STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED August 27, 2009
v	No. 280437 Washtenaw Circuit Court
LUTHER WILLIAMS, Defendant-Appellant	LC No. 06-001947-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	
v	No. 280599 Washtenaw Circuit Court
MARCUS MOORE, Defendant-Appellant	LC No. 06-001948-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

In Docket No. 280437, defendant Luther Williams appeals by right his conviction for assault with intent to rob while armed, MCL 750.89, assault with a dangerous weapon, MCL 750.82, and assault with intent to do great bodily harm less than murder, MCL 750.84. In Docket No. 280599, defendant Marcus Moore appeals by right his conviction for assault with intent to rob while armed, MCL 750.89, assault with a dangerous weapon, MCL 750.82, and assault with intent to do great bodily harm less than murder, MCL 750.84. Williams was sentenced to 15 to 40 years' imprisonment for assault with intent to rob while armed, 32 months to 4 years' imprisonment for felonious assault, and 80 months to 10 years' imprisonment for assault with intent to do great bodily harm less than murder. Moore was sentenced to 240 months to 40 years' imprisonment for assault with intent to rob while armed, 32 months to 4 years' imprisonment for felonious assault, and 80 months to 10 years' imprisonment for assault with intent to do great bodily harm less than murder. We affirm defendants' convictions.

Defendants both argue that the prosecutor presented insufficient evidence to support their convictions for assault with intent to rob. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We "view the

evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). To secure a conviction of assault with intent to rob while armed, the prosecutor must prove the following three elements: "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Defendants only dispute the sufficiency of the evidence related to the intent element. In order to prove the defendant had the intent to rob, the prosecution must show that at the time of the assault the defendant intended to permanently take money or property from the victim. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (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).

When viewed in a light most favorable to the prosecution, there was sufficient evidence that defendants assaulted Anthony Harris with the intent to rob him. Harris' testimony alone was sufficient evidence to establish defendants' guilt beyond a reasonable doubt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Harris testified that codefendants confronted him in the store while he was waiting to make a purchase. They yelled expletives at Harris and stated, "I'll take this from you," and "I'll rob you." As they exited the store, they told Harris, "We gonna' meet you outside." Outside the store, defendants attacked Harris, brutally beating and stabbing him, and during the attack, they yelled more expletives including, "I done robbed your ass." In addition, defendants initially confronted Harris when they noticed the money he was counting to make his purchase inside the store. Then, after the attack, Harris was missing money and the alcohol he had just purchased. This evidence constitutes satisfactory proof of defendants' specific intent to steal property from Harris.

In Docket No. 280437, Williams also argues that the trial court abused its discretion in permitting the prosecutor to introduce evidence of his tattoos at trial because it was irrelevant and prejudicial. We review a trial court's evidentiary ruling for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Relevant evidence is any evidence that has a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Here, Williams' tattoos were "of consequence" towards establishing Williams' identity and Harris' credibility. See *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976) ("'Identity' . . . is always an essential element in a criminal prosecution . . . ."); *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995) ("If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact"). Here, Williams' tattoos were highly probative of whether he was accurately identified as one of the robbers. During trial, Williams asserted that he was not there and was targeted by the police because he happened to be in the neighborhood when the attack occurred. But, Harris testified that during the attack his assailants continually repeated the phrase "900 block" and that he believed that "900 block" referred to where they were from. Williams had "900" tattooed on one hand, and "BLK" tattooed on the other hand. Williams' tattoos are distinctive, and the fact that the words tattooed on his hands were said during the attack corroborates his identity as one

of the attackers. Moreover, the existence of the tattoos coupled with Harris' testimony makes Harris' testimony more credible. Furthermore, defendant has provided no evidence to support that the probative value of this evidence was outweighed by the danger of unfair prejudice. MRE 403. Apart from a small chance of bias against tattoos in general, Williams cannot support a claim of unfair prejudice because there is nothing inherently offensive about "900" and "BLK." We conclude that because the danger of unfair prejudice did not substantially outweigh the probative value on the record before us, the trial court did not abuse its discretion admitting evidence of Williams' tattoos.

Williams also argues that the trial court improperly scored two sentencing offense variables. A sentencing court has discretion in determining the number of points to be scored for each offense if record evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial court scored offense variable (OV) 3, MCL 777.33 (physical injury to victim), at 25 points. The statute provides that OV 3 should be scored 25 points if a "[l]ife threatening or permanent incapacitating injury occurred to a victim," MCL 777.33(1)(c), and at ten points if "[b]odily injury requiring medical treatment occurred to a victim," MCL 777.33(1)(d). The statute generally requires, however, that when evidence would support different scores for OV 3, "the one that has the highest number of points" should be chosen. Evidence established that Harris received several injuries requiring medical attention. The most severe injury was a four-inch deep stab wound to the neck. Harris described the injury and indicated that he felt a gush of blood. He was transported to the hospital by ambulance, and a trail of his blood was left at the crime scene. The location of the neck injury and the depth of that injury is evidence that the injury was life threatening. Therefore, the trial court correctly scored OV 3 at 25 points.

The trial court also scored OV 4, MCL 777.34, at ten points. Ten points is scored if there is serious psychological injury to the victim that requires professional treatment. MCL 777.34(1)(a). "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004); MCL 777.34(2). Harris' description of the intense fear he experienced in the aftermath of the attack and the flashbacks that he experienced months after the attack were sufficient evidence to uphold the trial court scoring of OV 4 at ten points. *Apgar*, *supra* at 329.

In Docket No. 280599, Moore contends that the prosecutor's repeated references during direct examination to Harris' oath to testify truthfully improperly bolstered Harris' testimony. "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Improper bolstering of the credibility of prosecution witnesses may constitute prosecutorial misconduct. *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989). "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, a prosecutor's reference to a promise of

truthfulness is not improper, unless the reference is used to suggest that the prosecutor had some special knowledge concerning the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Moreover, "[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek, supra* at 70.

We conclude that Moore has failed to demonstrate that the prosecutor acted in bad faith or improperly bolstered Harris' credibility. Harris' assertion that he was testifying truthfully concerned his own testimony and not that of another witness. Further, nothing in the prosecutor's statement can be seen as asking the jury to convict Moore based on the prosecutor's personal knowledge. *Bahoda, supra* at 276. The prosecutor merely elicited testimony regarding Harris' past criminal convictions before it was introduced on cross-examination in an effort to show that the past convictions did not affect Harris' testimony. The prosecutor's questions were brief, and she did not refer to Harris' assertion to tell the truth during closing or rebuttal arguments. The prosecutor did not imply that she had special knowledge concerning Harris' promise of truthfulness, *Bahoda, supra* at 276, and her good faith effort to admit evidence was not misconduct. *Dobek, supra* at 70.

In Docket No. 280437, we affirm Williams' convictions and sentences.

In Docket No. 280599, we affirm Moore's convictions.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis