STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD HANNON,

Defendant-Appellant.

UNPUBLISHED
May 21, 1996

No. 185221
LC No. 94-007741

Before: Young, P.J., and Holbrook, Jr., and J.R. Ernst,* JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, unlawfully driving away an automobile ("UDAA"), MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to terms of imprisonment of five to fifteen years, two to five years, and two years for the respective convictions. Defendant appeals as of right. We affirm.

I

The victim returned home late on a dark, rainy night. Defendant suddenly approached the victim as she parked her car in her driveway. Defendant pointed a handgun to her head and ordered the victim to open the car door. As she opened the door, defendant placed the gun to her head and ordered her to start the car. He then took a gold chain from her neck. The victim got out of the car, leaving her purse behind.

Two other men approached the passenger side of the car and tried to get in. They were foiled, though, because the car was parked too close to a gate. One of the men yelled "shoot her"; the victim ran into the backyard screaming. As she ran, she turned and saw her car being backed out of the driveway. She saw the two other men get in, and the car was then driven away.

* Circuit judge, sitting on the Court of Appeals by assignment.

The police stopped the car and arrested the defendant. He fit the description of the gun wielding assailant provided by the victim. Defendant gave police a false name and said he had borrowed his sister's car. The officers found in defendant's possession a driver's license bearing the alias he had given. In later statements to the police defendant denied being involved in the robbery and said he got the car from two unidentified men at a gas station.

II

Defendant first argues that the evidence was insufficient to establish his guilt. We disagree. When the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt based on the victim's testimony alone. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The victim's positive identification of defendant as the man who pointed a gun at her and took her car was sufficient to support his convictions even though the gun used during this offense was not recovered. See *People v Hayden*, 132 Mich App 273, 295-296; 348 NW2d 672 (1984).

III

We next consider two allegations of instructional error. Defendant argues that the court erred by failing to instruct the jury on the lesser included offense of receiving or concealing stolen property. Defendant did not request the instruction, and indicated satisfaction with the instructions as given. He has therefore waived any error. *People v Pollick*, 448 Mich 376, 388; 531 NW2d 159 (1995). Assuming receiving and concealing is a lesser included offense of UDAA (a proposition for which defendant cites no authority), the court has no duty to sua sponte instruct on lesser included offenses. *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975).[1] We reject defendant's argument that counsel made a serious mistake by failing to request the instruction; trial counsel's conduct was not unreasonable. See *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797(1994).

Defendant also alleges error in the felony firearm instruction because the court did not define "firearm" in its instructions to the jury. Again, defendant indicated satisfaction with the instructions. *Pollick*, *supra*.

IV

Defendant argues that the court erroneously allowed into evidence the fake driver's license taken from defendant upon his arrest. Defendant did not object below, so the issue is waived. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994).

V

Finally, defendant argues that two offense variables were improperly scored. A scoring of an offense variable is to be upheld if there is "any evidence" supporting it. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986).

Offense Variable 7 was assigned five points, indicating exploitation of the victim due to a difference in size or strength. According to the evidence at trial, the victim arrived home late on a dark rainy night, and without warning, was suddenly faced with defendant pointing a gun in her face leaving her no room to retreat. Defendant then violently yanked a gold chain from her neck. Thus, we find no error in the scoring of this variable.

Offense Variable 9 was scored at ten points, indicating "leader in multiple offender situation." The facts at trial show that there were multiple offenders involved, and defendant took the lead role throughout. We find no error in the scoring of this variable.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Donald E. Holbrook, Jr.
/s/ J. Richard Ernst

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[1] The only exception to this rule is that a court must instruct on second-degree murder as a lesser included offense of first-degree murder, *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975). As this was not a murder case, there was no duty to sua sponte instruct.