

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM LEREN HARVEY,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274216

Wayne Circuit Court

LC No. 06-000282-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his plea-based conviction of armed robbery, MCL 750.529, for which he was sentenced as a fourth habitual offender, MCL 769.12, to 10 to 21 years' imprisonment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from a robbery at a CVS pharmacy. Defendant pleaded guilty in exchange for the dismissal of charges in another case and a sentence agreement. Before sentencing, defense counsel informed the trial court that defendant wanted to withdraw his plea. Defendant explained that he had been informed that the prosecution and the police had been coercing witnesses and asked if the trial court would appoint an investigator. The court denied the request for the investigator and to withdraw the plea.

On appeal, defendant argues that the trial court erred in denying his motion to withdraw his plea because the factual basis for the plea was inadequate. He claims that he denied having or implying that he had a gun and that the trial court could not supplement the record with a transcript of a witness's testimony to establish this element.

Because defendant did not rely on this specific ground as the basis of his motion to withdraw, the issue is unpreserved pursuant to MCR 6.310(D):

A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

See also *People v Kaczorowski*, 190 Mich App 165, 172; 475 NW2d 861 (1991). Moreover, the defense consented to the use of the testimony to establish the factual basis. When defendant was unwilling to admit that he possessed a gun or made a gesture to make the complainants believe that he was armed, defense counsel read a witness's preliminary examination testimony concerning defendant's actions that led the witness to believe that defendant had a gun.

THE COURT: Okay. I'm going to adopt that as part of the plea in this here based on that transcript record, Mr. Harvey, and you may not agree in terms of whether or not you actually had something, but the conduct consistent with that is sufficient. Do you understand that, sir?

[Defendant]: Yes, sir.

THE COURT: So we accept that, right?

[Defendant]: Yes, sir.

Defense counsel stated that he was "[s]atisfied." Defendant does not raise any claim that defense counsel was ineffective and, having invited the trial court to rely on the testimony, defendant is not entitled to relief because the court accepted the invitation. Counsel cannot harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). See also *People v Herron*, 464 Mich 593, 607 n 8; 628 NW2d 528 (2001).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski