for the jury to determine. See also *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) ("absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'").

In sum, on the basis of the evidence presented, a rational trier of fact could conclude that the essential elements of assault with intent to rob while armed were met. Therefore, the trial court correctly denied defendant's motion for a directed verdict. For the same reasons, the evidence was sufficient to sustain defendant's conviction of the inchoate offense of attempted assault with intent to rob while armed.

III. Effective Assistance Of Counsel

Defendant also argues that a new trial is required because defense counsel was ineffective. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

We reject defendant's claim that defense counsel's failure to object to the prosecutor's use of the term "victim" to refer to the complainant during opening statement constituted ineffective assistance of counsel. In opening statement, the prosecutor stated:

> Now ladies and gentlemen of the jury, if you look out there in the gallery you are not going to see any cameras from CNN, Court TV, Fox News, Channel 7, what have you. In fact, I don't even think there are any reporters out there from Macomb Daily or the Detroit Free Press. No paparazzi. That doesn't mean this isn't an important case. And one person who it is a very important case to his

name is Harry Schurr. And Harry Schurr is *the victim* in this matter. Harry Schurr is *the victim* of an assault with the intent to rob while armed.

Viewed in context,[4] the prosecutor was indicating what he intended to prove, i.e., that the complainant was a victim in this case.[5] *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd 405 Mich 38 (1979) ("The purpose of an opening statement is to tell the jury what the advocate proposes to show."). The prosecutor did not repeatedly refer to the complainant as "the victim." Further, it is highly unlikely that the prosecutor's brief and isolated references during opening statement affected the presumption of innocence. In the opening statement, subsequent to indicating that the complainant was "the victim," the prosecutor delineated the elements of the offense and stated that he was required to prove each element beyond a reasonable doubt. In addition, the trial court instructed the jury that defendant was presumed innocent, that the prosecution was required to prove the elements of the crime beyond a reasonable doubt, and that the lawyers' statements are not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), lv den 471 Mich 916 (2004). Under these circumstances and given the weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted but for trial counsel's failure to object. *Effinger*, *supra*.

Defendant further argues that defense counsel was ineffective for failing to object to the prosecutor's use of leading questions during the examination of the complainant. On direct examination, after the complainant testified about the incident, the jury viewed the in-store surveillance video of the incident. Thereafter, the prosecutor played the video while questioning the complainant about its contents:

Q. Where was he going?

A. As I said, he was headed towards the other end of the counter.

* * *

Q. - - when the Defendant comes up to the counter, is what you saw in the videotape [sic] he was holding the glove with what you thought was a gun inside the glove on the counter top?

A. Yes, sir.

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[4] This Court reviews preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995), reh den 448 Mich 1225 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002), lv den 468 Mich 880 (2003).

[5] "Victim" is defined as "a person harmed by a crime, tort, or other wrong." Black's Law Dictionary (7th ed).

Q. There is also a point in the videotape where it appears that you cock your head down a little bit downward. And obviously it is difficult because the tape is slowed down so much, but is [that] the point that you were focusing on the weapon?

A. Yes, sir.

Q. And then obviously in the second version you see you leave the cash register and move to what was your right. Was that the point in time when you were going down - -

A. Yes, sir.

MRE 611(c)(1) states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." To warrant reversal based on a prosecutor's use of leading questions, the defendant must show "some prejudice or pattern of eliciting inadmissible testimony." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), lv den 465 Mich 933 (2001) (citation omitted). Reversal is required if the defendant was prejudiced by the leading questions. *Id.*

We agree that the prosecutor should not have used leading questions. But viewed in context, defendant was not prejudiced. The jury viewed the videotape, and the complainant had already testified in detail about the incident. Further, apart from making general comments, defendant has failed to show "some prejudice or pattern of eliciting inadmissible testimony." *Id*. Indeed, the prosecutor could have elicited the same testimony through other questions. Consequently, defendant cannot demonstrate that the result of the proceeding would have been different had defense counsel objected. *Effinger*, *supra*.

IV. Statement By Defense Counsel Not Admitted

Defendant also argues that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. We disagree. We review de novo constitutional questions regarding a defendant's right of confrontation. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000), lv den 462 Mich 906 (2000). A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Watson*, *supra* at 572.

On direct examination, the arresting officer testified that although defendant stated that he went in the gas station to obtain change for the bus, "he already had a $1.11 completely in change." During defense counsel's cross-examination of the officer, the following exchange occurred:

Q. Do you know - - you said it was unusual or odd that he had a $1.11 yet he had gone to get change. Do you know how much bus [fare] is?

A. No, I don't.

Q. It is $1.75.

A. Okay.

The prosecutor objected, arguing that defense counsel was testifying. Defense counsel withdrew the question. The trial court sustained the objection, and instructed the jury to disregard the question.

On this record, the trial court did not abuse its discretion in sustaining the prosecutor's objection. Defendant does not address the propriety of the trial court's evidentiary ruling, but only asserts that the ruling denied him his right to present a defense. Although a defendant has a constitutional right to present a defense, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Here, the trial court did not preclude defendant from presenting evidence of the cost of bus fare, but only prevented this evidence from being offered in the form of "testimony" by defense counsel. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). For the same reasons, defense counsel was not ineffective for failing to challenge the prosecutor's objection. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000) (counsel is not required to make a futile argument).

V. Comments By The Court Were Impartial

Defendant further argues that the trial court denied him a fair and impartial trial by improperly commenting on witnesses' in-court identification of defendant. We disagree. Because defendant did not challenge the trial court's conduct below, we review this claim for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006), lv den 477 Mich 931 (2006).

During the prosecutor's examination of the complainant, the following exchange occurred:

Q. Did you see the person in the courtroom today that robbed you on that day?

A. Yes, sir, right over there, sir.

Q. Could you point him out by an article of clothing please?

A. He's wearing a blue shirt, sir.

[*The prosecutor*]: Your Honor, will the record reflect that the witness has identified the Defendant?

[*The court*]: The record will reflect that.

During the prosecutor's examination of the arresting officer, the following exchange occurred:

Q. Do you see the individual who you patted down that evening prese[n]t in the courtroom today?

A. Yes, I do.

Q. Where is he seated and what is he wearing?

A. He's seated - - he's the bald gentleman to the far right.

[*The prosecutor*]: Your Honor, I would ask that the record reflect identification?

[*The trial court*]: The record will reflect that.

It is well established that the trial court has a duty to control trial proceedings in the courtroom, and has wide discretion and power in fulfilling that duty. *Conley*, *supra* at 307 (citations omitted). But a court's conduct may not pierce the veil of judicial impartiality. *Id.* at 308. "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *Id.* (citations omitted).

No plain error is evident from the record. The trial court's remarks were not of such a nature as to unduly influence the jury. *Id.* Rather, the trial court properly exercised its duty to address an evidentiary matter by acknowledging the identification testimony for the record. The trial court's response, "[t]he record will reflect that," was not calculated to cause the jury to believe that the court had any opinion regarding the case. Moreover, the trial court instructed the jury that it had a duty to rule on the admissibility of evidence. The trial court also instructed the jurors that its rulings are not evidence, that it is not trying to influence the vote or express a personal opinion about the case when it makes a comment or gives an instruction, and that if they believe the court has an opinion, that opinion must be disregarded. As previously indicated, jurors are presumed to follow their instructions. *Abraham*, *supra*.

VI. Felonious Assault Instruction Unwarranted

Defendant also argues that the trial court erred in refusing to instruct the jury on felonious assault, MCL 750.82, as a lesser offense of assault with intent to rob while armed. We disagree.

MCL 768.32 only permits instruction on necessarily lesser included offenses, not cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002). "A necessarily included offense is one that must be committed as part of the greater offense; it would be 'impossible to commit the greater offense without first having committed the lesser.'" *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003), lv den 469 Mich 873 (2003) (citation omitted). A cognate offense is one that contains an element not found in the greater offense. *Cornell*, *supra* at 345. The determination whether an offense is a lesser included offense is a question of law subject to de novo review. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

In *People v Walls*, 265 Mich App 642, 645-646; 697 NW2d 535 (2005), lv den 474 Mich 1142 (2006), this Court held that felonious assault is not a necessarily lesser included offense of assault with intent to rob while armed. The Court explained that felonious assault requires the possession of a dangerous weapon, while assault with intent to rob while armed allows conviction when the offender has "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." *Id*. at 646 (citation omitted). Because the elements of felonious assault "are not completely subsumed in the greater offense," "felonious assault is a cognate offense of assault with intent to rob while armed." *Id.* (citations omitted). Consequently, the trial court's refusal to instruct the jury on felonious assault was not error.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood