

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE WASHINGTON SCRUGGS,

Defendant-Appellant.

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UNPUBLISHED

March 19, 2002

No. 225337

Oakland Circuit Court

LC No. 99-168826-FC

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to seven to twenty years' imprisonment for the armed robbery conviction, and to one to ten years' imprisonment for the carrying a concealed weapon conviction. We affirm.

In September 1999, defendant admittedly entered a store and stole a telephone. Store loss prevention employees observed defendant's conduct and followed him to the parking lot. When confronted in the parking lot, defendant struggled with a loss prevention employee. The employee allowed defendant to drive away when he saw that defendant had a knife, and thereafter the employee realized that he had sustained a cut on the hand. The other employee recorded defendant's license plate number, and later the police arrested defendant.

Defendant first challenges the sufficiency of the evidence for his armed robbery conviction. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of armed robbery to have been proven beyond a reasonable doubt where defendant, who admittedly stole a telephone while armed with a knife that he brandished during his escape from the scene. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000); *People v Randolph*, 242 Mich App 417, 420-421; 619 NW2d 168 (2000); *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991). Defendant also contends that the trial court erred in giving jury instructions that were unfairly balanced in the prosecution's favor. Having reviewed the record, we find this claim without merit because the trial court's instructions were an accurate reflection of Michigan law and adequately addressed the parties' theories. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

Defendant further argues that the prosecutor committed misconduct in his closing and rebuttal arguments by misstating the law, improperly using defendant's prior convictions as substantive evidence, and commenting on what a dismissed juror had said during voir dire. These claims are unpreserved and to avoid forfeiture of an unpreserved claim, defendant must demonstrate outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Also, the pertinent portion of the prosecutor's closing arguments must be evaluated in context. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

We find that none of defendant's claims of prosecutorial misconduct merit relief. Even if the prosecutor misstated the law in his closing argument, reversal is not required because the trial court's instructions to the jury cured any error. Regarding the prosecutor's comments about defendant's prior convictions, it is neither clear nor obvious that the prosecutor's references were error, and therefore, this claim is without merit. *Carines, supra*. Even assuming that it was plain error for the prosecution to refer to a dismissed juror's comments, this error was in no way outcome determinative; thus, this claim also fails under *Carines, supra*.

Defendant next claims that he received ineffective assistance of counsel. Defendant must overcome the presumption that his counsel rendered effective assistance, *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989), and the presumption that the assistance received may have constituted sound trial strategy, *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). Defendant must establish: (1) that his counsel's performance was below an objective standard of professional reasonableness; and (2) a reasonable probability that without counsel's error the result would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *Knapp, supra*.

Defendant asserts that trial counsel was ineffective because he conceded defendant's guilt to the charge of armed robbery during his closing argument. Trial counsel stated to the jury:

Armed [r]obbery classically is going into a gas station with a gun, going into a bank and holding up a teller. Is this any different because he had a knife and the [p]rosecutor can cut me to ribbons at [sic] this point. Well, he had a knife. He pulled a knife out. That's the armed part. I can't deny it. I am not going to try to pull any tricks here. There are no tricks up my sleeve.

Defendant's reliance on these comments does not establish that trial counsel was ineffective. When understood in the context of defendant's theory of the case, counsel's comments do not concede defendant's guilt to armed robbery. Defendant did not deny that he possessed a knife that was produced during the confrontation with the store personnel in the parking lot. Defendant, however, denied that he used it in any manner or fashion that was consistent with an assault, and consequently, he was not guilty of armed robbery, and could only be convicted of larceny in a building. Given the undisputed fact that defendant had a knife, we find that trial counsel's argument was a reasonable way to construe the facts of the case to defendant's best advantage. Further, with respect to defense counsel's remarks about the carrying a concealed weapon charge, defendant has not overcome the presumption that defense counsel's remarks were trial strategy, where defense counsel may have been pursuing the strategy of admitting to

the charge in the hope that the jury, because of defendant's candor, will convict defendant of a lesser offense than the charged armed robbery. See *People v Schultz*, 85 Mich App 527, 532; 271 Mich App 305 (1978).

Defendant also asserts that defense counsel was ineffective for failing to object to the prosecutors prejudicial comments made during closing and rebuttal arguments. Defendant's claim fails because defendant has not established that the result of his trial would have been different had defense counsel objected. *People v McCray*, 245 Mich App 631, 641; 630 NW2d 633 (2001). Nor was defense counsel's assistance ineffective because he failed to request an instruction on felonious assault because defendant has not overcome the presumption that this conduct was sound trial strategy. *Knapp, supra*; *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996).

Finally, defendant argues that he was denied a fair trial due to the cumulative effect of the alleged errors. We conclude that defendant was not denied a fair trial on the basis of the cumulative effect of the errors discussed above because any arguable errors were of little consequence. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra