STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2002
v	No. 227295 Oakland Circuit Court
SEAN MARCEL SUMNER, Defendant-Appellant.	LC No. 99-168533-FC

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

PER CURIAM.

The jury convicted defendant of two counts of assault with intent to rob while armed, MCL 750.89, and two counts of felony-firearm, MCL 750.227b. The court sentenced defendant to the mandatory two-year term for the felony-firearm convictions, to be served before the nine to twenty-five years on each of the assault convictions. We affirm.

Defendant argues that trial counsel was ineffective for failing to object while the prosecutor elicited opinion testimony from a police officer because the Due Process Clause of the United States Constitution, US Const, Am XIV, prohibits the introduction of opinion testimony regarding a defendant's guilt. Defendant failed to move for a new trial or a *Ginther*[1] hearing; therefore, appellate review is limited to the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). A claim of ineffective assistance of counsel is reviewed de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000).

The alleged error occurred when the prosecutor inquired of the police officer whether he had any dispute with the charge of assault with intent to rob while armed and the officer responded that he did not. The officer's response to the prosecutor's question did not indicate an opinion that defendant was guilty of the charge. Instead, the officer simply stated that he did not dispute the charge that was filed against defendant. The prosecutor continued to have the burden to demonstrate that defendant was guilty, the trial court instructed the jury that the elements of the charge had to be proven, and the trial court instructed the jury not to give undue weight to the police officers' testimony.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Further, were we to rule that the officer's statement was improper, there was nonetheless overwhelming evidence of defendant's guilt. For instance, evidence indicated defendant intended to frighten both victims and rob the store; defendant entered the jewelry store with a handgun to facilitate the robbery; defendant waved the handgun in the victim's face; defendant fired a shot over the victim's head; defendant attempted to fire the gun a second time; the victim testified that he was afraid of defendant; defendant's accomplice testified that he and defendant discussed robbing the store, and defendant's actions were caught on videotape which was shown to the jury as evidence.

Consequently, there was overwhelming evidence of defendant's guilt, and the outcome of the trial would not have been affected because of defense counsel's alleged error. Defendant has not demonstrated that counsel's performance did not meet an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the results of the proceedings would have been different. *People v Knapp*, 244 Mich App 361, 385, 386; 624 NW2d 227 (2001).

Defendant also argues that defense counsel was ineffective because he allowed defendant to withdraw his guilty plea and proceed to trial where defendant was convicted and received a harsher sentence than he would have received had the fifty-one months recommended sentence on his guilty plea been enforced.

When ineffective assistance of counsel is claimed in the context of a guilty plea, the relevant inquiry is whether the defendant tendered the plea voluntarily and understandingly. *People v Bordash*, 208 Mich App 1; 527 NW2d 17 (1994). Defendant does not argue that some failure by his trial counsel kept him from understanding the plea to which he agreed and from which he later withdrew. Indeed, defendant testified at the hearing on his guilty plea that he was satisfied with his attorney's representation. Additionally, at this hearing, the trial court found that defendant's plea was made voluntarily and intelligently. At this hearing, defense counsel advised the trial court that the guidelines were scored at fifty-one to eighty-five months and he asked the trial court to stay within those guidelines. The prosecutor agreed with the guidelines and stated that those guidelines would be correct provided defendant was not on any type of probation when the underlying offense was committed. The prosecutor confirmed that defense counsel inquired whether defendant was on probation during the relevant time and defendant indicated that he was not. Further, the trial court questioned defendant whether he was on probation at the time of the offense and defendant stated that he was not.

At the time defendant was to be sentenced on his guilty plea, defendant withdrew his plea because the guidelines as calculated were not what the guidelines were at the time of the plea. However, neither counsel was to blame because at the time of defendant's plea, neither counsel had information regarding defendant's prior record, specifically that defendant was on probation at the time he committed the offense. If defendant had been truthful with his defense counsel, the prosecutor, and the trial court regarding his probationary status, the guidelines would have been scored accurately at the time of the plea and would not have been scored differently at the time of sentencing. Because the blame was not on defense counsel regarding the disparity in the guidelines, defendant cannot now claim that defense counsel was to blame for defendant providing him inaccurate information. Moreover, counsel was not ineffective for failing to move to enforce an unenforceable plea agreement. *Knapp, supra* at 361.

Finally, defendant says that there was insufficient evidence to support his conviction of assault with intent to rob while armed because there was no evidence of a specific intent to rob. To determine whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Because the standard of review is deferential, a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id*.

Defendant was convicted of two counts of assault with intent to rob while armed, MCL 750.89. A conviction under MCL 750.89 requires proof of (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Because this is a specific intent crime, there must be evidence that the defendant intended to rob or steal. *Id*.

Contrary to defendant's claim on appeal, there is substantial evidence from which the jury could have concluded that defendant had an intent to rob or steal. A rational factfinder may use circumstantial evidence to infer intent. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

Defendant's intent to rob or steal can be reasonably inferred from the circumstances of the crime and defendant's words. Here, the storekeeper testified that in response to his inquiry whether he could help defendant, defendant pulled out a gun and instructed the proprietor to raise his hands. Further, defendant's accomplice testified that he and defendant intended to rob the store of jewelry and money.

The credibility of the victim's testimony was a matter for the jury to decide. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). The jury was free to infer intent from defendant's actions and his instruction to the victim to raise his hands. *People v Summers*, 73 Mich App 411, 413; 251 NW2d 311 (1977). A reviewing court must consider the evidentiary facts in conjunction with one another, in a light most favorable to the prosecution. *Nowack, supra* at 404. Appellate courts are not juries, and when reviewing a claim of insufficient evidence, the appellate court must not interfere with the role of the jury. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1205 (1992).

We find that the evidence clearly supported a reasonable inference that defendant intended to rob the jewelry store.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad