STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 1999
v	No. 206971 Recorder's Court
CHARLIE WILLIAMS, Defendant-Appellant.	LC No. 97-001275

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; MSA 28.797, and carjacking, MCL 750.529(a); MSA 28.797(a). The trial court sentenced him as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty to forty years' imprisonment. Defendant appeals his convictions and sentence, and we affirm.

I

Defendant wrongly contends that the evidence introduced at trial was insufficient to support his armed robbery conviction. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that all of the elements of the offense were proven beyond a reasonable doubt. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

An armed robbery conviction requires proof of (1) an assault; (2) to feloniously rob, steal and take; (3) from a person or in his presence; (4) money or other property which is the subject of larceny; (5) while armed with a dangerous weapon or article used or fashioned in a manner to lead a reasonable person to believe it to be a dangerous weapon. *People v Banks*, 454 Mich 469, 472-473; 563 NW2d 200 (1997). Defendant argues that element (5) was not satisfied because the prosecution failed to present proof beyond a reasonable doubt that defendant or his accomplice was armed with a dangerous weapon.

In *People v Jolly*, 442 Mich 458; 502 NW2d 177 (1993), our Supreme Court held that "there must be some objective evidence of the existence of a weapon or article before a jury will be permitted

to assess the merits of an armed robbery charge." *Id.*, 468. In *Jolly*, the defendant and an accomplice robbed a restaurant. The accomplice placed a bag on the counter and told the cashier to put money in it or the defendant, who was standing next to the accomplice, would shoot the cashier. Both of the defendant's hands were visible to the cashier, but there was a bulge under the defendant's vest. *Id.*, 470. Our Supreme Court concluded that this evidence was sufficient to permit a rational trier of fact to conclude that the defendant was armed with an article fashioned in a manner to lead the cashier to reasonably believe it to be a dangerous weapon. *Id.*, 470-471.

Here, complainant testified that while he was fueling his street salting truck, defendant approached him and asked if his company was hiring. While complainant was writing down his company's phone number for defendant, defendant's accomplice came up behind him, wrapped his arm around complainant's throat, and stuck a hard object in his back. Complainant was wearing only a T-shirt and flannel shirt, and he was positive that the object pressed against his back was not a fist or a finger, but a hard object that felt like a gun. This testimony was sufficient to permit a rational trier of fact to conclude that defendant's accomplice was armed with a gun or other object intended to make the complainant reasonably believe there was a gun. *Jolly, supra*.

II

Defendant claims that two alleged acts of prosecutorial misconduct denied him a fair trial. Defendant failed to object to either allegation of prosecutorial misconduct. Appellate review of the allegedly improper conduct is thus precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review alleged misconduct to determine if defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

First, defendant alleges that the prosecutor unfairly impeached him with the fact that he had withdrawn a motion challenging the voluntariness of his confession. In both direct and cross examination, defendant testified that he did not read his statement before signing it, and stated that the statement was not accurate. Defendant implied that the interviewing officer wrote down his own version of defendant's statement and then verbally recounted defendant's version before improperly inducing defendant into signing the inaccurate written statement. Defendant then claimed that he never personally reviewed his statement and that the interviewing officer was the only person to read the statement to defendant. Immediately thereafter, the prosecutor attempted to impeach defendant's claim as follows by questioning him generally about the withdrawn motion to suppress, and specifically if he reviewed the statement when preparing the motion. Additionally, in closing argument, the prosecutor commented that defendant's testimony that he did not review the statement was not credible.

Defendant argues that the prosecutor implied to the jury that, by withdrawing his motion to suppress his confession to the police, defendant effectively conceded that all of the statements attributed to him by the interviewing officer were accurate. We find that the prosecutor was merely attempting to impeach defendant with respect to his testimony that he never reviewed his statement. Moreover, any prejudicial effect stemming from the remark could have easily been cured with a timely instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

Defendant also alleges that the prosecutor seriously misstated the elements of armed robbery in her closing argument to the jury when she stated the following:

> Now, he never said it was a gun but the judge is going to read to you that in the Armed Robbery statute, if it's a gun or a dangerous weapon, then, ladies and gentlemen, that too is enough for Armed Robbery. Doesn't always have to be a gun or knife. If somebody comes to you and puts their knuckle in your back but you think it's a gun and as a result you give up your valuables and you do or don't do certain things, the law will say that's not an unarmed robbery. What that is is Armed Robbery.

While the prosecutor's remarks were not entirely accurate, they were a fair paraphrase of the law. Moreover, any potential misunderstanding was corrected when the trial judge correctly instructed the jury on the elements of armed robbery and further instructed the jury that "[t]he lawyer's [sic] statements and arguments are not evidence" and "[I]t is my duty to instruct you on the law. You must take the law as I give it to you." Even though the prosecutor's remark did not include the fact that the object had to be "used or fashioned in a manner to lead a reasonable person to believe it to be a dangerous weapon," MCL 750.529; MSA 28.797, this is clearly the type of error that could have been—and in fact was—cured by an appropriate instruction. *Turner, supra,* 213 Mich App 575. Accordingly, defendant's claims of prosecutorial misconduct are without merit.

III

Defendant avers that his trial counsel's ineffective assistance denied him a fair trial and alleges four instances in which his counsel failed to perform effectively. To establish ineffective assistance of counsel, a defendant must show that (1) trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and (2) that there is a reasonable probability that absent counsel's errors, the outcome of the particular proceedings would have been different. *Stanaway, supra* 687-688; *People v Graham,* 219 Mich App 707, 711; 558 NW2d 2 (1996). The defendant must overcome the strong presumption that counsel used sound trial strategy. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). Unless the trial court has held an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to the facts apparent on the record.

Defendant argues that defense counsel failed to move to suppress one of defendant's prior convictions for larceny over $100. The record is unclear as to whether such a motion was heard by the trial court. The conviction of larceny over $100 would have been admissible at the trial judge's discretion if the judge determined that the probative value of the conviction outweighed its prejudicial effect. MRE 609(a)(2)(B). Defendant argues that the prior conviction involves conduct which is similar to the charged offense, and therefore, weighs heavily against admission. However, even if we were to agree that the prior conviction should not have been admitted, defendant would not be entitled to relief. Erroneous admission of prior convictions is harmless if, despite the error, the prosecutor's case was so strong that a reasonable juror would not have voted to acquit if the impeachment evidence had been suppressed. *People v Reed,* 172 Mich App 182, 188; 431 NW2d 431 (1988). Here, the evidence against defendant is overwhelming. Complainant was approximately eighteen inches away from

defendant for a period of one to two minutes and identified him almost immediately in a live line-up. Complainant testified that defendant searched through his pockets and took his wallet and some money, and then drove away complainant's truck. Defendant admitted at trial that he was at the scene with an accomplice. Defendant admitted to the interviewing officer that he robbed someone of a truck. This evidence so strongly warrants conviction that suppression of the impeachment evidence would not have made a difference in the jury's verdict. *Reed, supra*.

Defendant further argues that defense counsel failed to challenge the prosecutor's proofs regarding the armed element of the offense of armed robbery. We partially addressed this issue when we concluded that the evidence supported a finding that defendant's accomplice was armed with a weapon or an article fashioned in a manner to lead complainant to reasonably believe it to be a dangerous weapon. Defendant elaborates upon his claim by contending that defense counsel was ineffective because he failed to sufficiently challenge the prosecutor's proofs on the armed element. We conclude, however, that it was sound trial strategy for defense counsel not to cross-examine complainant more vigorously on this point. In the preliminary examination, complainant testified that the accomplice threatened to shoot him if he moved. At trial, continued cross-examination might have given complainant the chance to recount the threatening statement and bolster the prosecution's case. Therefore, defense counsel was not ineffective for failing to further challenge the prosecutor's proofs on the armed element of the offense.

Defendant also contends that defense counsel was ineffective for failing to request the trial judge to instruct the jury on the lesser included offense of unarmed robbery. A trial judge must instruct on lesser included offenses when so requested and if supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

Because unarmed robbery is a necessarily included offense, the trial court would have been required to give the instruction if defense counsel had requested it. *People v Garrett*, 161 Mich App 649, 652; 411 NW2d 812 (1987). However, as defendant himself concedes, forcing the jury to make an all-or-nothing verdict decision can be a valid defense strategy in some circumstances. Defendant contends that the all-or-nothing strategy would only have been viable if defense counsel had argued that there was insufficient evidence to support the armed element of the offense. He is wrong. Defense counsel's strategy was valid here, where the defense theory was mere presence. It was uncontroverted that the accomplice, and not defendant, was the person complainant believed to be armed with a weapon. As noted by the prosecution, it would have been inconsistent for defense counsel to argue on the one hand that defendant was not a participant in the crime, but on the other hand, even if defendant was a participant, his accomplice was unarmed. These alternative and inconsistent strategies together would have weakened the defense.

Finally, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's misconduct. We have already concluded that the prosecutor did not engage in misconduct. Defendant's ineffective assistance claim cannot be predicated on his counsel's failure to make groundless objections to remarks that did not amount to misconduct. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 351 (1995).

V

Defendant challenges his twenty to forty year sentence as disproportionately harsh in light of the offense and his background. We disagree. We review a defendant's sentence for an abuse of discretion by the trial court. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Id.*, 635-636. The sentencing guidelines do not apply to habitual offenders, and may not be considered on appeal in determining an appropriate sentence for an habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and carjacking, MCL 750.529(a); MSA 28.797(a). Both offenses are felonies punishable by imprisonment for life or for any term of years. Accordingly, because defendant was also sentenced as a fourth habitual offender, he was subject to a sentence of life or for a lesser term. MCL 769.12(1)(a); MSA 28.1084(1)(a).[1] Defendant's criminal history demonstrates that he is unable to conform his behavior to the law. Therefore, given that the sentence was within the statutory limits, we find that the trial court did not abuse its discretion in sentencing defendant to twenty to forty years' imprisonment. *Hansford (After Remand)*, *supra*, 454 Mich 326.

Defendant claims that he deserved a lighter sentence because complainant did not suffer any lasting injury, defendant's record is not unusually serious, and because defendant's family gave the police information leading to the arrest of defendant's accomplice. None of these circumstances warrants a shorter sentence. Defendant and his accomplice randomly picked an innocent victim to rob. Though it is true that defendant did not severely or permanently injure complainant, that fact alone hardly justifies a more lenient sentence. Defendant also argues that he should be afforded some leniency in his sentence because of the help *his family* gave the police in apprehending defendant's accomplice. This argument is irrelevant given defendant's lack of cooperation in locating the accomplice. Defendant testified that he did not give the police the accomplice's address because he did not know the address, but this testimony is inconsistent with defendant's testimony that he "dropped off" the accomplice's van after the robbery—presumably at the accomplice's home or other convenient spot. Having failed to cooperate with police, defendant is not entitled to reap the rewards of his family's assistance.

VI

Finally, we give no credence to defendant's argument that the trial court did not properly sentence him as an fourth habitual offender. Defendant contends that he is entitled to resentencing because the prosecutor was unaware of the legislative amendments altering the habitual offender procedures. Although the prosecutor misspoke on the procedure for charging a defendant as an habitual offender, the trial court quickly corrected her, and nothing in the record indicates that the prosecutor or trial court utilized the wrong procedures.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] "If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person upon conviction of the fourth or subsequent offense to imprisonment for life or for a lesser term." MCL 769.12(1)(a); MSA 28.1084(1)(a).