

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

SAMUEL LAMOUNT SAMS,

Defendant-Appellant.

No. 306443
Washtenaw Circuit Court
LC No. 11-000087-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 12 to 25 years' imprisonment for each armed robbery convictions to be served consecutively to two years' imprisonment for his felony-firearm convictions. He appeals by right. We affirm.

On January 13, 2011, at about 9:24 p.m., Stephanie Hook and Aliesha Harrison were working as cashiers at a gas station with a convenience store or mini mart at the corner of Clark and Prospect in Ypsilanti Township. A man came in wearing a hooded sweatshirt, pointed a gun at Hook, and demanded the money out of her register. After Hook handed over the money, the man moved to Harrison and demanded the money out of her register. Hook estimated she handed the man about \$140 to \$160, and Harrison thought she gave the man about \$250, including a stack of about 30 to 50 one-dollar bills.

Hook described the gun, which looked real, as a small black handgun. Harrison was afraid the man would shoot her and Hook. Hook and Harrison described that the man wore a white hooded sweatshirt with black or gray designs that could zip all the way up. Hook thought the man had it zipped to his upper lip. Harrison recalled it being zipped past his nose. Both clerks thought the man had something on his head under the hood and that he was wearing tennis shoes. Both clerks recalled the man's having very distinctive eyes. He left on foot.

Sergeant David Egeler followed footprints away from the store for 30 or 40 feet. Egeler searched the area and found a cellular telephone in the road. He believed the cell phone had not been there long because there was a wet snow; the telephone was not very wet; no one had picked it up, and it had not been run over. Deputy Aaron Hendricks was in charge of the scene and Egeler gave him the telephone. There was a photograph of a man on the telephone wearing

clothes similar to those of the robber. The cell phone received a call and after several conversations with the caller, Deputy Hendricks met with Bruce Henry, defendant's roommate. Henry identified the man in the photograph on the telephone as defendant. Officers searched Henry's apartment, but did not find defendant or any clothing consistent with the robber's.

The police arrested defendant about 3:15 a.m. on January 14, 2011. He had \$330 in cash, but no one-dollar bills, and a charger that functioned with the cellular telephone. He did not have a gun, and he was not wearing a white hooded sweatshirt, a ball cap, or tennis shoes.

On January 14, 2011, defendant refused to participate in a physical lineup, so Detective Everette Robbins compiled a photographic lineup. Both Hook and Harrison identified defendant in the photographic lineup. Hook was "extremely sure" when she identified the robber from the photographic lineup and at trial she was a "[h]undred percent" sure defendant was the man who robbed her. Harrison was "one hundred percent sure" she picked out the photograph of the man who robbed her in the lineup and at trial she was "[o]ne hundred and ten percent" sure that defendant was the man who robbed her.

During closing argument, defense counsel pointed out weaknesses in the prosecution's case, including that the photographic lineup was suggestive, that Deputy Hendricks' testimony was not credible, and that there were variations in the description of the robber. During rebuttal, the prosecutor argued that his job was to present all the evidence and "argue to you what it means," while defense counsel's "job is to poke holes in that and to get his client off."

Before trial, defendant moved to suppress the photographic lineup identification evidence. At an evidentiary hearing, Robbins testified that defendant started screaming, banging on windows, and yelling when Robbins attempted to interview him. Defendant was returned to his cell. About 10 to 15 minutes later, Detective Robbins asked defendant several times if he would participate in a physical lineup. Defendant refused. The trial court admitted the evidence.

Defendant first argues the trial court erred by not suppressing the photographic lineup identification evidence because it was improperly conducted while defendant was in custody and without counsel. We review pertinent issues of law de novo, *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004), but "the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). We will find clear error exists when left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

Generally, with some exceptions, photographic lineups are not permitted when the accused is in custody. *Kurylczyk*, 443 Mich at 297-298 (citation omitted). One of the exceptions is when "[t]he subject refuses to participate in a lineup and by his actions would seek to destroy the value of the identification." *People v Anderson*, 389 Mich 155, 186-187 n 23; 205 NW2d 461 (1973), overruled in part on other grounds *Hickman*, 470 Mich 602. In this case, defendant was asked several times to participate in a corporeal lineup and refused. Additionally, during an attempted interview shortly before the request for defendant to participate, defendant quickly began screaming, yelling, jumping, and banging. Based on this evidence, the trial court did not err when it determined a photographic lineup was permitted because defendant refused to

participate and his behavior indicated he would attempt to “destroy the value of the identification.” *Id.*

“In the case of photographic identifications, the right of counsel attaches with custody.” *Kurylczyk*, 443 Mich at 302. However, the right to counsel does not begin before “the initiation of adversarial criminal proceedings.” *Hickman*, 470 Mich at 603. In this case, the record does not demonstrate when adversarial proceedings began. Moreover, any error in failing to provide counsel was harmless as defendant makes no argument that the photo lineup was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. See *Kurylczyk*, 443 Mich at 306, 310-311, 318; *People v Johnson*, 202 Mich App 281, 285; 508 NW2d 509 (1993).

Next, defendant argues there was insufficient evidence that he was the person who committed the crimes charged. We review de novo whether the evidence was sufficient to support a conviction. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). When reviewing whether sufficient evidence has been presented to support a conviction, we must examine the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found that the essential elements of a crime were proved beyond a reasonable doubt. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). This is a deferential standard of review requiring the reviewing court to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). “The credibility of identification testimony is a question for the trier of fact that we do not resolve anew. Moreover, positive identification by witnesses may be sufficient to support a conviction of a crime.” *Davis*, 241 Mich App at 700.

In this case, each victim identified defendant as the robber in a photographic lineup and at trial. This alone is sufficient to support defendant’s convictions. Further, defendant was connected with the crime through the cell phone found near the scene, the fact that when taken into custody defendant had a charger that functioned with the telephone, and that defendant had \$330 dollars in cash in his possession when taken into custody within a couple hours after the robbery. Taken in a light most favorable to the prosecution, this evidence would permit a rational jury to find beyond a reasonable doubt all essential elements of a crime were proved and that defendant was the person who committed the armed robberies. *Id.*

Next, defendant argues there was insufficient evidence to convict him of felony-firearm. “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b. For purposes of this offense, a firearm is defined as “a weapon from which a dangerous projectile may be propelled by an explosive, gas, or air.” MCL 750.222(d). The gun does not have to be operable for the defendant to be properly convicted of felony-firearm. *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006). In this case, Hook testified about what the gun looked like specifically and testified that it looked real. Harrison was afraid they would both be shot. “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). There was sufficient evidence for the jury, as the trier of fact, to infer from Hook’s testimony describing the gun and from Harrison’s testimony she was afraid they would be shot that

defendant possessed a gun during the armed robberies and to have found that all the elements of felony-firearm were proven beyond a reasonable doubt. *Nowack*, 462 Mich at 400.

Finally, defendant argues that the prosecutor committed misconduct when she stated in closing argument that it was her job to present all the evidence and it was defense counsel's job to "poke holes" in the evidence and "to get his client off." Because defendant did not preserve this argument by asserting a contemporaneous objection and a request for a curative instruction, our review is limited to plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We examine claims of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We will not find error requiring reversal where a contemporaneous instruction would have alleviated any prejudicial effect. *Callon*, 256 Mich App at 329-330. A prosecutor's comments must also be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. *Id.* at 330. Accordingly, "otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense." *Id.*

Here, we conclude the prosecutor's comments were improper to the extent they denigrated defense counsel's function in general and were insulting to the important role of defense counsel in our system, and we do take this opportunity to remind prosecuting attorneys to take care with their words and be mindful of their own important duty. But the comments were legally improper if they were intended to suggest that defense counsel was attempting to mislead the jury. *Watson*, 245 Mich App at 592. Nonetheless, the prosecutor's comments, made in response to defense counsel's closing argument, do not necessarily require reversal. *Callon*, 256 Mich App at 330. Additionally, when considered in context, the prosecutor's comments were isolated and brief, and there is no indication that they impaired defendant's right to a fair and impartial trial. *Watson*, 245 Mich App at 586. Moreover, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Because this instruction would have cured any prejudice from the alleged misconduct, there is no plain error requiring reversal. *Callon*, 256 Mich App at 329-331.

Defendant also states the prosecutor's comments "misstated the purpose of her office," but he does not clarify this argument. We conclude that plain error did not occur when the prosecutor described that it was her job to present the evidence.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto