STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO D. HADLEY,

Defendant-Appellant.

UNPUBLISHED
November 12, 2002

No. 231979
Wayne Circuit Court
LC No. 00-001952

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of carjacking, MCL 750.529a, and armed robbery, MCL 750.529. The trial court sentenced him as a second-offense habitual offender, MCL 769.10, to two concurrent terms of twelve to twenty-two years' imprisonment. We affirm defendant's conviction and sentence for carjacking, vacate defendant's conviction and sentence for armed robbery, and remand this case for further proceedings.

Defendant first argues that the trial court erred by denying defendant the opportunity to present an alibi witness. We review this issue for an abuse of discretion. See generally *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

On the first day of trial, before jury voir dire, defendant requested to present his sister, Patricia Hadley, as an alibi witness. The trial court denied defendant's request for failure to comply with the statutory notice requirement, MCL 768.20(1). This provision states, in relevant part:

> If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense . . . .

This notice provision was enacted to prevent the surprise introduction of an alibi defense. See generally *Travis*, *supra* at 675-676.

In *Travis*, *supra* at 682, the Michigan Supreme Court set forth the following test, taken from *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977), for the trial court to apply in determining whether to permit a party to present a witness when the proper notice has not been filed as required by MCL 768.20:

> "In determining how to exercise its discretionary power to exclude the testimony of undisclosed witnesses . . . a district court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case."[1]

We conclude that the trial court did not abuse its discretion when it denied defendant's request to present his alibi witness. Defendant first informed the trial court and the prosecution about the alibi witness on the first day of trial, right before jury voir dire. Such late notice would have significantly prejudiced the prosecution if Hadley had been allowed to testify, due to the lack of preparation time. Second, Hadley gave various explanations regarding her inability to inform someone sooner of the information regarding defendant, diminishing the validity of the explanations. Third, the possibility of harm from the nondisclosure was not significantly mitigated by subsequent events. Fourth, there was significant properly-admitted evidence supporting defendant's guilt. Finally, we find several other factors pertinent to this issue. We find the relationship between defendant and his alibi witness significant; given the sibling relationship, it is unlikely that defendant was truly unable to provide the proper notice to the prosecution. Furthermore, although Hadley testified that she had problems that prevented her from presenting the information regarding defendant's alibi sooner, she also indicated there were several other potential witnesses who were also present on the date of the incident in this case. However, defendant did not attempt to present any of the other witnesses, nor did defendant provide the prosecution notice of these other alleged witnesses. Finally, defendant's preliminary examination was held approximately eight months before trial, yet there was no notice of an alibi witness or alibi defense presented to the prosecution during this time. Under all these circumstances, no abuse of discretion occurred.

Next, defendant argues that the trial court erred by failing to make a record with regard to the incident or to grant a mistrial after it observed a juror sleeping. However, defendant did not object to the trial court's inaction and thus did not preserve this issue for appellate review. See *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Therefore, to obtain relief

[1] Although the *Travis* opinion specifically dealt with whether the prosecution could present a rebuttal witness to controvert an alibi defense when the prosecution had not provided the proper notice under MCL 768.20(2), we presume that the Court intended this test from *Myers* to apply also to a situation involving a defendant's presentation of an alibi witness. Indeed, the *Travis* Court noted that the *Myers* test had been applied to the defense in other cases. See *Travis, supra* at 682.

defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Moreover, "Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox (After Remand)*, 232 Mich App 541, 557; 591 NW2d 384 (1998). As noted in *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

> "[I]t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice." [*Id.* at 544-545, quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960).]

Here, defendant has not presented any evidence from which this Court may infer that defendant was prejudiced by the sleeping juror. The length of the period of sleeping (e.g., whether it was only momentary) and the substance of the testimony potentially missed is simply unknown. Under these circumstances, defendant has not met his burden of establishing prejudice. No plain error requiring reversal occurred.[2]

Next, defendant argues that the prosecutor committed misconduct requiring reversal by stating that "nobody got on the stand and said that he didn't do it." However, defendant did not object to this statement at trial, and we therefore review this issue, too, under the plain error standard. See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

While we agree that the prosecutor's statement was not entirely proper because it tended to infringe on defendant's right not to testify, we do not agree that the statement requires reversal. Indeed, we cannot conclude that this brief statement likely affected the outcome of the case, given the evidence of defendant's guilt presented at trial. Moreover, a prompt curative instruction could have removed any taint the prosecutor's comment may have caused. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Further, the trial court properly instructed the jury that the prosecution had the burden of proving guilt beyond a reasonable doubt and that defendant had a right not to testify. Under these circumstances, defendant has failed to demonstrate a plain error affecting his substantial rights. *Carines, supra* at 763.

Next, defendant argues that the trial court erred in denying his motion for a directed verdict on the armed robbery offense. "In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt."

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[2] We note that at least one court has determined that leaving a juror asleep can be a strategic move on the part of defense counsel. See *Mitchell v Kemna*, 109 F3d 494, 496 (CA 8, 1997).

People v Schultz, 246 Mich App 695, 702; 635 NW2d 491 (2001). "This Court applies the same standards in reviewing the trial court's ruling on a motion for a directed verdict." *Id*. "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *Id*. "'However, it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.'" *Id*., quoting *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

MCL 750.529 states, in pertinent part:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, *such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon*, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any terms of years.

In *People v Taylor*, 245 Mich App 293, 297; 628 NW2d 55 (2001), the Court noted:

> By allowing proof that the defendant simulated a weapon to induce the victim to believe it to be a dangerous weapon, [MCL 750.529] recognizes (1) the difficulty of proving actual possession of a dangerous weapon if, as in many cases, the robber obscures or feigns a weapon to induce compliance by a victim and (2) the aggravated nature of a confrontation in which no weapon is visible, but the robber's conduct leads the complainant to reasonably believe the robber is armed.

The *Taylor* Court further stated, "[W]hile this portion of the armed robbery statute focuses on the belief of the victim that the defendant was armed, that belief must be reasonable and our courts have long recognized that the victim's *subjective* belief alone is insufficient to support a conviction of armed robbery." *Taylor*, *supra* at 297 (emphasis in original). Accordingly, the prosecutor must present some objective evidence of the existence of a weapon or article to the factfinder. *Id*. at 297-298. In *Taylor*, this Court found that the evidence could objectively lead the complainant to believe that the defendant possessed a gun or other dangerous weapon because the defendant stated "this is a stick up," reached for a bulging object in his jacket, and demanded that the complainant open the cash register. *Id*. at 302.

In the instant case, the victim testified that, after a car passed through a nearby intersection, he stated, "There's a cop," hoping that his three attackers would disperse. Instead, defendant reached into his belt as if he had a gun and told the victim, "If you're a cop, I'm going to kill you." Reviewing this evidence in a light most favorable to the prosecution, we find that this evidence was sufficient to demonstrate defendant was armed for purposes of MCL 750.529.

Defendant also claims that his motion should have been granted because the victim's belief that defendant had a weapon came after the taking occurred. According to the victim, the event in question transpired as follows: (1) the victim was driving in his vehicle when he hit some debris and stopped along the side of the road to check the vehicle; (2) three people then drove up in an another vehicle and approached him; (3) defendant put the victim in a choke hold while the two accomplices hit him; (4) defendant stole the victim's wallet and some cash from

his pocket; (5) defendant then rifled through the wallet while directing one accomplice to get defendant's vehicle and one accomplice to stand watch over the victim; (6) the victim saw a vehicle at a nearby intersection and stated, "There's a cop;" and (7) defendant then reached into his belt as if he had a gun and said, "If you're a cop, I'm going to kill you."

In *People v Newcomb*, 190 Mich App 424, 430-431; 476 NW2d 749 (1991), overruled by *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002), this Court explained that "robbery is a continuous offense that is not complete until the perpetrator reaches a place of temporary safety." The *Newcomb* Court noted, "This transactional approach to armed robbery provides that a taking is not considered complete until the assailant has accomplished his escape, because the victim is still considered to be in possession of his property." *Newcomb, supra* at 431. However, in *Randolph, supra* at 551, the Supreme Court, in considering an unarmed robbery conviction, explicitly overruled this transactional approach. In *Randolph*, the defendant had taken items from a store without paying for them and then, when security guards approached him outside the store, the defendant physically assaulted one of the guards. *Id.* at 534-535. The Court concluded that because the defendant's original taking of the items had been accomplished without force or violence, the defendant did not commit unarmed robbery. *Id.* at 547.

The instant case involves armed robbery as opposed to unarmed robbery. However, we can discern no basis in the *Randolph* opinion for distinguishing *Randolph's* reasoning and holding with regard to unarmed robbery from a situation involving armed robbery. Indeed, the *Randolph* Court made the blanket statement that "the 'transactional approach' espoused by the Court of Appeals is without pedigree in our law," and the Court explicitly overruled a case, *People v Sanders*, 28 Mich App 274; 184 NW2d 269 (1970), that involved armed robbery. *Randolph, supra* at 546. Accordingly, the *Randolph* decision applies to the instant case. While we might not agree with the *Randolph* decision, we are obligated to follow it. See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987) (Court of Appeals must follow rule of law established by Supreme Court).

Because defendant's armed robbery conviction was based on the taking of defendant's money,[3] and because the allusion to a gun occurred after this money had already been taken, we must, under *Randolph*, vacate defendant's armed robbery conviction for insufficient evidence. The prosecutor did, however, present sufficient evidence of unarmed robbery (given the evidence of the choke hold and the hitting) and may elect to try defendant for unarmed robbery on remand. Alternatively, the prosecutor may elect to allow a larceny conviction to be entered against defendant.[4]

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[3] We note that the information specifically predicated the armed robbery charge on the taking of the money.

[4] Entry of a conviction for larceny would be appropriate because the jury's verdict concerning armed robbery unambiguously encompassed a finding of larceny. We are not at liberty to conclude, however, that the armed robbery verdict unambiguously encompassed a finding of unarmed robbery. Indeed, an unarmed robbery conviction would involve elements that have not necessarily been passed upon already by the jurors, e.g., whether the choke hold and hitting actually occurred.

Finally, defendant argues that the cumulative effect of the alleged errors denied him his right to a fair trial. "This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial." *Knapp*, *supra* at 387. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *Id.* at 388. "In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence." *Id.* "In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id.* With the exception of the erroneous armed robbery conviction, defendant has failed to establish that the alleged errors seriously prejudiced him. He was not deprived of a fair trial.

The conviction and sentence[5] for carjacking is affirmed, the conviction and sentence for armed robbery is vacated, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[5] Despite our vacation of defendant's armed robbery conviction, no resentencing for carjacking is necessary because the carjacking sentence relates to a separate crime for which the central facts remain unchanged. Moreover, although defendant argues that his armed robbery conviction was supported by insufficient evidence, he makes no argument that resentencing on the carjacking should occur if we vacate the armed robbery conviction. Finally, the vacation of the armed robbery conviction does not change the prior record variable level (E) that defendant ultimately received under the sentencing guidelines.