STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBEN QUINTINO, JR.,

Defendant-Appellant.

UNPUBLISHED
January 17, 2008

No. 269646
Washtenaw Circuit Court
LC No. 05-001087-FC

Before: Kelly, P.J., and Cavanagh and O'Connell, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and kidnapping, MCL 750.349. The trial court sentenced defendant to 14 to 35 years in prison for the carjacking conviction and 12 to 35 years in prison for the robbery and kidnapping convictions, to be served consecutively to his carjacking sentence. We affirm.

I. Basic Facts

The victim worked as a delivery driver for a restaurant in Ann Arbor, and she delivered submarine sandwiches to defendant and Todd Sterns a little before 4:00 a.m. one morning. Sterns displayed what appeared to be a gun and told the victim that they were going to steal her vehicle. Sterns forced the victim into the backseat, and defendant and Sterns took turns driving the vehicle to Grand Rapids. They stopped at an automatic teller machine (ATM) in Newaygo, and Sterns and defendant forced the victim to withdraw $400. Once in Grand Rapids, they drove her to a bank, where Sterns forced her to withdraw $650 and defendant remained in the vehicle. After driving around visiting friends, stopping at a park, visiting a bowling alley, and eating in a restaurant, Sterns eventually dropped off the victim at a parking lot in Grand Rapids around midnight. The victim's car was recovered, and defendant was found sleeping in the driver's seat.

While speaking with the police, defendant admitted that he and Sterns intended to rob the victim and steal her vehicle. He claimed that Sterns displayed a BB gun, and he admitted that they took the victim to an ATM and a bank, where she withdrew money. Sterns testified against defendant pursuant to a plea agreement, and he admitted that he and defendant had agreed to rob the victim and steal her vehicle. Sterns stated that, although he and defendant had not discussed kidnapping the victim, Sterns told the victim to get in the vehicle and refused to let her out of the vehicle when she requested. Sterns admitted that he and defendant had taken the victim to an

ATM and a bank, where she withdrew money. One of defendant's friends testified that she saw defendant, Sterns, and the victim during the incident, and defendant had told her that the victim was their hostage.

II. Prosecutor's Questioning of Police Officer

A. Police Statements

Defendant argues that the trial court erred when it permitted the prosecutor to question a police officer about whether defendant's police statement was consistent with Sterns's police statement. Because defendant failed to object to these questions on the same grounds he raises on appeal, this issue is unpreserved, *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999), and may only be reviewed for plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005), citing *Carines*, *supra*, 460 Mich 763.

"It is the province of the jury to determine questions of fact[.]" *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). During her redirect-examination of Officer William Stanford, the prosecutor asked him if defendant and Sterns had provided consistent statements to the police. Officer Stanford replied that they "were, for the most part, consistent[,]" but they sometimes "pointed the finger" at one another. Because whether the statements given by defendant and Sterns were consistent is a question of fact, it was improper for the prosecutor to pursue this line of questioning with the officer. However, this line of questioning was in response to Officer Stanford's cross-examination, during which defense counsel improperly asked him to comment on Sterns's credibility, in violation of *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985), and *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). Defense counsel also questioned Officer Stanford about the veracity of the victim's story, asking about inconsistencies and changes in her story. Given this context and the overwhelming evidence of defendant's guilt, the prosecutor's improper questions did not affect defendant's substantial rights. See *Bauder*, *supra* at 180.

B. Questioning About Armed Robbery

Defendant contends that the trial court erred when it allowed Officer Stanford to testify that an unarmed person could commit armed robbery. We disagree. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion, *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003), which occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes, *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally, a witness is not permitted to testify about questions of law "because it is the trial court's responsibility to determine the applicable law." *People v Schumacher*, 276 Mich App 165, 179; 740 NW2d 534 (2007). The elements of armed robbery are identified in MCL 750.529 and MCL 750.530, and questions concerning statutory construction are questions of law. *People v Osantowski*, 274 Mich App 593, 619; 736 NW2d 289 (2007). During cross-

examination, defense counsel questioned Officer Stanford about whether he would have pursued bank robbery charges against the victim if she had held up the bank after entering the bank with defendant while he was unarmed and the victim later claimed that she had acted under duress. During redirect-examination, the prosecutor asked Officer Stanford if someone could commit armed robbery without a weapon if the victim believed that he or she had a weapon, to which the officer responded, "They only have to put the victim in fear that they have a weapon."

Although the prosecutor's question was improper, defendant opened the door to this question, and reversal is not required. *People v Sutton*, 436 Mich 575, 591 n 16; 464 NW2d 276 (1990); *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Further, the trial court properly instructed the jurors that it was their duty to apply the law as given by the trial court, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, an error in the admission of evidence is not grounds for vacating a verdict or granting a new trial unless substantial justice requires it. MCL 769.26; MCR 2.613(A). *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Given defense counsel's cross-examination of Officer Stanford and the overwhelming evidence of defendant's guilt, the prosecutor's improper question was harmless.

III. Sentencing

Defendant claims that the trial court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 403 (2004), when it scored multiple offense variables based on facts not found by a jury, in determining his sentence. We disagree. Because defendant raises this issue for the first time on appeal, it is unpreserved and will be reviewed for plain error affecting substantial rights. *Carines*, *supra* at 762-763. We review de novo questions of constitutional law, including this Sixth Amendment challenge. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

The *Blakely* decision provides that any fact, other than that of a prior conviction, that increases a criminal sentence beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, *supra* at 301, applying *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Contrary to defendant's argument, Michigan's sentencing system is an indeterminate one, and the Michigan Supreme Court had repeatedly held that *Blakely* does not apply to this system. *People v McCuller*, 479 Mich 672, 682-683; 739 NW2d 563 (2007); *Drohan*, *supra* at 163-164; *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). Because the maximum sentence in Michigan is set by statute—not determined by the trial court—Michigan's sentencing guidelines create a range within which the trial court must impose a minimum sentence, and the trial court's sentence will always fall within the range that the jury's verdict authorizes. *Drohan*, *supra* at 161. In the instant case, the statutory maximum for carjacking, armed robbery, and kidnapping is life in prison, and defendant's sentences are all less than the maximum. MCL 750.529a; MCL 750.529; MCL 750.349(3). Therefore, defendant's argument is misplaced.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell