STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2009
v	No. 285025 Berrien Circuit Court
MICHAEL CHRISTOPHER WILLIAMS, Defendant-Appellant.	LC No. 2007-406473-FH

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and second-degree retail fraud, MCL750.356d, and the trial court sentenced him to concurrent prison terms of 15 to 60 years for the armed robbery conviction and one year for the retail fraud conviction.[1] Defendant appeals as of right. We affirm.

Defendant alleges that there was insufficient evidence to convict him of armed robbery because the prosecution failed to prove he possessed a weapon, or an object that resembled a weapon, during the commission of the larceny. We disagree. This Court reviews a claim of insufficient evidence de novo, viewing the evidence in a light most favorable to the prosecution to determine whether the evidence would justify a rational trier of fact finding that the defendant was guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). To establish armed robbery, the prosecution must prove, in pertinent part, that "the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon." *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007); MCL 750.529; MCL 750.530(1). MCL 750.530(2) defines "in the course of committing the larceny" as "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or

[1] The Sentencing Information Report indicates that defendant was convicted of being an habitual offender, fourth or subsequent offense, MCL 769.12. However, there is no indication in the record that the trial court enhanced defendant's sentence as a result of his habitual offender status.

in an attempt to retain possession of the property."[2] "[A]n armed robbery can be completed without the actual use of a dangerous weapon, such as . . . the defendant merely represents orally or otherwise that he or she is in possession of a dangerous weapon." *Chambers, supra* at 9.

Viewing the evidence in a light most favorable to the prosecution, the evidence at trial demonstrated that defendant orally represented to the loss prevention officer and the mall security guard that he had a gun and would shoot them. Defendant made the statements while motioning to the right side of his body soon after leaving a J.C. Penney store with unpaid merchandise. Defendant's argument that the evidence was insufficient because the threat occurred after the commission of the larceny is misplaced, as MCL 750.530(2) clearly states that actions that occur in an attempt to flee after the commission of the larceny are considered to be actions in the course of committing the larceny. MCL 750.529.

Defendant next argues that the trial court abused its discretion when it denied his motion for a new trial and failed to inquire further into the possible bias of two jurors. Specifically, defendant argues that his right to a fair and impartial jury was denied because one juror had a social relationship with a prosecutorial witness and another juror indicated, during deliberations, that she was predisposed to convict defendant based on his appearance. "There is no question that a criminal defendant has a constitutional right to be tried by an impartial jury." *People v Miller*, 482 Mich 540, 560; 759 NW2d 850 (2008); US Const, Am VI; Const 1963, art 1, § 20. To justify the grant of a new trial, however, defendant must establish that he was prejudiced by the juror's presence on the jury. *Miller, supra* at 553-554. That is, a defendant must establish that the juror was not impartial. *Id.* Jurors are presumed to be impartial. *Id.* at 550. "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.*

A thorough review of the record reveals that defendant was not denied his right to a fair and impartial jury. Both of the challenged witnesses were properly questioned by the trial court about any possible bias or partiality against defendant and both indicated under oath that they were or would be impartial and decided or would decide the case based solely on the evidence and testimony presented at trial. There is no evidence in the record, and defendant does not identify any instance in the record, that indicates these jurors were partial and that their presence on the jury actually prejudiced him. *Miller, supra* at 553-554. Because defendant failed to overcome the presumption that the jurors were impartial, defendant is not entitled to a new trial. *Id.* at 550.

In reaching our conclusion, we reject defendant's argument that the trial court failed to conduct a proper inquiry into the allegations of juror bias. During the trial and an evidentiary hearing, the trial court permitted both parties to question the two challenged jurors and another juror who reported possible juror bias. Defendant fails to explain how these inquiries were inadequate. Additionally, defendant declined the trial court's offer to allow defendant to present additional evidence and call any additional jurors at the evidentiary hearing, and thereby waived

[2] The armed robbery statute, MCL 750.529, specifically incorporates the language from the unarmed robbery statute, MCL 750.530. See *Chambers, supra* at 7.

this issue. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (A party waives an issue if the party intentionally relinquishes a known right.). Defendant affirmatively stated that he did not wish to present any additional evidence, he now fails to explain how any further inquiry would have revealed actual prejudice, and the trial court more than adequately inquired into any possible juror misconduct. Consequently, defendant is not entitled to an additional evidentiary hearing. *Id.*; *People v Washington*, 468 Mich 667, 668; 664 NW2d 203 (2003).

Defendant next argues that the prosecution improperly stated during her rebuttal closing argument that the shirt presented as evidence at trial was the same shirt recovered by Trooper Dilley on the night of the incident. Defendant failed to "timely and specifically object" to instances of prosecutorial misconduct, and our review is limited to plain error affecting a defendant's substantial rights. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). A defendant's claim of prosecutorial misconduct is reviewed on a case-by-case basis. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor's comments during a closing argument "will be reviewed in context to determine whether they constitute error requiring reversal." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A prosecutor is provided with great latitude and may argue the evidence and all reasonable inferences from it. *Bahoda, supra* at 282.

Reviewing the prosecutor's comments in context, the prosecution was simply responding to defendant's claims that the sweatshirt presented as evidence at trial was not the one recovered at the scene. This was proper rebuttal argument. *Schutte, supra* at 721; *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001) (Prosecutor is permitted to respond to the defense theory during the rebuttal argument). Further, the prosecutor's comment that "[t]his is what Trooper Dilley recovered" was not improper because the comment was based on the evidence and reasonable inferences. Trooper Blake Dilley was uncertain at trial if the shirt presented was the one he recovered, but Officer Wesley Koza testified that Trooper Dilley recovered the shirt presented at trial and turned it over to Officer Koza on the night of the incident. Based on Officer Koza's testimony, the prosecutor was free to argue that the shirt presented at trial was the one found at the house. *Bahoda, supra* at 282. Because the prosecutor did not engage in misconduct, defense counsel was not required to make a futile motion to be effective. *People v Petri*, 279 Mich App 407, 415; 760 NW2d 882 (2008) (To be effective, "counsel need not make a futile motion.").

Defendant further alleges that his double jeopardy rights were violated when he was convicted of both retail fraud and armed robbery arising out of a single criminal transaction. "We review an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). "The constitutional provisions barring double jeopardy, U.S. Const., Am. V, and Const. 1963, art. 1, § 15, prohibit a defendant from being punished multiple times for the same offense." *Chambers, supra* at 4-5. The proper test to determine if double jeopardy occurred in the context of multiple punishments is to determine if the offenses share common elements. *Id.*

at 5. If one offense requires proof of an element that the other offense does not, then double jeopardy has not occurred. *Id.*

At the outset, we note that the Michigan Supreme Court has rejected the argument that a defendant's convictions for multiple crimes originating from a single criminal transaction violate double jeopardy. *People v Smith*, 478 Mich 292, 295, 304; 733 NW2d 351 (2007). In *Smith*, the Court adopted the same element test as articulated in *Blockburger v United States*, 284 US 299; 304; 52 S Ct 180; 76 L Ed 306 (1932). Consequently, the ultimate question is whether the offenses of retail fraud and armed robbery require proof of elements that are not required by the other offense. *Id.*; *McGee, supra* at 683.

To convict a person of second-degree retail fraud, the prosecution must establish 1) the defendant took property offered for sale at a store, 2) the defendant physically moved the property, 3) the defendant intended to steal the property, 4) the defendant's actions took place inside a store or in the immediate area while the store was open to the public, and 5) the value of the property was less than $200. MCL 750.356d(2); MCL 750.356d(4)(a). To convict a person of armed robbery, the prosecution must prove: "(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, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon." *Chambers, supra* at 7; MCL 750.529; MCL 750.530(1). A plain reading of the text of the statute reveals that to prove armed robbery, the prosecution was required to prove that defendant "used force or violence against any person who was present or assaulted or put the person in fear" and that the defendant possessed a weapon or represented he possessed a weapon. MCL 750.529; MCL 750.530(1). Neither of these elements are required to prove retail fraud. Additionally, to prove retail fraud, the prosecution must demonstrate, among other elements, that defendant's actions took place inside the store and that the value of the property was less than $200. MCL 750.356d(2); MCL 750.356d(4)(a). These elements are not required to prove armed robbery. "While there may indeed be substantial overlap between the proofs offered by the prosecution to establish the crimes, the prosecution must nevertheless prove different elements under these statutory provisions." *McGee, supra* at 684-685. Thus, defendant's constitutional rights were not violated by his convictions for both offenses. *Id.*

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra