

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 25, 2013

v

JEREMY LAMONT HOLSTON,

Defendant-Appellant.

No. 310848
Washtenaw Circuit Court
LC No. 11-000470-FH

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of two counts of armed robbery, MCL 750.529, and one count of resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced him to 240 to 480 months' imprisonment for each armed-robbery conviction and to 16 to 24 months' imprisonment for the remaining conviction. Defendant appeals as of right. We affirm.

At about 1:00 or 2:00 a.m. on March 28, 2011, Desmond James was walking to the intersection of Emmet St. and Ballard St. in Ypsilanti when defendant parked his sister's white Ford Explorer near 421 Emmet St. Defendant ran up behind James with a gun, ordered him to hand over his property, and then fled when a Jimmy John's delivery vehicle driven by Shannon Balabuch parked behind the Explorer. Defendant drove the Explorer to three different gas stations and unsuccessfully attempted to use James's bankcard at each. At about 2:45 a.m. a telephone order, sent from James's cellular telephone, was placed at the Jimmy John's shop. The order was to be delivered to defendant's former residence on Hawthorne Avenue. Balabuch arrived at the address with the order at approximately 3:00 a.m. Defendant came around the side of the house, showed Balabuch a gun he had under his jacket, and led her through the front door. He frisked her, took her cash and the receipts she was carrying, picked up her dropped cellular telephone, and, after returning her car keys, which he had taken, he told her to leave.

Defendant sent his sister a text message from James's cellular telephone at 4:24 a.m. Later that morning, defendant went to his family's new residence on Woburn Drive. Officer John Cratsenburg subsequently arrived at the Woburn address and saw defendant drive away in the white Ford Explorer. Cratsenburg stopped defendant, ordered defendant out of the vehicle, and began moving defendant to handcuff him. Defendant pulled away, but Cratsenburg eventually managed to restrain defendant. Balabuch's broken cellular-telephone case was found in a pocket of the black coat defendant was wearing. Defendant's mother gave the police

consent to search the Woburn Drive home later that day, and a BB or Airsoft gun was found in an upstairs television room along with James's driver's license and Balabuch's Jimmy John's receipts from March 28 and 29. James and Balabuch both failed to identify defendant at subsequent corporeal lineups. At trial, however, James identified defendant as the robber and claimed that residual nervousness caused him to be unable to identify defendant in the corporeal lineup. At trial, defendant denied being the robber and implied that a man named "Chuck D" had actually robbed James and Balabuch.

Defendant argues that there was insufficient evidence presented to establish his identity as the man who robbed James and Balabuch. We disagree.

The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. . . . The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).]

"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" as described in MCL 750.529. *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007); *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Of course, establishing the identity of the defendant as the perpetrator is an essential element of any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be shown by either direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

Significant evidence established defendant's identity as the robber. Defendant was in possession of and driving a white Explorer at a time near to the robberies. A white Explorer was at the scene where James was robbed. James identified defendant as the robber. Defendant was recorded on video attempting to use James's stolen bankcard about 15 minutes after James was robbed. James's cellular telephone was later used to place the Jimmy John's order to the vacant Hawthorne address, and defendant admitted using it to send his sister a text message later that evening. Clearly, defendant was in possession of the telephone. Defendant's former next-door neighbor testified that defendant appeared at the Hawthorne address at 12:20 a.m., little more than two hours before Balabuch's robbery at that address. When defendant was arrested about eight hours after Balabuch's robbery, he had Balabuch's cellular-telephone case on his person. In addition to the cellular-telephone case and bankcard, other property taken from James and Balabuch was found in defendant's residence. Finally, defendant's self-description at trial was similar to the descriptions James and Balabuch provided of the man who robbed each of them.

Defendant specifically challenges James's and Balabuch's in-court identification of him as the robber, but Balabuch never made an in-court identification of defendant as the robber. With respect to James's identification, a witness's failure to identify the defendant at a lineup does not bar the admission of his subsequent in-court identification. *People v Barclay*, 208 Mich

App 670, 676; 528 NW2d 842 (1995); see also *People v Kurylczyk*, 443 Mich 289, 309; 505 NW2d 528 (1993).¹ Moreover, there was corroborating evidence of defendant's identity, such as the video of him attempting to use James's stolen bankcard minutes after the first robbery. Defendant also asserts that the prosecution did not disprove his theory that "Chuck D" committed these armed robberies, but this argument is meritless, because "the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Hardiman*, 466 Mich 417, 423; 646 NW2d 158 (2002), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). The evidence, when viewed in the light most favorable to the prosecution, was sufficient to permit a reasonable juror to find defendant guilty beyond a reasonable doubt. See *Nowack*, 462 Mich at 399-400.

Next, defendant argues that the trial court erred in assessing 15 points for sentencing offense variable (OV) 10, MCL 777.40. "Scoring decisions for which there is any evidence in support will be upheld." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010), quoting *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). However, "[t]he proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

MCL 777.40 provides, in relevant part:

(1) [OV] 10 is exploitation of a vulnerable victim. Score [OV] 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points: (a) Predatory conduct was involved . . . 15 points. . . .

The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Predatory conduct "under the statute is behavior that is predatory in nature, 'precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action. . ..'" *People v Huston*, 489 Mich 451, 463; 802 NW2d 261 (2011), quoting *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008). An otherwise "ordinary" victim may be "transformed" into a "vulnerable" victim if a "defendant . . . engaged in 'predatory conduct' . . ." *Huston*, 489 Mich at 467 n 11. The predatory-conduct provision of MCL 777.40(1)(a) only requires that the preoffense conduct be directed at "a" victim rather than "the" one particular or specific victim. *Id.* at 458-460. Thus, OV 10 may encompass an unknown victim for whom the defendant is lying in wait. *Id.* at 459-460.

The evidence established that defendant used a stolen cellular telephone to place an order to be delivered to a vacant house from which his family had recently moved. Then defendant stood to the side of the house, with a gun hidden under his coat, while Balabuch walked to the

¹ We note that, in his appellate brief, defendant does not elaborate upon his assertion that he "specifically challenges James'[s] and Balabuch's in-court identification of him as the robber.

front door. This evidence supports that defendant lay “in wait while armed and hidden from view” before committing armed robbery and, as a result, Balabuch’s vulnerability was increased. *Huston*, 489 Mich at 467. That defendant was unsuccessful in his attempt to enrich himself with James’s bankcard shortly before placing the Jimmy John’s order is evidence supporting an inference that defendant’s primary purpose for lying in wait was to commit another armed robbery because he was unsatisfied with what he had taken from James. See *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (discussing inferences). Because evidence supported the scoring decision, we uphold it. *Phelps*, 288 Mich App at 135.

In reaching our conclusion, we disagree with defendant that any preoffense conduct was merely run-of-the-mill planning to commit an armed robbery and then escape. “[L]ying in wait is not the equivalent of the ‘mere planning of a crime.’” *Huston*, 489 Mich at 466 n 10. We further disagree that there is only superficial similarity between the facts of *Huston* and this case such that its rulings do not apply.

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan