STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2016
v	No. 327456 Oakland Circuit Court
NATHANIEL DOMINIC SWANIGAN, Defendant-Appellant.	LC No. 2014-252018-FC

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant to 9 to 20 years' imprisonment for armed robbery, 2 years' imprisonment for felony-firearm, and 226 days for resisting or obstructing a police officer. For the reasons set forth in this opinion, we affirm.

I. FACTS

This case involves an armed robbery that occurred at a BP gas station in Southfield on August 27, 2014. On August 27, 2014, just after midnight, Mukhtar Almogari was working as a clerk at the gas station. The gas station included a convenience store, which contained refrigerated cases, a freezer, and a microwave. As Almogari worked, three men—including defendant—entered the convenience store. Almogari testified that defendant wore a white shirt, another man wore a red shirt, and the third man wore a black shirt. Almogari testified that he recognized the men in the red and black shirts because "every time they come they make commotion [sic]." Almogari testified that he did not recognize defendant.

According to Almogari, the men "started to be loud and they were doing whatever they wanted to do," including taking items off the shelves and putting them into their bags or pockets without paying for them. Almogari testified that defendant took a sandwich out of the cooler and heated it using the microwave, but did not pay for it. Almogari also testified that defendant took a bottle of water. Almogari testified that he may have given defendant a bag "believing that he was going to pay me," but defendant did not pay.

Almogari testified that, when he told the men that they had to pay for the goods, they "start[ed] screaming." According to Almogari, the man wearing a red shirt was "threatening" him, and defendant continued to "swear and put things in his pocket." Almogari testified that, at some point, defendant approached Almogari at the counter, and Almogari noticed that defendant had a gun. Almogari testified that, when defendant got to the protective glass that separated Almogari's cash register, defendant threatened Almogari and raised his right arm, moving it around at waist level. Almogari also testified that defendant "waived [sic] his gun" when Almogari argued with one of the other men. However, according to Almogari, defendant's gun was always pointed downward. Almogari testified that he felt "scared" but that he did not believe defendant would hurt him. According to Almogari, he had the ability to lock the doors to the store from where he sat behind the counter, but one of the men held the door to the store open throughout the incident. Almogari testified that he called 911 to report the crime, and when he called 911, the men "became even more chaotic." Almogari testified that the man in the red shirt paid him one dollar, but it was not enough to cover everything that was stolen. Eventually, the men left the gas station. Almogari testified that as defendant was leaving, he took a full box of candy bars. Almogari testified that the police arrived within five minutes.

Police eventually located defendant and two other men in the parking lot of a nearby apartment complex. Defendant attempted to jump over a series of fences in the backyards of several houses. However, police ultimately apprehended defendant. Specifically, an officer testified that he encountered defendant in a parking lot. According to the officer, defendant refused to stop after repeated commands so the officer deployed a Taser onto defendant. The officer indicated that, even after using the Taser, defendant refused to comply with orders to "stay on the ground," and "kept trying to get up off the ground." Two officers struggled with and ultimately handcuffed defendant and took him into custody.

After defendant was in custody, police located a firearm on the ground near a wall that defendant jumped over. At the police department, defendant informed police that he drank "some margaritas that night" and went to a nightclub with his friends. Defendant stated that he went to Woodland Arms apartments to meet a woman and that defendant denied being at the gas station at all.

Defendant testified that he did not remember much from the night of August 27, 2014. According to defendant, he went to a bar with friends, drank "three, four cups of liquor," and took some type of pill. Defendant did not remember going to the gas station, and he testified, "I probably paid for my stuff because I had money." Defendant testified that the next thing he remembered after drinking alcohol at the bar was "being chased by the police," and ultimately hit with a Taser.

Defendant was charged with armed robbery, MCL 750.529; felony-firearm, MCL 750.227b; and resisting or obstructing a police officer, MCL 750.81d(1). He was convicted and sentenced as noted above. This appeal ensued.

II. JURY INSTRUCTIONS

First, defendant argues that the trial court violated his due process rights when it denied his request for jury instructions for felonious assault and brandishing a firearm.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). It is the trial court's duty to instruct the jury as to the law applicable to the case. MCL 768.29. "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). The determination whether an offense is a necessarily included lesser offense is a question of law that is reviewed de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). "[T]he trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *Dobek*, 274 Mich App at 82. "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Id*.

Under MCL 768.32(1), a jury "may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." The word "inferior" refers "to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). Therefore, "a defendant is entitled to a lesser offense instruction only if that lesser offense is necessarily included in the greater offense; that is, the offense must be committed as part of the greater offense insofar as it would be 'impossible to commit the greater offense without first committing the lesser offense.'" *People v Jones*, 497 Mich 155, 164; 860 NW2d 112 (2014), quoting *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). Necessarily included lesser offenses, then, "are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). Cognate lesser offenses, or offenses that "share several elements, and are of the same class or category, but may contain some elements not found in the higher offense," may not be considered. *Cornell*, 466 Mich at 345; see also *Jones*, 497 Mich at 164.

To determine whether a defendant is entitled to instructions on a necessarily included lesser offense, the court must first determine whether an offense is necessarily included by comparing the elements of the offenses. *Jones*, 497 Mich at 164. This determination "requires an abstract analysis of the elements of the offenses, *not* the facts of the particular case." *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007). Next, if the court determines that an offense is necessarily included, it "must then determine whether an instruction is warranted on the facts of a particular case by examining whether the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support the instruction." *Jones*, 497 Mich at 164-165 (quotation marks, brackets, and citation omitted).

Defendant was charged with armed robbery, MCL 750.529. He argues on appeal that the trial court should have granted his request for jury instructions on felonious assault and brandishing a firearm.

The trial court properly declined to instruct the jury on felonious assault. Felonious assault is a cognate offense, not a necessarily included lesser offense, of armed robbery because it is not impossible to commit armed robbery without first committing felonious assault. *Jones*, 497 Mich at 164. To establish the elements of armed robbery, the prosecutor 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. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

The elements of felonious assault, MCL 750.82, are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

As this Court found in *Chambers*,

> Having compared the elements of armed robbery and felonious assault, we deduce that armed robbery requires proof of an element not required to establish a felonious assault, i.e., actions in the course of committing a larceny. Furthermore, the elements of felonious assault require proof of an element not required to establish an armed robbery, i.e., the use of a dangerous weapon. Indeed, an armed robbery can be completed without the actual use of a dangerous weapon, such as where a defendant uses an article fashioned in a manner to lead a person to reasonably believe that the article is a dangerous weapon, or where the defendant merely represents orally or otherwise that he or she is in possession of a dangerous weapon. Felonious assault, on the other hand, requires the use of a dangerous weapon. [*Chambers*, 277 Mich App at 8-9.]

Because felonious assault contains an element not included in the offense of armed robbery, it is a cognate lesser offense, not a necessarily included lesser offense. Accordingly, the trial court did not err in declining to provide a felonious assault instruction.

Similarly, the offense of brandishing a firearm is a cognate lesser offense of armed robbery. To prove brandishing a firearm, MCL 750.234e, the prosecution must establish that defendant "willfully and knowingly brandish[ed] a firearm in public." MCL 750.234e. The offense of armed robbery includes several elements that are not included in the offense of brandishing a firearm. For example, to prove armed robbery, the prosecution must establish that the defendant acted in the course of committing a larceny. *Chambers*, 277 Mich App at 7. The prosecution also must prove that the defendant used force or violence or put a person in fear. *Id*. These elements are not required to prove the offense of brandishing a firearm. The offense of brandishing a firearm also includes an element that is not required to prove the offense of armed robbery. To prove brandishing a firearm, the prosecution must show that the defendant brandished a firearm in public. MCL 750.234e. This is not an element of armed robbery.

Because the offenses of armed robbery and brandishing a firearm each contain elements not found in the other offense, it is a cognate offense, not a necessarily included lesser offense. Accordingly, the trial court correctly refused to instruct the jury on brandishing a firearm, and defendant is not entitled to a new trial. *Cornell*, 466 Mich at 345.

In sum, the trial court did not err in declining to provide an instruction on felonious assault and on brandishing a firearm.

III. SCORING OF THE OVs

Next, in a Standard 4 brief, defendant argues that the trial court erred in scoring OVs 1 and 19 at sentencing and that the improper score violated his constitutional rights.

We review a trial court's factual determinations under the sentencing guidelines for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. A trial court's factual findings in support of its scoring of the sentencing guidelines must be supported by a preponderance of the evidence. *Id*.

OV 1 concerns the aggravated use of a weapon. MCL 777.31 provides, in relevant part, that OV 1 should be scored at 15 points if "[a] firearm was pointed at or toward a victim." The trial court did not clearly err in scoring OV 1 at 15 points. At trial, the cashier identified defendant as one of the men who robbed him and testified that defendant had a gun inside the gas station. The cashier testified that defendant aimed his gun downward, but he also testified that defendant threatened him and raised his right arm—the arm holding the gun—moved it around at waist level. This evidence supported that defendant was using the gun in a threatening manner and that the gun was pointed toward the victim; therefore, the trial court did not clearly err in assessing 15 points for OV 1.

Defendant also argues that the trial court erred in assessing 10 points for OV 19.

OV 19 concerns interference with the administration of justice. A trial court must assess 15 points for OV 19 when "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services," and 10 points must be assessed if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(b) and (c). "The phrase 'interfered with or attempted to interfere with the administration of justice' is broad," and it includes acts constituting obstruction of justice. *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009).

In this case, the trial court did not clearly err in finding that a preponderance of the evidence supported scoring OV 19 at 10 points. At trial, a police officer testified that when he first encountered defendant in a parking lot, he stated, "police, stop," but defendant did not stop. Instead, defendant "put up his fists and started coming directly towards" the police officer in what the officer described as a "fighting stance." The police officer testified that he said "stop, stop, stop, stop" and "taser, taser, taser," and deployed his Taser on defendant when defendant

failed to stop. The officer testified that, even after defendant was hit with the Taser, he refused to comply with orders and "kept trying to get up off of the ground." The officer explained that defendant resisted being handcuffed and attempted to "roll out" of the handcuffs and hide his hands underneath his body. Based on this record, the trial court did not clearly err in finding facts to support scoring OV 19 at 10 points. See, e.g., *People v Hershey*, 303 Mich App 330, 344; 844 NW2d 127 (2013) (holding that flight from police contrary to an order to freeze amounted to an interference with the administration of justice sufficient to score OV 19 at 10 points); *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474 (2013), vacated in part on other grounds 495 Mich 876; 838 NW2d 687 (2013) (fleeing in a vehicle after an officer ordered the defendant to "freeze" and continuing to flee on foot after the vehicle stopped was sufficient to support a score of 10 points under OV 19).

III. INEFFECTIVE ASSISTANCE OF COUNSEL/DUE PROCESS

Next, in his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel and denied due process.

An ineffective assistance of counsel claim presents a mixed question of fact and constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). A trial court's factual findings, if any, are reviewed for clear error and constitutional issues are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). Because there was no evidentiary hearing in the lower court, our review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To prevail on an ineffective assistance of counsel claim, a defendant must show that "counsel's performance was deficient" and that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citations omitted). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*.

First, defendant argues that trial counsel was ineffective for failing to object to the scoring of OVs 1 and 19. As discussed above, the trial court did not clearly err in finding facts to support the scoring of these variables; therefore, defendant cannot show that counsel was ineffective in failing to object to the scoring. See *People v Ericksen,* 288 Mich App 192, 201; 793 NW2d 120 (2010) ("[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

Second, defendant argues that he was deprived of his rights to due process and the effective assistance of counsel when he was subjected to an in-court identification during the preliminary examination.

To constitute a violation of due process an identification must be "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). A defendant must establish that the pretrial identification procedures were so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id*.

In the event that an identification procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis can be established for the in-court identification "that is untainted by the suggestive pretrial procedure." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Courts should consider the following factors when determining whether an independent basis exists for the admission of an in-court identification:

> (1) the witness's prior knowledge of the defendant, (2) the witness's opportunity to observe the criminal during the crime, (3) the length of time between the crime and the disputed identification, (4) the witness's level of certainty at the prior identification, (5) discrepancies between the pretrial identification description and the defendant's actual appearance, (6) any prior proper identification or failure to identify the defendant, (7) any prior identification of another as the culprit, (8) the mental state of the witness at the time of the crime, and (9) any special features of the defendant. [*People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).]

"Most eyewitness identifications involve some element of suggestion." *Perry v New Hampshire*, 565 US ___; 132 S Ct 716, 718; 181 L Ed 2d 694 (2012).

In this case, during the preliminary examination, the victim testified that defendant was the man that had the gun during the robbery. The victim identified that defendant was wearing "orange." Defendant argues that this identification was suggestive. Defendant was presumably wearing prison garb during his preliminary examination. The record reflects that defendant was in custody at the time and was brought into the courtroom after his attorney was already seated. Also, Almogari testified that defendant was wearing orange. The fact that defendant was seated next to his attorney at the defense table wearing prison garb created the inference that defendant was the individual suspected of the crime. See, e.g., *People v Colon*, 233 Mich App 295, 305; 591 NW2d 692 (1998) (finding that "there is no question that the preliminary examination was a suggestive atmosphere in that defendant was placed in the courtroom in prison garb").

However, it does not necessarily follow that the victim's identification of defendant was constitutionally defective. Defendant must demonstrate that there was a substantial likelihood of misidentification. *Williams*, 244 Mich App at 542. Defendant has failed to make such a showing here. Almogari was able to observe defendant at the time of the robbery. Almogari testified that he saw defendant enter the convenience store portion of the gas station along with two other men, and he described the clothing worn by all three men at trial. Almogari testified that he saw defendant and the other men take various items from around the store. Specifically, Almogari testified that defendant took a sandwich out of the cooler and heated it using the microwave. This testimony indicates that defendant was in the gas station within Almogari's sight for at least enough time to heat a meal. Almogari also testified that defendant approached his cashier station and that he gave defendant a bag. This testimony indicates that Almogari was able to observe defendant from a close distance, as Almogari was close enough to defendant to hand him a bag. Moreover, Almogari reviewed the surveillance video at trial and identified defendant in the video. Under these circumstances, defendant has not established that the victim's identification of defendant at the preliminary examination created a substantial likelihood of misidentification. *Williams*, 244 Mich App at 542. Therefore, defendant has not shown that his identification was constitutionally defective. *Id*.

Furthermore, even where an identification procedure is impermissively suggestive, evidence concerning the identification may be admitted at trial where there is an independent basis for the in-court identification that is untainted by the pretrial procedure. *Kurylczyk*, 443 Mich at 303. To the extent that defendant's presence at the preliminary examination was unduly suggestive, the record establishes an independent basis for the victim's in-court identification of defendant at trial. When evaluating the factors outlined in *Gray*, the factors weigh in favor of finding an independent basis. Although the victim testified that he had never seen defendant before the robbery, his opportunity to view defendant and his level of certainty at the preliminary examination and at trial weigh in favor of finding an independent basis. The victim consistently identified defendant as the robber with the gun at the preliminary examination and at trial. Weighing these factors, the record establishes that there was an independent basis for the victim's in-court identification, and the identification was properly admitted at trial. *Kurylczyk*, 443 Mich at 303. Given our conclusion that the identification was not constitutionally deficient, defendant cannot show that counsel's failure to object to the identification denied him the effective assistance of counsel. See *Ericksen*, 288 Mich App at 201.

Finally, defendant argues that counsel was ineffective when he failed to object to the armed robbery instruction.

The trial court instructed the jury on armed robbery as follows:

> [I]n count one, [defendant] is charged with the crime of armed robbery. To prove that charge the prosecutor must prove each of the following beyond a reasonable doubt.
>
> First, that defendant used force or violence against and/or assaulted or put in fear Mr. Almogari.
>
> Second, that [defendant] did so while he, [defendant] was in the course of committing a larceny.
>
> A larceny is the taking and movement of someone else's property or money with the intent to take it away from that person permanently. []
>
> Third, that Mr. Almogari was present while [defendant] was in the course of committing a larceny.
>
> And fourth, that while in the course of committing a larceny Mr. Swanigan possessed a weapon designed to be dangerous and capable of causing death or serious injury.

Defendant argues that the instruction was inadequate as follows:

> the trial court errorred [sic] in defining the assult [sic] element of Armed Robbery only as putting another Person in fear, omitting the Attempt Battery theory of Assult [sic] and failing to instruct that the victim must be in reasonable Apprehension of a Immediate Battery.

The trial court's instruction was consistent with M Crim JI 18.1, which provides in relevant part that the first element of armed robbery is "the defendant [used force or violence against/assaulted/put in fear] [against the victim]" (footnote omitted). This element contains a footnote that indicates, "If needed, a definition of 'assault' can be found at M Crim JI 17.1." Defendant argues that the trial court should have defined assault to include putting someone in fear of an immediate battery. However, armed robbery can be completed by an assault—i.e. a reasonable apprehension of an immediate battery—or when one "puts the [victim] in fear." MCL 750.529; MCL 750.530(1). In this case, the prosecution's theory was that defendant put the victim in fear when he committed the robbery. Specifically, with respect to the first element, the prosecutor argued as follows:

> So let's look at more closely at the first element. Defendant assaulted or put in fear Mukhtar Almogari. You heard Mr. Almogari tell you he was scared. He has a family. He told you he got a new job as a result of this incident. If that's not scared, fearful I don't know what is. He switched jobs after this.

Thus, the jury instruction incorporated the prosecution's theory of the case and sufficiently defined the first element of armed robbery. MCL 750.530(1); MCL 750.529. Thus, the jury instruction "fairly presented the issues to be tried and sufficiently protected the defendant's rights," *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003), and counsel was not ineffective for failing to raise an objection. See *Ericksen*, 288 Mich App at 201

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Michael J. Riordan