STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ANTHONY KRUEGER,

Defendant-Appellant.

UNPUBLISHED
June 21, 1996

No. 172422
LC No. 93-8197-FC

Before: Young, P.J., and Corrigan, and Callahan,* JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction for armed robbery, MCL 750.529; MSA 28.797. Defendant also pleaded guilty to habitual offender third, MCL 769.11; MSA 28.1083. He was sentenced to fifteen to thirty years of imprisonment for the habitual offender conviction.

Defendant first argues that the trial court erred when denying defendant's motion for a directed verdict. Defendant claims that the evidence was insufficient to prove that he was armed with a dangerous weapon. We disagree. When reviewing a motion for a directed verdict, this Court views the evidence in the light most favorable to the prosecution to 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 Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). Use of a dangerous weapon can be established by showing the defendant was armed with an "article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.259; MSA 28.797.

The existence of the weapon or article fashioned to be a weapon must be proven by objective evidence, and testimony that the victim subjectively believed that the defendant had a weapon is insufficient. *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993); *People v Saenz*, 411 Mich 454, 457-458; 307 NW2d 675 (1981). "The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant

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

possesses a dangerous weapon or an article used or fashioned to look like one. Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article." *Id*. at 469-470.

Defendant approached the cashier and insisted that she open the safe. The cashier testified repeatedly that she believed that defendant had something and that he would hurt her. He was standing in front of her in such a way that she could see his hand in his pocket during the entire exchange. She described defendant's right hand in his pocket as pulled away from his body and pointed upward. Defendant repeatedly insisted that she open the safe until she convinced him that she could only open the register. She then opened the register, and defendant grabbed its contents and left the store.

Defendant's use of his hand and a covering to resemble a gun raises a factual question for the jury's consideration. *Jolly*, *supra*, 442 Mich 469; *People v Shipp*, 34 Mich App 67, 69; 190 NW2d 750 (1971); *People v Jury*, 3 Mich App 427, 432; 142 NW2d 910 (1966). This is distinguishable from *Saenz*, 411 Mich 458, in which the victim believed there was a weapon, although he could not see where the defendant's hand was underneath the coat. Unlike the victim in *Saenz*, this victim actually saw defendant's right hand pulling the pocket outward. Accordingly, the trial court properly submitted this issue to the jury. Moreover, the victim's testimony regarding defendant's demeanor and tone of voice supports an inference that the victim reasonably feared a threat of harm. See *Jolly*, *supra*, 442 Mich 469-470.

Defendant next argues that he was denied a fair trial by statements made in the prosecutor's closing argument. We disagree. Because defendant did not object to these errors at trial, the issue may only be reviewed on appeal if a special instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We note that prosecutors are generally accorded wide latitude when presenting arguments to the jury. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant first contends that the prosecutor denigrated his intoxication defense in closing arguments by stating to the jury that defendant and his attorney were asking them to "chase rabbits." We disagree. Viewed in context, the prosecutor properly argued that the evidence supported the prosecution's theory that defendant intended his conduct, but it did not support defendant's claim that he was so intoxicated that he could not remember what happened. *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). Contrary to defendant's argument, this comment did not rise to the level of accusing defense counsel of lying or deliberately trying to mislead the jury. See *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). We also reject defendant's remaining allegations of prosecutor error. The prosecutor did not place the prestige of his office behind the cashier's credibility or defendant's guilt, as defendant maintains. Instead, our review discloses that the prosecutor properly discussed the evidence which supported his argument and rebutted defendant's claim that there was no evidence that he was armed. *Jansson*, *supra*. Further, any alleged error could have been cured by a timely objection and instruction. *Stanaway*, *supra*.

Defendant lastly argues that his sentence for the habitual offender conviction was disproportionate. Appellate review of sentencing decisions is limited to determining whether an abuse of

discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). Although defendant claims that the sentence fell outside the guidelines recommendation for the armed robbery conviction, the guidelines do not apply to habitual offenders. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). We find no abuse of discretion. Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan