

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY SMITH, a/k/a ROBERT NESBITT,

Defendant-Appellant.

UNPUBLISHED

August 2, 1996

No. 170826

LC No. 92-014033

Before: Michael J. Kelly, P.J., Markman and J.L. Martlew *, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529; MSA 28.797, assault with a deadly weapon, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent terms of fifteen to thirty years for the armed robbery conviction and two to four years for the assault with a deadly weapon conviction, consecutive to two years for the felony firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to establish beyond a reasonable doubt that defendant committed these crimes. Specifically, defendant challenges the prosecution's use of circumstantial evidence to establish identity.

When considering a sufficiency of the evidence challenge following a bench trial, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. People v Petrella, 424 Mich 221, 268-280; 380 NW2d 11 (1985); see also People v Hutner, 209 Mich App 280, 282; 530 NW2d 174 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime, including identity. People v Jolly, 442 Mich 458, 466; 502 NW2d 177 (1993); People v Williams, 39 Mich App 234, 252; 197 NW2d 918

*Circuit Judge sitting on the Court of Appeals by assignment.

(1972). Here, an eyewitness, who had an unobstructed view of the incident, testified that defendant approached complainant, pointed a gun at complainant's head, and demanded a bag of money. This was sufficient to persuade a rational trier of fact of defendant's guilt beyond a reasonable doubt.

Defendant next argues that he was denied a fair trial because the trial court improperly admitted evidence that defendant assaulted and threatened to kill one of the prosecution's witnesses. Specifically, defendant argues that the trial court abused its discretion by failing to balance the prejudicial effect of the evidence against its probative value. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. People v Bahoda, 448 Mich 261, 289; 531 NW2d 659 (1995). The trial court's decision on a close question ordinarily cannot be an abuse of discretion. Bahoda, supra at 209. Contrary to defendant's assertion, our review of the record reveals that the trial court, upon defendant's objection, inquired as to the relevance of the testimony, weighed its probative value against the danger of unfair prejudice, and admitted the evidence. MRE 403. Evidence of attempts by the accused to induce witnesses not to testify may properly be considered by the finder of fact. Bahoda, supra at 290; see also People v Falkner, 36 Mich App 101; 193 NW2d 178 (1971); People v Hill, 44 Mich App 308; 205 NW2d 267 (1973). We find no abuse of discretion.

Defendant's next claim of error is that the prosecutor made improper remarks during closing argument which prejudiced the court against defendant. Specifically, defendant takes issue with the prosecution's comment which accused defendant of "tying a guilt trip on the court." We disagree.

A failure to object below to alleged prosecutorial misconduct precludes appellate review unless the issue would result in a miscarriage of justice. People v Stanaway, 446 Mich 643, 687; 521 NW2d 557 (1994); People v Slocum, 213 Mich App 239; ___ NW2d ___ (1995). When reviewed in context, the unobjected to remarks were intended to neutralize the effect of defendant's theory regarding the dangers of misidentification and, therefore, were innocuous. Further, we find no manifest injustice because the remarks were not so egregious that an instruction could not have cured their prejudicial effect. Stanaway, supra at 687.

Lastly, defendant argues that, if failure to object to alleged prosecutorial misconduct precluded appellate review of that issue, then trial counsel's failure to object deprived defendant of effective assistance of counsel. We again disagree.

In order to establish ineffective assistance of counsel, the defendant must show that, under an objective standard of reasonableness, counsel's performance was deficient and was prejudicial to defendant's case. The defendant must overcome the presumption that the challenged action could be considered sound trial strategy. People v LaVearn, 448 Mich 207, 213; 528 NW2d 721 (1995). Here, defendant's claim of ineffective assistance of counsel is without merit because the remarks were not improper. Also, defendant failed to overcome the presumption that trial counsel's failure to object

to the prosecutor's closing argument could be considered sound trial strategy. Most importantly, however, defendant has failed to show that, but for counsel's alleged error, the outcome at trial might have been different.

Affirmed.

/s/ Michael J. Kelly

/s/ Stephen J. Markman

/s/ Jeffrey L. Martlew