STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL HERNANDEZ CRUZ,

Defendant-Appellant.

UNPUBLISHED
September 10, 1996

No. 172434
LC No. 93-007822-FC

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, armed robbery, MCL 750.529; MSA 28.797, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and assault with intent to commit murder, MCL 750.83; MSA 28.278. Following those convictions, defendant pled guilty to being a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant received concurrent sentences of two to five years' imprisonment on the felon in possession of a firearm conviction, two to five years for carrying a dangerous weapon, twenty to thirty years for armed robbery, six to ten years for assault with intent to do great bodily harm, and twenty to forty years for assault with intent to commit murder. Defendant also received sentences of two years' imprisonment for the felony-firearm convictions. The amended judgment of sentence provided that all of defendant's sentences were to be served consecutive to the expiration of the maximum sentence for which he was then on parole. Defendant appeals as of right. We affirm in part, and reverse in part.

Defendant argues that the trial court abused its discretion by rejecting his plea agreement. We disagree. Both defendant and his counsel signed a document acknowledging that the court would not accept any plea except to the original charge or charges after Thursday, September 9, 1993. On

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

November 2, 1993, the first day of trial, defendant requested to accept a plea agreement which he had previously rejected. The trial court did not err in rejecting a plea agreement that was entered into after the date set forth in the scheduling order. *People v Austin*, 209 Mich App 564, 567-568; 531 NW2d 811 (1995).

Defendant argues that he was denied the effective assistance of counsel. We disagree. Failure to move for a new trial or an evidentiary hearing before the trial court forecloses appellate review of this claim unless the record contains sufficient detail to support defendant's claims. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Here, the record does not support defendant's claim that his counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant argues that the trial court erred by refusing to give the requested instruction for attempted armed robbery. We disagree. A trial court is not required to instruct on attempt in every case because attempt is a cognate offense, not a necessarily included offense, of the substantive crime. *People v Jones*, 443 Mich 88, 103 n 21; 504 NW2d 158 (1993). Where there is no evidence to suggest that a robbery was merely attempted, the court does not err by refusing to instruct on attempt. *People v Weatherspoon*, 171 Mich App 549, 555-556; 431 NW2d 75 (1988). Here, the events stemmed from an armed robbery of a gas station. Following the robbery, the two victims did not pursue defendant. Any armed robbery had been completed at least by the time defendant arrived with the stolen money at railroad tracks outside of the store. See *People v Newcomb*, 190 Mich App 424, 430-431; 476 NW2d 749 (1991); *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989).

Defendant argues that he was denied equal protection of the law by the prosecutor's exclusion of four African-American women from the jury. We disagree. The prosecutor exercised eight peremptory challenges, dismissing four whites as well as four blacks. Further, the prosecutor did not exercise all of his peremptory challenges and allowed three black jurors to remain on the jury panel that was selected. See *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Finally, the prosecutor articulated a neutral reason for dismissing each of the African-American women. See *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Moye*, 194 Mich App 373, 377; 487 NW2d 777 (1992), reversed on separate grounds 441 Mich 864; 491 NW2d 232 (1992). The trial court did not clearly err in finding the prosecutor's explanations plausible. MCR 2.613(C).

Defendant argues that he was denied his constitutional right to testify where the trial court did not take a personal waiver of the right to testify from defendant. We disagree. A trial court has no duty to ascertain whether a defendant intelligently and knowingly waived his right to testify. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1994); *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

Defendant argues that the trial court erred in imposing sentences consecutive to the maximum sentence for which defendant was on parole. We agree. In *People v Young*, 206 Mich App 144,

159; 521 NW2d 340 (1994), this Court determined that MCL 768.7a(2); MSA 28.1030(1)(2) requires that the subsequent sentence of a parolee who commits an offense while still on parole must begin to run at the end of the *maximum* sentence for the prior offense. However, because this ruling represented a departure from the consistent prior interpretation of this statute, the *Young* court held that its ruling was to be given prospective application only. *Id.* Because the instant offenses were committed in 1993, the 1994 *Young* decision does not apply.[1] *People v Clark*, 207 Mich App 500, 503; 526 NW2d 357 (1994). Accordingly, we remand this case for modification of the amended judgment of sentence to remove the notation that the instant sentences are consecutive to the maximum sentences for offenses for which defendant was on parole at the time of sentencing. Rather, defendant's judgment of sentence should direct the Department of Corrections to follow its pre-*Young* interpretation of MCL 768.7a(2); MSA 28.1030(1)(2). *Clark*, *supra*, p 503.

Affirmed in part, reversed in part.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock

[1] Because *Young* does not apply here, we need not address the conflict created when a panel of this Court held recently that it was following *Young* only because it was required to do so by Administrative Order 1994-4. *People v Tolbert*, ___ Mich App ___; ___ NW2d ___ (Docket No. 182583, issued 4/19/96) slip op p 4.