# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL YARBOURGH,

Defendant-Appellant.

UNPUBLISHED
February 2, 1999

No. 203808
Recorder's Court
LC No. 96-008133

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for armed robbery, MCL 750.529; MSA 28.797, second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3),[1] and possession of firearm during the commission of a felony, MCL 750. 227b; MSA 28.424(2). Defendant, as a third habitual offender, MCL 769.11; MSA 28.1083, was sentenced to an enhanced term of twenty-five to forty years' imprisonment for the armed robbery conviction, and ten to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. Defendant was sentenced to the mandatory term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence presented at trial to sustain his convictions. We disagree. The standard for deciding a sufficiency of the evidence issue is whether a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find the elements of the crime to have been proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

A defendant is guilty of second-degree criminal sexual conduct if he engages in sexual contact with a victim during the commission of any other felony. MCL 750.520c(1)(c); MSA 28.788(3)(1)(c); CJI2d 20.2; CJI2d 20.5. A defendant may also be guilty of second-degree criminal sexual conduct if the defendant engages in sexual contact with a victim while armed with a dangerous weapon. MCL 750.520c(1)(e); MSA 28.788(3)(1)(e); CJI2d 20.2; CJI2d 20.8. The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the person or in the presence of the victim; and, (3) the defendant being armed with a dangerous weapon or an article which is used in such a way as to

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

lead a reasonable person to believe that it was a dangerous weapon. MCL 750.529; MSA 28.797; *Jolly, supra,* 442 Mich 465; *People v Johnson,* 206 Mich App 122, 123; 520 NW2d 672 (1994). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. MCL 750.227b; MSA 28.424(2); *People v Barclay,* 208 Mich App 670, 674; 528 NW2d 842 (1995).

Defendant does not dispute that the crimes took place, nor does he dispute that the elements of the crimes have been established. Rather, defendant argues that he was not the perpetrator of the crimes and that the victim's identification testimony was so incredible that a rational trier of fact could not conclude that defendant committed the crimes. We disagree.

The victim testified that she was able to focus on her attacker's features. While she admitted that at the beginning of the attack she made an effort *not* to look at the perpetrator, the victim testified that she tried to commit his features to memory in order to later help officers locate her attacker. She remembered that he had a round face, a "pitted" complexion, a scar above his forehead and reeked of alcohol. Defendant points out that the victim gave inconsistent descriptions of the perpetrator, failed to mention to officers that the attacker had a scar, and even identified another man as the attacker. It is true that there were some discrepancies in the victim's descriptions, especially with regard to weight and the scar, but the mere fact that there has been an inaccuracy in identification does not render the testimony inadmissible. Rather, it merely goes to a witness' credibility and the weight to be accorded the witness' testimony. *People v Pennington,* 113 Mich App 688, 694; 318 NW2d 542 (1982).

Not all identifications will be completely accurate, especially in a stressful situation. *People v Anderson,* 389 Mich 155, 175 n 11; 205 NW2d 461 (1973). Such questions of credibility should be left to the trier of fact to resolve. *People v Daniels,* 172 Mich App 374, 378; 431 NW2d 846 (1988); *People v Queenan,* 158 Mich App 38, 55; 404 NW2d 693, (1987). The victim was able to study the robber's features during the crime itself. In addition, defendant was never misidentified. The officer who showed the victim the mug books testified that the victim never identified another man as the perpetrator; rather, the victim merely indicated that one photo look *similar* to the perpetrator. The victim was able to identify defendant in the lineup and identified defendant once again in court.

There was also testimony from two police officers that a wallet containing certain items belonging to the victim was found in the back seat of the patrol car where defendant was placed after his arrest on an unrelated incident. Both officers testified that there was no such evidence in the car prior to defendant being placed in the back seat. From this evidence, it is reasonable to assume that defendant had possession and control of the wallet and its contents. The fact that he had several items bearing the victim's name is further support that defendant was the victim's attacker. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *Jolly, supra,* 442 Mich 466. Viewing the evidence in a light most favorable to the prosecution, the victim's identification testimony, coupled with the evidence that defendant possessed items belonging to the victim, could lead a reasonable trier of fact to conclude that the elements of the crimes had been proven beyond a reasonable doubt. *Id.*

Defendant next argues that his twenty-five-year minimum sentence for armed robbery was disproportionate. We disagree. A sentencing court abuses its discretion when it violates the principle of proportionality by imposing a sentence which is disproportionate to the seriousness of the circumstances

surrounding the crime and the defendant. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990). The sentencing guidelines do not apply to habitual offenders and should not be considered when reviewing a defendant's sentence. *People v McFall,* 224 Mich App 403, 415; 569 NW2d 828 (1997).

Upon first conviction of armed robbery, a defendant may be sentenced to a maximum term of life. MCL 750.529; MSA 28.797. Pursuant to MCL 769.11; MSA 28.1083 if a felony is "punishable upon first conviction by imprisonment of life then the court . . . may sentence the person to imprisonment for the term of life or for a lesser term." The court actually gave defendant less of a term than it could have.

Defendant's sentence was not disproportionate. The presentence investigation report indicates that defendant has had a lengthy history with the criminal justice system including at least three prior felonies. Defendant's adult record includes armed robbery, possession with intent to deliver less than fifty grams of heroin, domestic violence, carrying a concealed weapon and numerous parole violations. Taking into account the severity of the crime involved, as well as defendant's history of violent behavior, the trial court did not abuse its discretion in sentencing defendant as it did. *Milbourn,* 435 Mich 636.

Defendant next argues that the trial court erred in refusing to instruct the jury on receiving and concealing stolen property as a cognate lesser offense to armed robbery. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant was not entitled to such an instruction where armed robbery and receiving and concealing stolen property are not cognate offenses because they share no overlapping elements. *People v Jackson,* 158 Mich App 544, 558-559; 405 NW2d 192 (1987); *People v Robinson,* 101 Mich App 687, 692; 301 NW2d 41 (1980). In addition, armed robbery and receiving and concealing stolen property do not appear to be of the same class or category where the statute regarding receiving and concealing stolen property is aimed at deterring others from assisting the person responsible for the robbery itself. *Robinson, supra,* 101 Mich App 692; *People v Rood,* 83 Mich App 350; 268 NW2d 403 (1978).

Finally, we have considered the issues raised in defendant's supplemental brief in propria persona. We are not persuaded that defendant is entitled to relief on those issues.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

[1] It is not clear whether the jury found defendant guilty of MCL 750.520c(1)(c); MSA 28.788(3)(1)(c) (sexual contact under circumstances involving the commission of any other felony), or MCL 750.520c(1)(e); MSA 28.788(3)(1)(e) (sexual contact while armed with a weapon).