

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES H. ERVIN,

Defendant-Appellant.

UNPUBLISHED

April 3, 2001

No. 215192

Wayne Circuit Court

LC No. 98-001604

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

First, defendant argues that the court erred by instructing the jury as to the crime of UDAA because it is not a lesser included offense of armed robbery. Defendant contends that the instruction constituted an improper amendment of the information, denying defendant proper notice and depriving him of his right to a preliminary examination. We disagree.

We have thoroughly reviewed the entire record of the proceedings below, and we conclude that defendant expressly acquiesced in the UDAA instruction on more than one occasion and has therefore waived the issue for review. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). “To hold otherwise would allow defendant to harbor error as an appellate parachute.” *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

As a part of his first issue, defendant asserts without argument that the manner in which the jury was instructed on the felony-firearm charge was improper and that conviction should be vacated as well. Because defendant has provided no argument, we will not address this contention. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997) (“A party may not merely announce a position and leave it to us to discover and rationale the basis for the claim.”).

Second, defendant argues that the court erroneously refused to give the prosecutor-requested cautionary instruction regarding defendant's testimony involving other bad acts. The prosecutor counters that because defendant did not request the instruction, this issue has not been preserved for appeal. Even assuming that the trial court erred in refusing to give the instruction, we find such error to be harmless in light of ample evidence supporting defendant's UDAA and felony-firearm convictions. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Third, defendant argues that defense counsel was ineffective by failing to object to the UDAA instruction because, given defendant's habitual offender status, the shorter underlying sentence for UDAA would necessarily be vacated and an enhanced sentence imposed, which is potentially the same penalty as for armed robbery; consequently, there was no sound trial strategy in allowing the jury to consider the less serious offense. Defendant also argues that counsel was ineffective by failing to request a cautionary instruction regarding defendant's testimony concerning his prior drug activity, given the obvious potential prejudice.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Furthermore, under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), in order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and also that the representation so prejudiced the defendant as to deprive him of a fair trial. *Id.* at 309. Prejudice exists where a court can conclude that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695. To prevail, "defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy." *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

Defendant argues that the mere fact that he was found guilty of UDAA demonstrates that he was prejudiced by defense counsel's failure to object to the new charge. The assumption underlying this argument is that without the new charge, he may have been acquitted. However, defendant can only speculate that he received a more severe penalty than he would have had the UDAA instruction not been given because the jury could have found him guilty of armed robbery or of unarmed robbery. A similar argument was rejected in *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993). Thus, defendant cannot claim that he was prejudiced merely on the basis that he was convicted of the added charge.

Defendant does not argue that there was insufficient evidence to convict him of the UDAA charge; rather, he asks this Court to assume that he would have been acquitted of all charges if the court had not instructed the jury on the UDAA charge. However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992),

quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Here, the jury was properly permitted to consider and convict defendant of the less serious crime of UDAA.

Other than defendant's mere conclusion that the fact alone that he was convicted demonstrates prejudice, he has not shown that counsel's decision to acquiesce in the UDAA instruction prejudiced him. It appears from the record that defense counsel either requested the UDAA instruction or else did not object to it because, as a matter of trial strategy, he feared that defendant might be found guilty of armed robbery or unarmed robbery. There is a strong presumption that this was counsel's sound trial strategy.

Because of defendant's status as a fourth habitual offender, a felony conviction for UDAA triggered sentence enhancement the same way that a felony conviction for armed robbery would have. Thus, defendant argues that he had nothing to gain from the UDAA instruction because a conviction for UDAA could carry "potentially the same penalty" as armed robbery. Nonetheless, common sense compels the conclusion that, short of complete acquittal, the goal for which counsel clearly strived, it is better to be convicted of UDAA, which is a non-assaultive property crime that alone carries a maximum sentence of five years, than it is to be convicted of armed robbery, a serious, assaultive crime that alone carries a maximum sentence of life.

Defendant cites *People v Lloyd*, 459 Mich 433; 590 NW2d 738 (1999), and states that "*Lloyd* is helpful here," but fails to give any explanation for this conclusion. We can only speculate that defendant cites *Lloyd* because in that case, our Supreme Court found that a defense counsel's failure to advocate a guilty but mentally ill defense could not be said to have prejudiced the defendant, in part because the defendant would have been subjected to incarceration for life whether he was found guilty but mentally ill or guilty of first-degree murder. *Id.* at 451.

Lloyd is distinguishable from this case. In *Lloyd*, both potential underlying offenses (first-degree murder or first-degree murder but mentally ill, MCL 768.36(3); MSA 28.1059(3), MCL 750.316(1); MSA 28.548 (1), MCL 791.234(6); MSA 28.2304(6)), mandated life in prison. In this case, the underlying offenses of armed robbery and UDAA carried substantially different penalties in and of themselves. Obviously, defendant cannot argue that both underlying offenses carried the same penalty. Accordingly, defendant will not be allowed to use his fourth habitual offender status to his advantage now by arguing that, because under a conviction for either armed robbery or UDAA, his habitual offender status rendered the potential sentence for his crime life in prison, there was no tactical advantage to acquiescing in the UDAA instruction.

Furthermore, in *Lloyd, supra* at 438, the defense counsel actually conceded that the defendant had killed the victim, but argued that the defendant lacked the state of mind necessary for a premeditated murder conviction. Conceding to a lesser included offense can sometimes be sound trial strategy. However, there is an important distinction between conceding to a lesser offense as a matter of trial strategy and simply failing to object to, or agreeing to, an instruction on the lesser offense. Although defendant strongly implies it throughout his brief, our review of the record evidences that defense counsel by no means conceded anything to the jury relating to the UDAA charge. To the contrary, defense counsel specifically argued throughout trial that the victim authorized defendant to drive the truck home. Thus, this is not a situation where counsel chose to concede guilt on one charge in order to avoid another.

For these reasons, it is reasonable to conclude that defense counsel failed to object to the UDAA instruction because, as a matter of trial strategy, he feared that defendant would be found guilty of armed robbery, a capital crime, and concluded that, short of complete acquittal, a conviction for a non-assaultive property crime would be less harmful to defendant's record than a conviction for armed robbery. Sentencing courts are permitted to consider the severity of a crime in sentencing, as well as a defendant's criminal history. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Thus, if not during sentencing for this particular crime, if defendant were ever again faced with sentencing for a criminal conviction, it would be better for him to have a UDAA conviction, than another armed robbery conviction as part of his criminal history.

Furthermore, whether to impose an increased sentence as authorized by the habitual offender act is discretionary with the sentencing court. *People v Alexander*, 234 Mich App 665, 673; 599 NW2d 749 (1999). Because of defendant's habitual offender status, the penalty for many different felonies would be potentially the same. Nonetheless, the court may consider the underlying crime, but using its discretion, sentence a defendant to a less severe penalty than that allowed under the habitual offender statutes. In fact, the court in this case chose not to sentence defendant to life in prison even though it could have. See MCL 769.12(1)(a); MSA 28.1084 (1)(a). Obviously, it is always preferable for a defendant to be convicted of the least serious crime possible both for the immediate sentencing ramifications and for future criminal history considerations.

For these common sense reasons, defendant simply cannot plausibly argue that if given a choice between an armed robbery conviction and a UDAA conviction, he would have chosen an armed robbery conviction. Defendant simply cannot assume that in the absence of the UDAA instruction, he would have been acquitted of all charges.

As part of his ineffective assistance of counsel argument, defendant also asserts that the "only" reason that he was not "completely acquitted" was that the UDAA instruction was given "contrary to law formulated by the Michigan Supreme Court." For the reasons discussed above, the UDAA instruction was not given "contrary" to law, and defendant's claim that he would have been acquitted but for the UDAA instruction is a bold assumption, especially in the complete absence of any argument from defendant that there would have been insufficient evidence to support an armed robbery conviction.

Next, defendant argues that counsel was ineffective for failing to "vigorously urge the trial judge to give a cautionary or limiting instruction" regarding defendant's other bad acts and by failing to object to the court's refusal to give such an instruction upon the prosecutor's request. We disagree. In order to establish a claim of ineffective assistance, a defendant must show that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), quoting *Strickland, supra*, 466 US at 687. The record reveals that the prosecutor requested a cautionary instruction, but the court denied it. As previously stated above, in light of the ample evidence supporting defendant's convictions, any error on the trial court's refusal to give the instruction was harmless.

Thus, defendant cannot satisfy the second prong of an ineffective assistance claim because he cannot establish that he was prejudiced by counsel's failure to request the instruction.

We affirm.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Jeffrey G. Collins