

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT HARDY SMITH,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

No. 188833

LC No. 92-117274

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ.

PER CURIAM.

This Court originally dismissed defendant's application for leave to appeal because of its tardiness, and denied defendant's motion for rehearing. By order dated August 28, 1995, the Supreme Court vacated this Court's prior orders in this case and remanded the matter for consideration as on leave granted. We now consider the issues raised by defendant, and affirm.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 282.424(2). Defendant also pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced ten to fifteen years' imprisonment for the unarmed robbery conviction and two and one-half to four years' imprisonment for the felonious assault conviction. These sentences were then vacated and defendant was sentenced ten to thirty years' imprisonment for the habitual offender conviction. The court also imposed two years' imprisonment for the felony-firearm conviction, to run consecutively to his habitual sentence.

Due to a clerical error, approximately one hour of the trial was not transcribed on the record. This included portions of the jury *voire dire*, opening statements, direct examination of the complainant, as well part of defendant's cross-examination of the complainant. Defendant made a motion pursuant to MCR 7.210(B)(2) to reconstruct the record and alternatively, for a new trial. Defendant's trial counsel submitted an affidavit claiming lack of knowledge of the testimony in question. The prosecution

* Circuit judge, sitting on the Court of Appeals by assignment.

submitted a proposed statement of facts supported by an affidavit of the prosecuting attorney. After a hearing, the trial court adopted the prosecution's statement of facts as the reconstruction of the missing testimony and denied defendant's motion for a new trial. On appeal, defendant challenges the trial court's decision regarding the motion to reconstruct the record as well as the sufficiency of the evidence to support his unarmed robbery conviction.

First, defendant claims that he is entitled to a new trial because the trial court failed to record the complainant's testimony. We disagree. The Michigan constitution guarantees an appeal as of right for a criminal conviction. 1963 Const, Art 1, §§ 10, 17, 20. The failure of the State to provide a transcript when, after good faith effort, it cannot physically do so, does not automatically entitle a defendant to a new trial. *Norvell v Illinois*, 373 US 420, 424 83 S Ct 1366, 10 L Ed 2d 456 (1963). This view has been explicitly adopted by the Michigan courts. *People v Carson*, 19 Mich App 1, 7-8; 172 NW2d 211 (1969).

MCR 7.210(B)(2) addresses the issue of reconstruction of incomplete transcripts. MCR 7.201(B)(2)(a) requires the trial court to adopt a statement of facts that concisely sets forth the substance of the missing testimony. We find that the facts presented by the prosecution, as well as the foundations on which they are based, do not fulfill this requirement. The prosecution's statement of facts merely summarized the testimony already contained in the record, the closing arguments which referenced the complainant's testimony and the complainant's testimony from defendant's preliminary examination hearing. However, nowhere is the substance of the complainant's testimony at trial set forth. Therefore, we find that the missing testimony was not reconstructed pursuant to MCR 7.210(B)(2)(a).

However, defendant is not necessarily entitled to a new trial merely because the testimony was not reconstructed. Although an incomplete transcript may jeopardize a defendant's right to appeal, such is not the case if the surviving record is sufficient to allow evaluation of the issues on appeal. *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 249-250; 404 NW2d 233 (1987). "Where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant's claim on appeal. The sufficiency of the record depends on the questions that must be asked of it." *People v Federico*, 146 Mich App 776, 799-800; 381 NW2d 819 (1985).

Defendant only raises one issue on appeal that requires a review of the record: that the evidence was insufficient to support his unarmed robbery conviction. In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). There are three elements that must be proven for a conviction of unarmed robbery: (1) a felonious taking of property which may be the subject of larceny from the person or presence of the complainant, (2) said taking must be accomplished through force and violence, assault or putting in fear, and (3) while not armed with a dangerous weapon. *People v Spry*, 74 Mich App 584, 594; 254 NW2d 782 (1977).

Although defendant has failed to specify which elements are allegedly lacking on the record, the incomplete transcript contains sufficient evidence to support all three elements. Officer Powell testified that he interviewed the complainant who informed him that defendant had forcibly ripped a gold necklace and medallion from his neck and fled. During an altercation between defendant and the complainant. Because we find that the testimony supports defendant's unarmed robbery conviction, defendant is not entitled to a new trial.

Affirmed.

/s/ Robert P. Young
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp