STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 301118 Washtenaw Circuit Court
DEVAUGHN ANDRE MARKS, Defendant-Appellant.	LC No. 09-001970-FC

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.157a, MCL 750.529; and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was found not guilty of felony firearm, MCL 750.227b. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 180 to 360 months' imprisonment for the armed robbery conviction, 180 to 360 months' imprisonment for the conspiracy to commit armed robbery conviction, and 16 to 24 months' imprisonment for his conviction for resisting or obstructing a police officer. We affirm.

On November 9, 2009, Brahim Brucetta was working for New York Pizza Depot. At approximately 10:00 p.m., he was sent to deliver a pizza to an apartment. He knocked on the door to the apartment, which appeared to be unoccupied, and was attempting to call his employer when defendant came up behind him and put a gun to his head. Defendant forced him into another apartment, where his co-defendant was waiting, armed with a knife. The two men robbed Brucetta of his wallet, money, and phone and left him in the apartment. Brucetta left the apartment, located a security officer and asked him to call the police. The police arrived almost immediately and shortly thereafter located and arrested defendant and his co-defendant. Though Brucetta's wallet was found, neither defendant nor his co-defendant was found to have a weapon at the time of their arrest.

On appeal, defendant first contends that the trial court abused its discretion in denying defendant's motion for a mistrial where his jointly-tried co-defendant was seen in shackles and prison clothing by three jurors and the viewing led to a mistrial as to his co-defendant. We disagree.

Reversal of a trial court's denial of a motion for a mistrial is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the trial court's abuse of discretion. *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992). The trial court's denial of a mistrial must be "so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983).

Defendant's claim of prejudice is based on the jury's view of his *co-defendant* in shackles and in prison garb. As defendant acknowledges, the majority of appellate cases alleging prejudice resulting from shackling are brought by the defendant who was actually shackled. Defendants seeking relief from a criminal conviction based on the jury's inadvertent viewing of them in shackles are required to show that they were prejudiced as a result. *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008); *People v Herndon*, 98 Mich App 668, 672; 296 NW2d 333 (1980). The same is no less true in the instant matter.

In this case, defendant has failed to show that he suffered prejudice resulting from the trial court's ruling. Only three jurors reported seeing the codefendant in shackles. All three indicated, when questioned by the trial court, that they did not talk about what they saw with any of the unaffected jurors. Although the affected jurors were not told that discussions with others regarding the incident were prohibited and there were no questions asked about whether the incident prejudiced them against defendant, defendant's attorney was present during the questioning and never requested that the jurors be questioned further or given any additional instructions.

Further, any potential for prejudice resulting from the jury's inferred knowledge that defendant, like his codefendant, was in jail was mitigated by the fact that during the trial, the jury was presented with other information from which it could infer that defendant was in jail. Jurors heard testimony that defendant was pursued by police, captured, and placed under arrest, and a booking photograph of defendant was admitted into evidence at trial. Finally, the trial court gave a curative instruction to the jury, which was drafted by defendant's attorney, indicating that the codefendant's trial was being postponed for reasons totally unrelated to defendant and instructing the jurors not to consider the change in their deliberations. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has failed to show that the trial court's denial of his motion for a mistrial deprived him of a fair and impartial trial or resulted in a miscarriage of justice.

We also reject defendant's argument that his Sixth Amendment rights were violated because his codefendant exercised four peremptory challenges during jury selection, at a time when defendant had challenges remaining but chose not to use them. Defendant, who fully participated in jury selection, failed to object to the jury's composition after his codefendant was granted a mistrial, and does not allege that the jury was unfair or that his codefendant's use of peremptory challenges was improper. Further, defendant has not alleged or established any prejudice based upon the jury composition. See *People v Coles*, 79 Mich App 255, 264; 261 NW2d 280 (1977), remanded on other grounds 417 Mich 523 (1983).

Defendant next contends that there was insufficient evidence to sustain his conviction for armed robbery. In a standard 4 brief[1], defendant also challenges the sufficiency of the evidence with respect to his conviction for conspiracy to commit armed robbery. Claims of insufficient evidence are reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). A court reviewing the sufficiency of the evidence must view the evidence in the light most favorable to the prosecution and determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

The elements of armed robbery are: "(1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). Defendant challenges only the evidence as it pertains to the third element—that he was armed. This element can be established by evidence "that the defendant was armed either with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery." *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993).

Here, the victim testified that he felt a gun pushed into the back of his head and that he turned and saw a silver gun in defendant's hand. In addition, the victim testified that defendant threatened to kill him if he moved. When viewed in the light most favorable to the prosecution, this testimony was sufficient to support the jury's finding that defendant was armed. Defendant's claim that the evidence was insufficient merely because no weapon was found is entirely without merit. "Where conviction of an offense requires proof beyond a reasonable doubt that a defendant possessed a firearm, this element may be proven without the actual admission into evidence of the weapon." *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Defendant also makes the meritless argument that because the jury found defendant not guilty of possession of a firearm during the commission of a felony, it must have found that there was a reasonable doubt as to whether defendant was in possession of a weapon during the robbery. Juries in criminal cases may reach different conclusions on identical elements in two different offenses. *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). There was sufficient evidence to convict defendant of armed robbery.

The same holds true for the conspiracy to commit armed robbery conviction. The elements of conspiracy are: (1) the defendant intended to combine with another person; and (2) the participants intended to accomplish an illegal objective (here, armed robbery). *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Circumstantial evidence of the parties' circumstances, acts, and conduct can be used to prove that there was an agreement. *People v Sutherlin*, 116 Mich App 494, 500; 323 NW2d 456 (1982).

In this matter, testimony at trial established that defendant approached Brucetta from behind with a gun and directed him to another apartment, where co-defendant was waiting with a

[1] See Supreme Court Administrative Order 2004-6.

knife. The two men, together, then robbed Brucetta. The fact that defendant's co-defendant was waiting in a nearby apartment, also armed, and that defendant directed Brucetta to that apartment where both men then acted in concert to rob Brucetta presents more than sufficient circumstantial evidence suggesting that the two men had agreed to conspire to rob Brucetta.

In his standard 4 brief, defendant next contends that the trial court erred in denying his motion for a directed verdict. We disagree.

We review a trial court's decision on a motion for a directed verdict de novo. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). We view the evidence in a light most favorable to the nonmoving party to determine whether a factual question exists upon which reasonable minds could differ. *Id*. Only where no such factual question exists is a directed verdict appropriate. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008).

Here, defendant takes issue with the trial court's ruling both on procedural and substantive bases. According to defendant, the ruling was procedurally deficient because the trial court failed to comply with MCR 6.419(A) and 6.419(E). MCR 6.419(A) provides, in relevant part:

> After the prosecutor has rested the prosecution's case-in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion . . .

Defendant contends that the trial court, in fact, reserved decision on the motion until the conclusion of oral arguments in violation of MCR 6.419(A). While the motion itself is not part of the record, the trial court did indicate, at the conclusion of the trial:

> I did want to clarify some things for the record. One is that it was not placed on the record at the time but at the conclusion of the defense case—of the prosecution's case, defense counsel at the bench did make a motion for directed verdict and I indicated it would be preserved. At that time I did deny the motion but I did—we did not state that for the record but nunc pro tunc, I'm doing it back to that time.

While perhaps not clearly stated, the trial court indicates that it denied defendant's motion for directed verdict at the time the motion was made. While the trial court also indicated the motion would be "preserved," given the trial court's unequivocal statement that it denied defendant's motion, the most rational view of this statement is that the motion would be preserved for the record.

Defendant also contends that the trial court failed to comply with MCR 6.419(E), which requires the trial court to "state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict . . . " We, too, can find no oral or written explanation in the record for the trial court's denial of defendant's motion.

However, because our review is de novo, any error by the trial court in failing to explain its decision on the record was harmless.

Moreover, defendant's pro se argument on appeal merely asserts that his motion should have been granted because the evidence presented was insufficient to convict him. As discussed above, this argument is without merit. We thus find no error in the trial court's denial of defendant's motion or directed verdict.

Defendant next contends that the trial court erred in scoring 15 points for offense variable (OV) 10. We disagree.

A sentencing court's scoring decisions are reviewed for an abuse of discretion. *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006); *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417.

MCL 777.40(1)(a) directs the sentencing court to score 15 points for OV 10 for offenses involving predatory conduct, which is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3). To score 15 points for OV 10, then, a sentencing court must find that the offender engaged in preoffense conduct directed at one or more specific victims who were noticeably susceptible to injury, physical restraint, persuasion or temptation, and for the primary purpose of victimization. *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).

In this case, the trial court found that defendant took part in an orchestrated effort before the offense to lure the victim to the apartment to facilitate the robbery. This finding is supported by the evidence, which showed that a call was placed ordering pizza to be delivered to an empty apartment and that the victim, upon arriving with the pizza, was approached from behind by defendant, who wore a mask, held a gun to defendant's head, and pulled the victim into another apartment nearby. Either defendant or his codefendant made the call, both of them then hid and waited until the victim arrived, and the purpose of this preoffense conduct was to specifically lure the victim to a place where he would be isolated and vulnerable. This is the type of genuinely predatory conduct contemplated by the statute. See *People v Huston*, 489 Mich 451, 462-463; 802 NW2d 261 (2011).

In his standard 4 brief, defendant also argues that the trial court erred in assessing points for OV 1 and OV 2. We disagree.

OV 1 concerns the aggravated use of a weapon. A defendant is assigned 15 points for OV 1 if "a firearm was pointed at or toward a victim . . . ." OV 2 addresses the lethal potential of the weapon possessed or used. Five points may be assigned to a defendant for OV 2 if the offender "possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon."

Defendant contends that he should not have been assessed any points for either OV 1or OV 2 because the jury acquitted him of the charge of felony firearm, i.e., explicitly finding that he did not possess a firearm during the commission of the robbery. The jury did, however, find defendant guilty of armed robbery, one of the elements of which is that the defendant was armed

with a weapon. *Smith*, 478 Mich at 319. And, the victim clearly testified that defendant held a gun to his head. Again, "[s]coring decisions for which there is any evidence in support will be upheld." *Endres*, 269 Mich App at 417. Because there is evidence supporting the scoring of 15 points for OV 1 and 5 points for OV 2, the trial court did not abuse its discretion in assessing such points.

In his standard 4 brief, defendant lists several errors which he avers, when taken cumulatively, require reversal. These errors include those addressed above, which this Court have found to be without merit, but also include several others which simply appear in list form without analysis or citation to authority. As this Court has repeatedly stated, we will not search for authority to sustain or reject a party's position, nor we will we make a party's arguments for him. *Hughes v Almena Twp*, 284 Mich App 50, 71–72; 771 NW2d 453 (2009). We thus need not, and will not, consider those assertions of error defendant simply lists in his standard 4 brief as additional bases for reversal.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto