STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYANT DAMON WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
September 17, 2002

No. 229665
Calhoun Circuit Court
LC No. 00-001535-FC

Before: Markey, P.J., and Cavanagh and R.P. Griffin*, JJ.

PER CURIAM.

Defendant was initially charged with armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was convicted of armed robbery, and thereafter sentenced to seven to fifteen years' imprisonment. Defendant appeals by right.

Defendant first asserts that he was denied the effective assistance of counsel because his attorney failed to request a jury instruction on the lesser offense of unarmed robbery. We disagree. In the present case, this Court's review is limited to the facts contained in the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Regarding counsel's performance, a defendant must overcome the strong presumption that the attorney's action constituted sound trial strategy. *Id*. Regarding prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant has failed to overcome the strong presumption that his attorney's action constituted sound trial strategy. *Toma, supra* at 302. The lower court record in this case reveals that the defense counsel's theory at trial was that an actual robbery never happened. During counsel's statements to the jury, he stressed that there was no physical evidence and no

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

corroborating eyewitnesses and that the alleged victim was incredible because he had repeatedly lied and told different stories about what happened on the day in question. It appears from the record that defense counsel believed that the evidence against defendant did not support the charged offenses (i.e., armed robbery and felony-firearm) and that counsel did not want to give the jury an opportunity to convict defendant of a lesser offense. As the prosecutor points out, "[c]ounsel was going for broke." Although defense counsel's strategy did not work with respect to the armed robbery charge, the approach appears logical because of the victim's differing stories about what happened and the lack of corroborating testimony regarding the presence of a gun and the actual exchange of money between the victim and defendant. In any event, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); see, also, *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Further, defendant has failed to demonstrate that he was prejudiced, i.e., that there was a "reasonable probability" that the result of the proceeding would have been different absent the alleged error. Defendant is correct in stating that had defense counsel requested the unarmed robbery instruction, the trial court would have been obligated to give it because unarmed robbery is a necessarily included lesser offense of armed robbery. *People v Reese*, 242 Mich App 626, 629-630; 619 NW2d 708 (2000), aff'd 466 Mich 440 (2002); *People v Garrett*, 161 Mich App 649, 651-652; 411 NW2d 812 (1987). However, contrary to defendant's suggestion, just because the jury acquitted defendant of felony-firearm does not mean that there was a reasonable probability that the jury would have found him guilty of unarmed robbery rather than armed robbery. First, it is not unusual for a jury to reach an inconsistent verdict. *People v Goss (After Remand)*, 446 Mich 587, 597 (Levin, J); 521 NW2d 312 (1994); *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982). Juries possess the "capacity for leniency" and "are not held to any rules of logic." *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); see, also, *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984). Moreover, there was no evidence presented at trial to support a finding that defendant did not have a gun when he robbed the victim. The victim testified that defendant put a gun to his head and that he actually saw the gun after defendant got out of the car and stood beside him at the driver's side window. Further, although the other two passengers in the car did not see a gun, neither one testified that defendant did not have a gun. Both fled the vehicle when the robbery began. In addition, one witness saw defendant put something to the back of the victim's head while the other saw defendant "reach for something" down near his hip or pocket. Although witness Richardson did not see a gun during the robbery, his testimony supports the victim's testimony that defendant got out of the car and stood beside him at the driver's side window while holding a gun. Based on the evidence presented, it cannot be said that the jury would have convicted defendant of the lesser offense of unarmed robbery had the instruction been given. Defendant's ineffective assistance claim is without merit.

Defendant also argues that the jury "verdict was against the great weight of the evidence and, therefore, insufficient to convict [him] of armed robbery." To the extent that defendant is raising a great weight of the evidence issue, we consider the issue waived because defendant failed to raise the issue in a motion for a new trial below. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). No miscarriage of justice will result from our failure to consider the issue. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

With regard to defendant's claim that insufficient evidence existed to convict him of armed robbery, we disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). 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).

Defendant claims that "[w]hile the record provides evidence of robbery," there was no evidence of a gun being used in the robbery and that the jury's failure to convict him of felony-firearm supports this claim. As previously stated, it is not unusual for a verdict to render an inconsistent verdict. *Goss, supra; Lewis, supra*. Moreover, the evidence presented in this case was sufficient for a jury to find that a gun was used during the robbery. The victim testified that a gun was held to his head and that he actually saw the gun after defendant got out of the vehicle. The victim testified that the gun appeared to be medium in size and semiautomatic. By stating that defendant put something to the victim's head and reached for something out of his hip or pocket area, the testimony of the other two passengers supported the victim's testimony that defendant had a gun. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Further, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant argues that the trial court improperly scored offense variables (OV) 1 and 2. On appeal, a party shall not challenge the scoring of the sentencing guidelines unless he raised the issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." MCL 769.34(10); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001); see, also, MCR 6.429(C). Although defendant filed a motion to remand in this Court, the motion was denied. The motion was untimely and was not a "proper" motion to remand pursuant to MCL 769.34(10). Further, defendant failed to follow any of the other procedures allowed by the statute. Thus, "the scoring issue is not properly presented for appeal." *Harmon, supra*. Further, because this forfeited claim does not involve "a plain error affecting the defendant's substantial rights," review is unnecessary. *People v Kimble*, ___ Mich App ___; ___ NW2d ___ (Docket No. 227212, issued 7/19/02), slip op p 3 (resentencing is required on the basis of forfeited scoring error because the defendant's substantial rights were affected).

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin