STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2011
v	No. 295867 Wayne Circuit Court
LAJUAN DONTE BROWN, Defendant-Appellant.	LC No. 09-013772-FC

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and felony firearm, MCL 750.227b. The trial court sentenced defendant a habitual offender, third offense, MCL 769.11, to 20 to 30 years' imprisonment each for robbery and assault with intent to rob, 5 to 10 years' imprisonment each for being a felon in possession of a firearm and carrying a concealed weapon, and two years' imprisonment for felony firearm, the latter to be served consecutive to the other sentences. Defendant appeals by right. We affirm defendant's convictions, but we remand for the trial court to clarify the basis for defendant's sentence as an habitual offender, third offense, and if necessary, resentence him accordingly.

This case arises out of the robbery at gunpoint of a used car dealership in Detroit by two men, one of whom was a juvenile. The two men entered a used car dealership in Detroit. The taller of the two pointed a gun at the manager and demanded money. When an employee emerged from the bathroom, the manager fled, and then the two robbers did as well. The employee got into a car while watching the robbers flee and get into a red Ford Focus, pursued them in his car, and summoned the police, who took over the chase. Officers pursued the vehicle until it stopped and four people got out. Officers identified defendant as one of them; although he escaped officers' sight briefly, he was found and arrested in a vacant house after being tracked by fresh footprints left in snow. The victims were unable to pick defendant out of a line up, but one of them identified defendant as the tall robber at trial.

Defendant first contends that the prosecutor impermissibly shifted the burden of proof to the defense. We disagree.

Because no timely objection was made, defendant has the burden of showing that an error occurred and that he suffered actual prejudice as a consequence. *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Claims of prosecutorial misconduct are reviewed de novo, in the context of the particular case, to determine whether the alleged misconduct denied defendant a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). The prosecution may not argue to the jury that it has made out a case of probable guilt and therefore defendant has the burden of proving his innocence. *People v Lange*, 90 Mich 454, 459; 51 NW 534 (1892). The prosecution may not imply that defendant or counsel must prove or explain something. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, the prosecutor may properly comment on weaknesses in any alternative theory of the case advanced by a defendant, even if the defendant is the only person who could have presented evidence supporting his or her alternative theory. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995).

Defendant argues that the prosecutor shifted the burden of proof by telling the jury, during rebuttal closing argument, that defendant must have been hiding from something and that there was no explanation given for why defendant was in the vacant house. In context, this was a fair response to defendant's argument that defendant's presence in the house was not enough to prove beyond a reasonable doubt that he was one of the robbers. The entire defense theory of the case rested on the assertion that defendant just happened to be in the wrong place at the wrong time and that his identification as one of the robbers was a mistake. Therefore, the prosecution was permitted to comment on any holes in the defense's theory, even if defendant was the only person who could have filled in those holes. The prosecution pointed out that defendant was dressed identically to one of the four people who fled from the car that had been tracked all the way from the robbery, that he was the occupant of a house that had been identified by fresh footprints in snow, that trained police officers identified defendant as one of the people from the car, and no alternative explanation had been proffered for why defendant was in that house. In context, the prosecutor's comments during rebuttal closing argument were simply a fair comment on defendant's argument that defendant's presence in the house was not enough to prove beyond a reasonable doubt that he was one of the robbers and a fair elucidation of a weakness in defendant's theory of the case.

Defendant also argues that the prosecutor shifted the burden of proof by making references to "the defendant" when examining the victim who had never identified defendant.[1] Defendant does not explicitly say so, but defendant strongly implies that the prosecution subtly introduced a fact not in evidence to the jury, contravening defendant's presumption of innocence and improperly bolstering a weak case. However, the victim never referred to "the defendant" himself—rather, the victim only referred to the robbers by their relative heights, in this case, "the

[1] Defendant asserts that the prosecutor did the same thing during examination of one of the police officers, but that officer *did* identify defendant as one of the people she saw exit from the vehicle and as the person arrested in the vacant house.

tall guy." The trial court properly instructed the jury that they must consider only the evidence, and that statements, arguments, and questions by the lawyers are not evidence. This Court presumes that jurors follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Nothing in the record suggests that the jury did not do so, and because the victim continued to refer only to "the tall guy," the prosecutor's references to "the defendant" seem to have passed notice harmlessly.

Defendant next argues that the trial court denied him a fair trial by refusing to instruct the jury on "mere presence." We disagree.

The applicability of jury instructions is a question of law that is reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Jury instructions are reviewed in their entirety to determine whether they fairly presented the issues to be tried and sufficiently protected the defendant's rights, not to determine whether they were perfect. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). The Michigan Criminal Jury Instructions are not sanctioned by our Supreme Court, so they are not required and they should be examined carefully for appropriateness and accuracy before being given. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Upon request, a defendant is entitled to a jury instruction on a theory or defense supported by the evidence, but the trial court's failure to give the requested instruction is not grounds for reversal unless it appears more probable than not that the error affected the outcome. *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

Michigan Criminal Jury Instruction 2d 8.5 provides:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

Defendant contends that this instruction should have been given because his mere presence at the scene of the arrests is the sole reason why he is on trial.

The "mere presence" instruction is superficially compatible with defendant's theory of the defense, because it is a claim of "not only an absence of criminal intent but also passivity and nonparticipation in the actual commission of crime." *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995). But as in *Moldenhauer*, the "mere presence" instruction is not substantially correct under the circumstances. Defendant does not really contend that he was "merely present" at the scene of a crime. Rather, defendant contends that he is the wrong person altogether, and it just happens that the reason for this mistaken-identity case is that he was in the wrong place at the wrong time. In other words, defendant's theory of the defense is really one of mistaken identity. During closing argument, defense counsel was able to make the point clearly that the victims had had ample opportunity to study the perpetrators and failed to pick defendant out of a lineup, that there was no unbroken chain leading to defendant in the vacant house, and that defendant's presence in the house was not enough to convict him. The trial court instructed the jury that one of the issues in the case was identification, that the prosecution must show beyond a reasonable doubt that defendant was the person who committed the charged crimes, and that the jury could consider, inter alia, "any times that the witness failed to identify the

defendant." The trial court's instructions protected defendant's rights and defendant's ability to present his theory of the defense.

Finally, defendant argues that he was inaccurately sentenced as an habitual offender, third offense, when he should have been sentenced as an habitual offender, second offense. This issue is unpreserved. However, "this Court may overlook preservation requirements where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002) (citations omitted). "It is difficult to imagine something more 'inconsistent with substantial justice' than requiring a defendant to serve a sentence that is based upon inaccurate information." *People v Francisco*, 474 Mich 82, 89 n 6; 711 NW2d 44 (2006). The record strongly supports defendant's contention.

Defendant's habitual offender notice states:

> Take notice that the defendant was twice previously convicted of a felony or an attempt to commit a felony in that on or about 04/10/07, he or she was convicted of the offense of deliver/manufacture marijuana in violation of 333.74012d3 in the 3rd Circuit Court for Wayne County, State of Michigan;
>
> And on or about 04/10/07, he or she was convicted of the offense of deliver/manufacture marijuana in violation of 333.74012d3 in the 3rd Circuit Court for Wayne County, State of Michigan.
>
> Therefore, defendant is subject to the penalties provided by MCL 769.11 [769.11]
>
> PENALTY: Twice the maximum sentence on primary offense or a lesser term. The maximum penalty cannot be less than the maximum term for a first conviction.

This notice was included in the felony warrant, and it was apparently copied verbatim into the Information. At no point anywhere in the lower court record is there any indication that anyone noticed anything wrong with the above notice. However, according to the lower court register of actions from defendant's April 10, 2007, conviction, defendant pled guilty to *a single count* of delivery/manufacture of marijuana. It appears that the habitual offender notice inadvertently counted one conviction twice.

However, we have not been provided with a copy of defendant's presentence investigation report, nor do we have a certified copy of the prior proceedings. We are therefore unable to conclude with certainty that defendant *was* only convicted of a single prior felony. However, if so, it would be manifestly unjust to permit defendant's sentence to stand. He is entitled to resentencing irrespective of whether his sentence would still be within the appropriate corrected guidelines range, because the trial court appears to have relied on inaccurate information or improper scoring and did not explicitly state on the record that it would have imposed the same sentence irrespective of any errors. *Francisco*, 474 Mich at 88-91.

Defendant's convictions are affirmed. Defendant's sentence is remanded to the trial court to determine whether defendant was actually convicted of one or two prior felonies, and if only one, resentence defendant accordingly on the basis of accurate information. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause