

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAUDY SONNY JACKSON,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 191777
Recorder's Court
LC No. 94-011560-FH

Before: Holbrook, Jr., P.J., and White and R. J. Danhof,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to three concurrent terms of fifteen to forty-five years for the assault convictions, to be served consecutively to a two-year sentence for his felony-firearm conviction. We affirm.

Defendant raises six issues on appeal. First, defendant argues that the trial court erred in not instructing the jury regarding the probative value of defendant's attempt to escape arrest despite defendant's failure to request such an instruction. Defendant also claims that his attorney was ineffective for failing to request the instruction. We disagree.

Evidence of flight is admissible to prove consciousness of guilt, although such evidence on its own is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Although the evidence of defendant's attempt to escape arrest by hiding in a crawl space in his home was sufficient to justify the giving of a flight instruction if requested, a trial court is generally not required to give limiting or cautionary instructions absent a request or a proper objection. Defendant did neither. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988); *People v Shepherd*, 63 Mich App 316, 321; 234 NW2d 502 (1975).

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

No manifest injustice resulted from the failure to give a flight instruction, despite the evidence that defendant attempted to evade arrest, because the instructions the trial court did give included all the elements of the charged offenses and all material issues, and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996); *People v Curry*, 175 Mich App 33, 39; 437 NW2d 310 (1989).

We also conclude that defendant has failed to overcome the presumption that defense counsel's failure to ask for the flight instruction was sound trial strategy. *People v Pickens (People v Wallace)*, 446 Mich 298, 344; 521 NW2d 797 (1994); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Defense counsel, in this case, could reasonably have decided that the flight instruction would have prejudiced defendant, since the instruction emphasizes consciousness of guilt and the prosecutor had highlighted that aspect of the case. Moreover, defendant is unable to show prejudice in light of the overwhelming evidence, including his own and his girlfriend's statements.

Defendant's second argument is that the prosecutor deprived him of a fair and impartial trial by making improper remarks during closing argument. We disagree.

Defendant contends that the prosecutor improperly appealed to the civic duty of the jurors by telling the jurors that they brought "community value" into the courtroom. However, the prosecutor's comment was not an attempt to encourage the jurors to suspend their own powers of judgment, but to encourage them to use their common experience to look at the strength of the evidence. *People v Simon*, 189 Mich App 565; 473 NW2d 785 (1991); *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

Defendant also contends that the prosecutor improperly emphasized his attempt to escape arrest by hiding in the crawl space as substantive evidence of his guilt. We disagree. Evidence of flight is admissible to show consciousness of guilt, and the prosecutor's comments were proper inferences from this evidence. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Moreover, defendant failed to object to the prosecutor's alleged misstatement of the law and secure a curative instruction. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989); *People v Hernandez*, 84 Mich App 1, 18-19; 269 NW2d 322 (1978).

Defendant next argues that the prosecutor impermissibly commented on defendant's failure to testify at trial by asking rhetorical questions about defendant's hiding in the crawl space. Again, we disagree. The prosecutor's comments were not directed at defendant, but at defense counsel, who had suggested in his closing argument that the police officers handling defendant's and his girlfriend's statements had acted unethically and that defendant was not aware that he was a suspect in the attempted robbery at the time of his arrest.

Finally, defendant argues that the prosecutor attacked defense counsel in making his rebuttal argument. We disagree with this characterization of the prosecutor's argument.

Next, defendant argues that the prosecutor deprived him of a fair and impartial trial by examining defendant's girlfriend about her fearful demeanor while testifying and so implying that

defendant was dangerous. We disagree. In eliciting this testimony, the prosecutor was merely attempting to discover if defendant's girlfriend had been threatened as a way to explain her testimony and demeanor. We conclude that the prosecutor's questions to defendant's girlfriend did not deprive defendant of a fair and impartial trial. *McElhaney, supra* at 283.

Next, defendant argues that the trial court violated defendant's due process rights by allowing the prosecution to use his statement and his girlfriend's statement to convict him, notwithstanding that both defendant and his girlfriend were illegally arrested. We disagree. While we concede that defendant's girlfriend was illegally arrested, because she was detained without a warrant or probable cause, defendant lacks standing to challenge the illegality of her arrest. Fourth Amendment rights are personal in nature and may not be asserted vicariously, but rather only at the instance of one whose own protection was infringed by the search and seizure. *People v Armendarez (People v Griffor)*, 188 Mich App 61, 71; 468 NW2d 893 (1991); *People v O'Donnell*, 127 Mich App 749, 753; 339 NW2d 540 (1983). Defendant's girlfriend's arrest infringed her own privacy rights, not defendant's. Further, defendant's arrest was legal. Defendant's arrest was based on probable cause. Police officers went to defendant's home based on information provided by a confidential informant and on an independent investigation of the crime scene. Police had sufficient facts to justify a fair-minded person of average intelligence to believe that defendant had committed a felony. *People v Richardson (People v Frost)*, 204 Mich App 71, 79; 514 NW2d 503 (1994); *People v Melvin Davis*, 146 Mich App 537, 544; 381 NW2d 759 (1985). Further, if the arrest in the home was improper for failure to obtain a warrant, defendant's statement given outside the home is not properly suppressed. *People v Dowdy*, 211 Mich App 562, 568, 570; 536 NW2d 794 (1995).

Defendant's fifth issue on appeal is that the trial court committed reversible error by rebuking defendant's girlfriend for failing to speak clearly while testifying, thus casting unfavorable reflections on the girlfriend's credibility. We disagree. The trial court was simply attempting to cause the witness to testify loud enough for the jury to hear her testimony; the court was not trying to influence the jury to the detriment of defendant's case. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992); *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). We conclude that the trial court did not commit an error so serious that we need to intervene to prevent manifest injustice to defendant. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Finally, defendant argues that the trial court abused its discretion by basing his sentence on a pending concealed weapon charge. We disagree. A sentencing court is permitted to consider both pending charges and the defendant's potential for rehabilitation or reform when passing sentence, as long as defendant has an opportunity to test the accuracy of the facts underlying the pending charges. *People v Ewing (After Remand)*, 435 Mich 443, 455; 458 NW2d 880 (1990); *People v Durfee*, 215 Mich App 677, 683; 547 NW2d 344 (1996). Defendant was aware of the pending concealed weapon charge; and both he and his attorney had an opportunity to address the court at sentencing. Further, the trial court's reference to the charge was fleeting and there were many other factors supporting the sentence. The trial court did not abuse its discretion in sentencing defendant. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Robert J. Danhof