

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE TERRILL HUNT,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2009

No. 284648

Wayne Circuit Court

LC No. 07-014870-FC

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. A jury found him guilty as charged of carjacking and the weapons offenses, but acquitted him of armed robbery and convicted him of the lesser offense of assault with intent to rob while armed, MCL 750.89. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred by instructing the jury on the lesser offense of assault with intent to rob while armed because it was not supported by a rational view of the evidence. Although defendant objected below, he objected only on the ground that assault with intent to rob is not a necessarily included lesser offense of armed robbery. Therefore, this issue is not preserved, *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992), and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In a jury trial, the court must "instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The court is only required to instruct on necessarily included lesser offenses or attempts if such an instruction is requested and is supported by a rational view of the evidence. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002).

The elements of armed robbery are "(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, . . . possessed a dangerous weapon[.]"

*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (footnote omitted). The elements of assault with intent to rob while armed are (1) the defendant committed an assault with force and violence, (2) the defendant had the intent to rob or steal, and (3) the defendant was armed with a dangerous weapon or a feigned weapon. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Assault with intent to rob while armed is a necessarily included lesser offense of armed robbery. *People v Kamin*, 405 Mich 482, 500-501; 275 NW2d 777 (1979). The offenses are distinguished only by whether a larceny occurred.

In this case, it was undisputed that a man with a gun confronted the victim, took her car keys, and drove off in her car. The only issue was whether the victim had correctly identified defendant as the perpetrator. If the offense had been limited to the taking of the car keys or the car, a rational view of the evidence would not have supported an instruction of assault with intent to rob because it was undisputed that those items had been stolen. However, the evidence also showed that when defendant initially accosted the victim, he demanded her money but she had no money to give to him. He also demanded her purse and sent her into her house to get it, but left the scene before she brought it out. A rational view of this evidence supported the instruction on assault with intent to rob while armed because defendant was unable to obtain any money from the victim directly, and the requested purse and its contents were not stolen. Therefore, plain error has not been shown.

Defendant next argues that the trial court gave an erroneous instruction regarding his theory of the case and that trial counsel was ineffective for failing to request a proper instruction. Defendant has waived his claim of instructional error because defense counsel stated that he had nothing to bring to the court's attention regarding the instructions apart from the issue regarding the lesser included offense instruction. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Because defendant did not raise the ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing, our review of that issue is limited to mistakes apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

The record indicates that defendant initially intended to pursue an alibi defense and that defense counsel submitted a proposed instruction indicating that defendant's theory of the case was one of alibi. That instruction was given to the jury. At trial, however, defendant did not pursue the alibi defense and instead argued that the victim's testimony was too inconsistent to be believed, especially on the issue of identification. Defendant would have been entitled to an instruction on misidentification as the theory of the defense because it was supported by the evidence. *People v Robinson*, 79 Mich App 145, 161-162; 261 NW2d 544 (1977), abrogated in part on other grounds by *People v Heflin*, 434 Mich 482, 503 n 16; 456 NW2d 10 (1990). The record permits a finding that counsel's performance was objectively unreasonable because he allowed the court to instruct the jury on a theory of the case that had been abandoned instead of

the theory presented at trial. However, defendant has not shown a reasonable probability that had counsel requested and received an instruction on the actual theory of the case, the outcome of the case would likely have been different. Defense counsel made it clear that part of the defense was that the victim “does not know who took . . . her car under these conditions with a gun” and asked for a not guilty verdict “because it was not Mr. Hunt” who did it. In addition, the court instructed the jury in accordance with CJI2d 7.8, identification as a disputed issue. Because the jury was aware that identification was the key issue and that it would have to determine whether the victim’s identification testimony was credible, and because the court properly instructed the jury on the law regarding the assessment of identification testimony, it is not reasonably probable that the outcome of the trial would have been different had the court more accurately instructed the jury that defendant’s theory of the case was that he was incorrectly identified as the perpetrator.

Defendant next argues that misconduct by the prosecutor denied him a fair trial, and that trial counsel was ineffective for failing to object. Because defendant did not object to the prosecutor’s conduct, we review that issue for plain error affecting defendant’s substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *Id.* at 454.

Defendant argues that the prosecutor improperly expressed a personal belief in defendant’s guilt, or used the prestige of his office to encourage the jury to return a guilty verdict. We disagree. The prosecutor concluded his closing argument with the statement, “I feel that after you’ve had a chance to deliberate, and take into account the evidence and the testimony that it deserves a guilty verdict,” and concluded his rebuttal argument with the statement, “I feel if you take all this into consideration you’ll see that this warrants a guilty conviction on every charge.”

The prosecutor is permitted “to relate the facts to his theory of the case, and in so doing say that certain evidence leads him to believe the defendant is guilty.” *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). Because the prosecutor’s remarks were based on the evidence presented at trial, they were not improper. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). Because the remarks were not improper, defense counsel was not ineffective for failing to object. *Matuszak*, *supra* at 60.

Defendant lastly argues that the cumulative effect of the alleged errors raised on appeal denied him a fair trial. Because defendant’s allegations of error either are without merit or were not prejudicial, defendant has not established a basis for relief.

Affirmed.

/s/ David H. Sawyer  
/s/ Christopher M. Murray  
/s/ Cynthia Diane Stephens