STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 23, 2008
v	No. 277901 Oakland Circuit Court
JOSEPH JEROME SMITH, Defendant-Appellant.	LC No. 2007-212716-FC

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, third-degree fleeing or eluding a police officer, MCL 257.602a, carrying a concealed weapon (CCW), MCL 750.227, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 60 to 100 years each for the armed robbery and carjacking convictions, and 5 to 20 years each for the felon in possession, fleeing or eluding, and CCW convictions, with the carjacking and felon in possession sentences to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise from the September 5, 2006, robbery of a Bank of Michigan branch in Farmington Hills, Michigan.

I. Appellate Counsel's Brief

Defendant first argues that the prosecution abused its discretion by charging him in the alternative with both armed robbery and bank robbery. Defendant did not preserve this issue below, because he did not object to the alternative charges in the trial court. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant was charged in the alternative with both armed robbery and bank robbery, MCL 750.531, and the jury was given the option of finding him guilty of either armed robbery "or" bank robbery, or not guilty. The jury found him guilty of armed robbery.

On appeal, defendant argues that he should have been charged only with bank robbery, because that statute is more specific. He relies on case law holding that where two statutes prohibit the same conduct, the defendant must be charged under the more specific, and more recently enacted, statute. See *People v Patterson*, 212 Mich App 393, 394-395; 538 NW2d 29 (1995). But if two statutes prohibit different conduct (i.e., an additional element is required to convict the defendant of one crime, but not the other), the prosecutor has the discretion to charge under either statute. *People v Werner*, 254 Mich App 528, 536-537; 659 NW2d 688 (2002); *People v Peach*, 174 Mich App 419, 423; 437 NW2d 9 (1989). With respect to armed robbery and bank robbery, this Court observed in *People v Avery*, 115 Mich App 699, 701-702; 321 NW2d 779 (1982):

> The essential elements of armed robbery consist of an assault, a felonious taking of property from the victim's person or presence, and that the defendant be armed with a weapon. In contrast, the statute on bank robbery does not require that a defendant be armed, nor does it require an assault or felonious taking. In addition, the statute on bank robbery requires that there be an intent to steal from a building, bank, safe, or other depository of money to establish a violation whereas the statute on armed robbery requires the felonious taking to be from a person or in his presence.
>
> There will be times when the statute on armed robbery and the statute on bank robbery will overlap. However, not every violation of the statute on bank robbery will result in a violation of the statute on armed robbery. This is not a case of the Legislature carving out an exception to a general statute and providing a lesser penalty for a more specific offense, in which case the prosecutor would have to charge the defendant under the statute fitting the particular facts. The crimes of armed robbery and bank robbery involve different elements and carry the same possible sentence. [Citations omitted.]

In *Avery*, this Court concluded that the prosecutor had the discretion to charge either bank robbery or armed robbery. *Id*. at 702.

In this case, there was factual support for both charges, and because the prosecution had the discretion to charge defendant with either bank robbery or armed robbery, there was no plain error in charging defendant in the alternative with both offenses.

Defendant next argues that there was insufficient evidence to support his carjacking conviction. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and 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 Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The offense of carjacking requires proof of three elements: (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the

defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998).

The evidence indicated that defendant entered a motor vehicle that was occupied by the driver and three passengers, announced he was taking the car, and pointed a gun at the occupants. The occupants fled the vehicle and defendant attempted to drive away. We find no merit to defendant's argument that the evidence did not establish a taking because he only intended to use the vehicle to flee from the police, and never actually took the vehicle because it was involved in an accident before he was able to evade the police. A defendant takes a motor vehicle from another when he acquires possession of the motor vehicle, through force or violence, threat of force or violence, or by putting another in fear. *People v Green*, 228 Mich App 684, 695-696; 580 NW2d 444 (1998). In this case, defendant announced he was taking the vehicle, threatened the occupants with a gun, gained physical possession of the vehicle, and attempted to drive away. The evidence was sufficient to support defendant's carjacking conviction.

Defendant next argues that the trial court erred by allowing the prosecutor to admit evidence of his 1996 and 1997 convictions (for receiving or concealing stolen property, two counts of unlawful use of a motor vehicle, and receiving or concealing stolen property), for impeachment. We disagree.

This Court reviews for an abuse of discretion a trial court's determination whether a prior conviction involving a theft component may be used to impeach a defendant. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005).

The trial court applied the balancing test under MRE 609(b) to determine the admissibility of the convictions. The prosecutor established that each of the prior convictions involved the theft of a car. Because the prior convictions involved theft crimes, they were probative of defendant's credibility. *Meshell*, *supra* at 635. The probative value of the convictions was diminished, however, by their age.[1] Nonetheless, the prior convictions were dissimilar to the charged offenses, and defendant appeared prepared to testify regardless of whether the convictions were admitted, thereby minimizing any prejudicial effect. Although the charges in this case included carjacking, which like defendant's prior convictions involves the taking of an automobile, none of the prior convictions was for an offense involving the taking of an automobile by force or violence, and therefore, the prior convictions were dissimilar to the charged carjacking offense. On balance, however, the trial court did not abuse its discretion in admitting defendant's prior convictions for impeachment.

Defendant next argues that improper comments by the prosecutor deprived him of a fair trial. Because defendant did not object to the prosecutor's comments at trial, we review this

[1] Although defendant asserts for the first time on appeal that the convictions did not qualify for admission under MRE 609 because they were more than ten years old, MRE 609(c) provides that the ten-year cut-off period is measured from the date of the conviction or the date of release from confinement, whichever is later. The record in this case indicates that less than ten years elapsed since the date of defendant's release from confinement for the convictions.

issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

Contrary to what defendant argues, the prosecutor did not vouch for the credibility of her witnesses, by suggesting that she had special knowledge that they were testifying truthfully. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Rather, she offered plausible explanations, based on the evidence at trial, for why some of their testimony conflicted with other evidence. A prosecutor properly may comment on a witness's credibility, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), and is permitted to comment on testimony and draw reasonable inferences from it, *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). Further, it was not improper for the prosecutor to argue from the evidence that defendant was a liar. A prosecutor properly may argue from the facts that a defendant is unworthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). Accordingly, there was no plain error.

II. Defendant's Standard 4 Brief.

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which has merit.

First, defendant argues that his statement to Officer Beesley was improperly admitted at trial because he was not advised of his *Miranda*[2] rights before making the statement. We disagree.

This Court reviews de novo a trial court's ultimate decision on a defendant's motion to suppress a statement to the police. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, the trial court's factual findings are reviewed for clear error. *Id.*

While placing defendant in her patrol car after he was arrested, Office Beesley told defendant he was lucky he was not shot. Defendant responded, "You guys are lucky I didn't shoot you. I do practice and know how to shoot my gun."

Failure to give *Miranda* warnings to a person, before the person is subject to a custodial interrogation, renders any statement made inadmissible for purposes other than impeachment. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). "Interrogation" refers to express questioning, and to any words or actions by the police that the police should know are reasonably likely to elicit an incriminating response. *Id.* Statements made voluntarily by persons in custody do not fall within the purview of *Miranda*. *Id.*

In this case, Beesley testified that she was not questioning defendant, and expected no response from him when she told him he was lucky he was not shot. Viewed objectively, Beesley's brief remark did not involve questioning, nor did it call for an incriminating response. The trial court did not clearly err in finding that it was not reasonably designed to elicit an

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

incriminating response. Accordingly, defendant was not being interrogated when he made his remark, and *Miranda* warnings were not required. Thus, the statement was admissible.

Next, defendant argues he was denied a fair trial, because defense counsel had a folder with both his name and the words "In Custody" written on it, which was pointed toward the jury. Defendant argues that this situation is comparable to appearing before a jury in shackles. We disagree.

"Freedom from shackling and manacling of a defendant during a trial of a criminal case has long been recognized as an important component of a fair and impartial trial." *People v Duplissey*, 380 Mich 100, 103; 155 NW2d 850 (1968). In *People v Baskin*, 145 Mich App 526, 546; 278 NW2d 535 (1985), this Court observed that shackling "is a situation where actions speak louder than words" and that "mere shackling" "impinge[s] upon defendant's credibility by indicating that defendant was not to be trusted." These same concerns are not implicated by the mere display of a folder with the words "in custody." Moreover, as the trial court observed, the jury was aware that defendant had been charged with several serious offenses, and two sheriff's deputies were in the courtroom throughout the trial, so the mere fact that defendant may have been in custody should not have been alarming or unexpected to the jury.

Although defendant asserts on appeal that the trial court should have at least provided a cautionary instruction, he did not request an instruction in the trial court. In any event, the trial court did instruct the jury that a person accused of a crime is presumed to be innocent, that this presumption continues throughout the trial, and that defendant is entitled to a not-guilty verdict unless the jury was satisfied beyond a reasonable doubt that defendant was guilty.

Under the circumstances, the folder display did not prejudice defendant's right to a fair trial, and the trial court did not abuse its discretion in failing to take any additional action. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002).

Finally, because no cognizable errors have been identified, reversal under a cumulative error theory is unwarranted. *Werner, supra* at 544.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello