STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALONZO DANIELL JONES,

Defendant-Appellant.

UNPUBLISHED
October 9, 1998

No. 198312
Ingham Circuit Court
LC No. 96-70231 FC

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of armed robbery. MCL 750.529; MSA 28.797. The lower court sentenced him to twenty to thirty years in prison. We affirm.

I

Defendant first argues that the police lacked probable cause to arrest him and that therefore his arrest was illegal. Because this issue involves a potential Fourth Amendment violation,[1] it is constitutional in nature. We review constitutional issues de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). We need not determine whether the police had probable cause to arrest defendant because defendant was arrested not for armed robbery, but for an outstanding traffic warrant, the validity of which he does not contest. As we stated in *People v Edwards*, 73 Mich App 579, 587; 252 NW2d 522 (1977), "[p]olice officers should not be obliged to ignore traffic offenses merely because they suspect the driver of other, greater offenses; they need only be prevented from using such offenses as a pretext to search." Here, defendant does not argue that the officer used the traffic warrant as a pretext to search. Therefore, the officer was allowed to arrest defendant on his outstanding traffic warrant even though he also suspected that defendant had committed an armed robbery.

II

Next, defendant argues that the evidence presented at his preliminary examination was insufficient to bind him over for trial. We review the decision to bind a defendant over for an

abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). We review de novo the lower court's analysis of the bindover process. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). The evidence must have been sufficient for a typically prudent and cautious individual to reasonably believe that defendant is probably guilty of the charge against him. *Justice, supra* at 344; *McBride, supra* at 681. Because defendant did not provide this Court with a complete transcript of the preliminary examination, it is impossible for us to determine whether the trial court was correct in ruling that the magistrate properly bound defendant over for trial. However, we need not make that determination in order to decide whether defendant's allegedly improper bindover requires reversal. So long as sufficient evidence supporting the charged crime was presented at trial, an improper bindover is deemed harmless. See *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996). Here, sufficient evidence was presented at trial for the jury to find defendant guilty of armed robbery beyond a reasonable doubt.

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). See MCL 750.529; MSA 28.797. As applied to this case, these elements were established at trial by the testimony of the complainant, who identified defendant as the person who robbed her. Indeed, her testimony alone was sufficient for the jury to have found defendant guilty of armed robbery beyond a reasonable doubt. Therefore, even if defendant was improperly bound over for trial, the error was harmless.

III

Next, defendant argues that the trial court improperly denied his motion for a *Wade*[2] hearing to challenge the complainant's in-court identification of him. Although defendant argued this issue in a pretrial motion and hearing, he later withdrew his motion for a *Wade* hearing; therefore, defendant has not preserved this issue for our review on appeal. Even if defendant had preserved the issue, reversal is unwarranted because the need to hold a *Wade* hearing to establish an independent basis for an in-court identification only arises where a pretrial identification is tainted by improper procedure or is unduly suggestive. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995). Defendant did not challenge the previous identification procedure. Accordingly, even if defendant had not withdrawn his motion, the lower court was not obligated to grant defendant a *Wade* hearing. See, e.g., *People v Johnson*, 202 Mich App 281, 286; 508 NW2d 509 (1993).

IV

Next, defendant argues that the trial court erred in denying him funds for an expert tire-track witness. We review a trial court's decision regarding whether to appoint an expert witness for an indigent defendant for an abuse of discretion. MCL 775.15; MSA 28.1252; *People v Jacobsen*, 205 Mich App 302, 304; 517 NW2d 323 (1994), rev'd on other grds 448 Mich 639; 532 NW2d 838 (1995). To be entitled to an appointed expert, a defendant must show a nexus

between the facts of the case and the need for an expert. *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997). Furthermore, the defendant must make a timely request for the desired expert. *Id.* at 584.

Here, defendant's request was untimely because it was made three days before the start of his second trial. Moreover, defendant failed to make a particularized showing of how an expert would have helped his case as was demonstrated by our Supreme Court in *Jacobsen*, *supra* at 641-642. Instead, the only reasons defendant cited regarding his need for a tire-track expert were to assist defendant's attorney in cross-examining the prosecution's tire-track expert and to provide an additional, independent evaluation of the tire-track evidence. Defendant made no offer of proof as to *how* an expert would aid his attorney in cross-examining the prosecution's expert, nor did he demonstrate that an additional expert would likely reach different conclusions. Therefore, the trial court did not abuse its discretion in denying defendant's request to appoint an expert witness.

V

Next, defendant argues that he received ineffective assistance from his trial counsel because counsel did not attempt to retain an expert on eyewitness reliability or to secure testimony of the attorney who was present at the pretrial lineup, who, defendant alleges, could have attested to the unreliability of the complainant's identification of him. To prove ineffective assistance of counsel, defendant must show (1) that his attorney's performance was objectively unreasonable as evidenced by prevailing professional norms; and (2) that but for the attorney's error or errors, a different outcome could reasonably have resulted. See *Strickland v Washington*, 466 US 668, 687, 690; 104 S Ct 2052, 2064; 80 L Ed 2d 674, 693 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). There is a presumption of reasonable assistance, *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), and an attorney's "failure to call witnesses is presumed to be trial strategy," *id.* at 163.

Defendant's allegation that his attorney provided ineffective assistance by failing to subpoena the attorney present at the pretrial lineup is without merit. The complainant's identification of a person other than defendant at the lineup was fully developed by other witnesses at trial; therefore, any testimony the attorney might have offered would have been cumulative. Defendant's allegation that his attorney was ineffective in failing to seek an expert in eyewitness identification is similarly without merit. In order for this omission to warrant reversal, counsel must have deprived defendant of a "substantial defense," i.e., "one which, if asserted, might have made a difference in the outcome of the trial." *People v Turner*, 115 Mich App 247, 250; 320 NW2d 57 (1982). To prove that such an expert might have changed the outcome of the trial, defendant had to present some proof that the expert's testimony would have been favorable to his defense. *Id*. at 250-251. Defendant has provided no such proof. Moreover, defendant's attorney competently cross-examined the complainant by emphasizing her selection at the lineup and by questioning the reliability of the in-court identification of defendant. Defendant has not shown that an expert witness would have brought out additional information regarding the identification procedures such that a different verdict might have resulted. Accordingly, defendant has not proven that he was deprived of effective assistance of counsel.

VI

Next, defendant argues that MCR 6.425(F)(2), in its 1994 amended version, deprives him of due process because it amounts to a violation of due process. In pertinent part, the court rule stated the following:

> The appointment order also must
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> (a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,
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> (i) the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause, [MCR 6.425(F)(2).]

In *People v Bass (On Rehearing)*, 223 Mich App 241, 260; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 865; 577 NW2d 667 (1998),[3] this Court indicated "that a transcript of voir dire must be provided in all cases where appointed appellate counsel was not the indigent defendant's trial counsel" so that potential claims of error can be discovered. Pursuant to our holding in *Bass,* defendant is entitled to a transcript of the jury voir dire proceedings because his appellate attorney was not his trial attorney. The prosecution concedes this point on appeal.

VII

Next, defendant argues that the prosecutor committed prejudicial error when he incorrectly indicated in his opening statement that after the trial but before the verdict, "defendant's presumption of innocence will be gone." However, defendant did not object at trial to this statement; therefore, we are not to review the allegation on appeal "unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice." *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Because both the trial judge and the defense attorney repeatedly informed the jury of the proper statement of the law, which is that a defendant is presumed innocent until a jury finds him guilty, we do not find that the prosecutor's misstatement resulted in manifest injustice to defendant. Additionally, the prosecutor's misstatement could have been immediately cured if defendant had objected at the time it was made. Therefore, we decline to review the merits of defendant's allegation of prosecutorial misconduct. See, e.g., *People v Solak*, 146 Mich App 659, 677-678; 382 NW2d 495 (1985).

VIII

Next, defendant argues that the trial court erred in failing to instruct the jury regarding any lesser included offenses of the charged offense of armed robbery. However, defendant failed to request a lesser included offense instruction. See *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). Moreover, defendant did not object at trial to the given instructions. Therefore, our review of this issue is precluded unless manifest injustice would result in the absence of appellate review. See,

e.g., *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Failure to review this issue will not result in manifest injustice because the testimony of one of the complainants clearly established that an armed robbery, not a lesser included offense, occurred at the restaurant; the remaining question was only whether defendant was the perpetrator of the armed robbery. A trial court is not required to instruct on included offenses where no evidence is presented to support such an instruction. See *People v Wansley*, 35 Mich App 196, 198-199; 192 NW2d 278 (1971).

IX

Next, defendant argues that the trial court erred in denying his motion for a directed verdict. We review de novo a decision to deny a directed verdict. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). "If the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered." *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998).

Defendant's sole contention with regard to the directed verdict issue is that there was insufficient evidence to support the "armed" element of armed robbery. The statute prohibiting armed robbery provides as follows:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or *any article* used or fashioned in a manner to lead a person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years. [MCL 750.529; MSA 28.797 (emphasis added).]

Here, the testimony of one of the complainants established that the robber was carrying "a laser . . . a black, kind of oblong object . . . with a red light on the end." The object was about six inches long, one inch thick, and two inches wide. The robber placed the object against the complainant's temple while directing her to open the cash register. This evidence was sufficient for the jury to find that defendant used an article in a manner to lead the complainant to reasonably believe that it was a dangerous weapon. The fact that it may in fact not have been a dangerous weapon is irrelevant, so long as the object was used to induce someone to believe that it was. See generally *People v Jolly*, 442 Mich 458; 502 NW2d 177 (1993). Therefore, the trial court properly denied defendant's directed verdict motion.

X

Last, defendant argues that his sentence is disproportionate. We review sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality, which dictates that

a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *Id.* at 635-636. Here, the scoring of the sentencing guidelines produced a range of four to twenty years, and the trial judge sentenced defendant to twenty to thirty years' imprisonment. Even though defendant's sentence fell at the high end of the guidelines range, it was still within the range. As such, we presume the sentence is proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Wybrecht*, 222 Mich App 160, 175; 564 NW2d 903 (1997).

Defendant has failed to overcome the presumption of proportionality. Factors to consider in evaluating a sentence under the *Milbourn* proportionality principle include the defendant's prior criminal history and the nature of the present offense. *People v Yeoman*, 218 Mich App 406, 422; 554 NW2d 577 (1996). For example, in *Yeoman*, *supra* at 409, 422, a defendant was convicted of inserting an instrument into a money changer with the intent to steal, a relatively minor theft offense; however, the defendant was given a sentence of four to fifteen years in prison in light of his extensive criminal record, and we affirmed the sentence. Here, defendant was convicted of a serious theft offense and had an extensive criminal record, which included an additional armed robbery conviction for which he was serving time at the time of this case, as well as a misdemeanor conviction and a very lengthy juvenile record. Given his criminal history and his seeming inability to conform his conduct to the laws of society, we find no abuse in the sentence imposed.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. MCL 764.15; MSA 28.874." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

[2] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[3] In its order denying leave to appeal and vacating part of this Court's decision in *People v Bass (On Rehearing)*, 223 Mich App 241, 260; 565 NW2d 897 (1997), our Supreme Court stated that its understanding of the panel's holding was that "the impediments of the court rule constitute state interference with appellate counsel's ability to provide effective assistance." 457 Mich 865-866; 577 NW2d 667 (1998). Accordingly, on May 6, 1998, the same day that its order was issued, the Court amended the rule and removed the limitations on transcription of the jury voir dire. In its present form, the court rule states the following:

> The appointment order also must
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> (a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees. [MCR 6.425(F)(2).]

Procedural rules changed by court rule generally have prospective effect only, *People v Blunt*, 189 Mich App 643, 648; 473 NW2d 792 (1991); therefore, our holding that defendant is entitled to a transcript of the voir dire proceedings is based on this Court's analysis of the rule as it was previously written.