

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIO ULYSSES HERRON,

Defendant-Appellant.

UNPUBLISHED
September 6, 1996

No. 172143
LC No. 93000974 FC

Before: Markman, P.J., and Marilyn Kelly and Reilly, JJ.

PER CURIAM.

Defendant was charged with assault with intent to rob, aggravated assault and larceny from a person. MCL 750.89; MSA 28.284, MCL 750.81a; MSA 28.276(1), MCL 750.357; MSA 28.589. Following the preliminary examination, the larceny count was dismissed. The judge bound defendant over on the remaining counts.

A jury convicted defendant of felonious assault and aggravated assault. MCL 750.82; MSA 28.277, MCL 750.81a; MSA 28.276(1). Defendant then pleaded guilty to habitual offender, third offense. MCL 769.11; MSA 28.1083.

He appeals as of right, arguing that the evidence was insufficient to bind him over on the charge of assault with intent to rob while armed. He asserts that remarks made by the prosecutor regarding the theft of a pager denied him a fair trial. He argues that the trial judge erred in denying his motion for an adjournment, because defense counsel had to be substituted the day before trial. Finally, he alleges that, because counsel was unprepared, he was denied the effective assistance of counsel. We affirm.

I

The magistrate did not abuse his discretion in binding defendant over on the charge of assault with intent to rob while armed. In order to bind a defendant over for trial, there must be evidence amounting to probable cause to believe that a felony has been committed and that defendant was the

perpetrator. There must be evidence of each element of the crime charged or evidence from which the elements may be inferred. *People v Cotton*, 191 Mich App 377, 384; 478 NW2d 681 (1991).

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) an armed assailant. *Cotton, supra*, p 391; *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985).

Ramsey Bishar and Heather Somers testified at the preliminary examination that defendant approached them, demanded money, brandished a knife and punched Somers. From the evidence, an inference can be drawn that defendant intended to steal their money and that he used a knife to perpetrate the crime. *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991).

II

Defendant was not denied a fair trial where the prosecutor stated during his closing argument that defendant's theft of a pager was evidence of his intent to rob. Defendant asserts that there was no evidence on the record to support the prosecutor's statement that he stole the pager.

We find that the prosecutor could reasonably infer from the evidence that defendant stole the pager. *People v Wilson*, 163 Mich App 63, 66; 414 NW2d 150 (1987). Bishar's testimony indicated that he did not know whether defendant took the pager out of his hand or whether Bishar gave it to him. Bishar only remembered that defendant had the pager when he walked away from the car. Any prejudice was tempered when the prosecutor told the jury that defendant was not charged with stealing the pager. The trial judge also gave cautionary instructions to the jury which cured any prejudice. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

III

We reject defendant's argument that the judge abused his discretion in denying his motion to adjourn the trial. While we appreciate the situation created when new counsel took over the case the day before trial, defendant has failed to convince us that he was prejudiced by it. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The trial judge was aware of defense counsel's limited preparation time. He allowed her extra opportunities to prepare throughout the trial when requested. Precautions were taken to protect defendant's rights.

Moreover, defendant has failed to establish that he was denied the effective assistance of counsel due to counsel's unpreparedness. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant has not overcome the presumption of effective assistance of counsel by showing that counsel failed to perform an essential duty or to meet a minimum level of competence. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich

866 (1990), *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980). Defendant's general allegations that counsel was unprepared are insufficient to warrant a new trial.

Affirmed.

/s/ Stephen J. Markman

/s/ Marilyn Kelly

/s/ Maureen Pulte Reilly