

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH CORDELL LAURY,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 189677

Kent Circuit Court

LC No. 95-000114-FC; 95-
000408-FC; 95-000415-FC

Before: Griffin, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

In each of three separate cases, defendant was charged with armed robbery, MCL 750.529; MSA 28.797, and as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant pleaded guilty to all three charges of armed robbery and to two charges of being a fourth habitual offender. Defendant also pleaded guilty to one charge of being a second habitual offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to ten to forty years' imprisonment for each armed robbery conviction. These sentence are to be served concurrently to one another but consecutively to a sentence imposed for a conviction for which defendant was on parole at the time he committed the instant offenses. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court erred by ruling that he could not present a duress defense.¹ We disagree. Defendant argues that he committed the instant robberies because he was threatened with physical harm for failing to pay a drug debt. "In order to properly raise the defense, the defendant has the burden of producing 'some evidence from which the jury can conclude that the essential elements of duress are present.'" *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997) (quoting CJI2d 7.6, *commentary*). Accordingly, a defendant successfully raises the defense of duress when the

defendant presents evidence from which a jury could conclude: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of imminent death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant, (3) the fear or duress was operating

on the mind of the defendant at the time of alleged act, and (4) the defendant committed the act to avoid the threatened harm. [224 Mich App 447, 453; 569 NW2d 641 (1997).]

Additionally, the defendant must establish “that the threatening conduct or act of compulsion [is] . . . “present, imminent, and impending”” *Lemons, supra*, 247 (quoting *People v Merhige*, 212 Mich 601, 610; 180 NW 418 [1920], quoting 16 CJ, *Duress or Compulsion* § 59, p 91). ““A threat of future injury is not enough.”” *Merhige, supra*, 611 (quoting 16 CJ, *Duress or Compulsion* § 59, p 91). Furthermore, “[s]uch compulsion must have arisen without the negligence or fault of the person who insists upon it as a defense.” *Id.*

We agree with the trial court that even assuming that defendant did have a reasonable fear of either death or serious bodily harm, defendant failed to establish that such threatened consequences were imminent. There is nothing in the record to suggest that on the days that defendant committed the armed robberies in December 1994, he was acting under the compulsion of a present threat of impending physical harm. At most, what defendant was facing was the threat of future harm. Additionally, the threats defendant was facing were the direct result of his own actions. He alone chose to use illegal drugs and then not pay the dealers. Furthermore, we note that there was no evidence presented that the alleged duress was operating upon defendant’s mind at the time of the instant robberies. We also agree with the trial court that defendant had other reasonable options to avoid the threatened harm available to him other than committing armed robbery. For example, because the threats apparently began approximately two months before defendant committed the armed robberies, defendant had ample opportunity to inform the police. See *United States v Lee*, 694 F2d 649, 654 (1983). Accordingly, we find that the trial court did not err when ruling that defendant could not raise the defense of duress at trial.

Defendant also argues that there was an insufficient factual basis to support his guilty pleas. We disagree. “In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding.” *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996). “The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim’s person or presence while (3) the defendant is armed with a weapon described in the statute.” *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Although defendant did not admit to having verbally threatened to shoot any of his victims, he did admit that in each robbery he *intentionally* placed his hand inside his coat in such manner as to suggest the existence of a gun. We believe that defendant’s admission that he intended for his victims to believe he had a gun supplies the requisite factual basis to sustain the plea based convictions. See *People v Jolly*, 442 Mich 556, 468-469; 502 NW2d 177 (1993) (observing that a bulge under a coat together with statements threatening to shoot the victim, “if believed, make clear an intent to convince the victim of the existence of such a weapon or article”); *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983) (observing that “some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon” is sufficient to support a finding that the defendant was armed).²

We also disagree with defendant’s assertion that the trial court improperly initiated plea negotiations. The record establishes that the trial court’s only involvement in the plea discussions was its

agreement to sentence defendant within the guidelines range, which is permissible conduct. *People v Cobbs*, 443 Mich 276, 282-283; 505 NW2d 208 (1993).

Defendant also argues that both his trial counsel's and his first appellate counsel's performances were ineffective. To prevail on a claim of ineffective assistance of counsel, defendant "must show that counsel's performance was below an objective standard of reasonableness under prevailing norms . . . [and] that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Accord *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), aff'd 449 Mich 375 (1995) (observing that the same standard applies to an analysis of a claim of ineffective assistance by appellate counsel). "Accordingly, any deficiencies in counsel's performance must be prejudicial to defendant in order to constitute ineffective assistance . . ." *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Reed, supra*, 646.

Defendant asserts that his trial counsel was ineffective for failing to secure records relating to a prior juvenile conviction. However, defendant fails to show how he was prejudiced by this alleged error. As for his original appellate counsel, defendant asserts that her representation of him was ineffective because she failed to file any post-conviction motions, including a motion to withdraw his guilty pleas. As a result, defendant asserts that had he not had to file in pro per a motion to withdraw his guilty pleas, the result might have been more favorable. We conclude that defendant has failed to establish that he was in anyway prejudiced by appellate counsel's inaction. In his motion to withdraw his guilty pleas, defendant alleged: (1) that he was denied his right of due process when the trial court became actively involved in plea negotiations; (2) that he failed to supply a factual foundation for the armed robbery convictions; (3) that the trial court erred when it denied his motion for a continuance; and (4) that his trial counsel's failure to inform him of the effect his parole violation would have on his sentence rendered counsel's assistance ineffective. Our review of the record convinces us that the trial court did not err when it denied defendant's motion to withdraw his guilty pleas. As noted above, the record belays defendant's assertion that the trial court was actively involved in plea negotiations or that he failed to supply a sufficient factual foundation for the convictions at the plea hearing. Additionally, the denial of the motion for continuance does not evidence an abuse of discretion, *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995), and the transcript of the plea hearing shows that defendant was made aware of the effect of his parole violation on his sentence. Further, we note that defendant fails to support his assertion that somehow the outcome of the motion to withdraw would have been different had counsel been involved. We conclude, therefore, that defendant has failed to establish that he was prejudiced by either his trial counsel's his original appellate counsel's actions.

Finally, defendant raises two challenges to the sentences imposed. First, defendant argues that his sentences are disproportionate. We disagree. We note that the sentence imposed was the same sentence defendant agreed to as a part of his plea bargain. Under the circumstances of this case, we find that the sentence imposed were proportionate to the offenses and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Second, defendant argues that he was denied due process of law when the time he spent incarcerated prior to conviction on the armed robbery charges was not applied toward his sentence for those offenses. This very same issue was raised in *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 137 (1994), in which this Court specifically held that

that application of jail credit to the sentence being served while on parole does not violate a defendant's right to due process. In the alternative, defendant argues that he should be given credit on his armed robbery sentences for what he characterizes as the "deadtime" that elapsed between the days he committed the armed robberies and the day he was first arrested on those charges. In essence, defendant is arguing that he should be given credit on his armed robbery sentences for the time that will not be credited toward his sentence being served on parole due to his violation of the terms of that parole. See MCL 791.238(2); MSA 28.2308(2). We reject this specious argument as being entirely baseless.

Affirmed.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff

¹ Defendant's guilty pleas were conditioned on his being able to appeal to this Court the trial court's April 18, 1995 ruling that he would not be able to present a duress defense to the jury. See MCR 2.301(C)(2).

² In *People v James Banks*, 454 Mich 469; 563 NW2d 200 (1997), the Michigan Supreme Court made the following observations:

In *Jolly*, the majority held that the woman robber's threat that the male robber would shoot the victim if he did not comply and the victim's observation of a bulge under the male robber's vest "located in a place where a handgun could conceivably be concealed," was sufficient circumstantial evidence to submit the armed robbery charge to the jury. We believe that this interpretation of the "evidence" constitutes *the absolute minimum level* of evidence sufficient to support an armed robbery conviction. [*Id.* at 475 (emphasis added; citation omitted).]

We do not read *Banks* as requiring in the case of a feigned weapon prosecution that a trial court need necessarily elicit from a defendant during a plea hearing that the defendant both (1) displayed an object in such a manner as to simulate the appearance of a weapon, and (2) made *verbal* statements indicating the existence of a weapon. Rather, we believe that *Banks* stands for the proposition that the presence of an observable "bulge" coupled with the threat of harm is sufficient to sustain an armed robbery conviction. Whether that threat is verbal or nonverbal is irrelevant. What is relevant is that threat gives context to the simulated appearance of a weapon. As the *Jolly* Court observed "The existence of some object, whether actually seen or obscured by clothing . . . is objective evidence that a defendant possess a dangerous weapon or an article used or fashioned to look like one. Related threats, *whether verbal or gesticulatory*, further support the existence of a weapon or article." *Jolly*, *supra* 442 Mich at 469-470. In the case at hand, defendant admitted to acting in a manner intended to create in the victims the belief that defendant was armed with a gun. We conclude that this amounts to an admission that defendant gestured in such a manner as to induce in his victims the reasonable belief that he was armed. Accordingly, because defendant both feigned the appearance of a gun and threatened his victims with harm, defendant's guilty pleas satisfy the requirements of *Banks*.