STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWNDERRICK MINTER,

Defendant-Appellant.

UNPUBLISHED
September 13, 1996

No. 179675
LC No. 94-001047

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERNON DAVIDSON,

Defendant-Appellant.

No. 179676
LC No. 94-001047

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS WILLIAMS,

Defendant-Appellant.

No. 180248
LC No. 94-001047

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*Circuit Judge sitting on the Court of Appeals by assignment.

Before: Cavanagh, P.J., and Hood and J.J. McDonald,* JJ.

PER CURIAM.

Defendant Minter appeals as of right from his jury trial convictions of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645. Defendants Davidson and Williams each appeal as of right from their bench trial convictions of two counts of armed robbery and one count of UDAA. Minter and Davidson were sentenced to twenty to forty years' imprisonment for the armed robbery counts, while Williams was sentenced to twelve to twenty years' imprisonment for armed robbery. All three defendants were sentenced to three to five years' imprisonment for UDAA. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

People v Minter

On appeal, defendant Minter argues that he was denied effective assistance of counsel by his attorney's failure to present the defense of voluntary intoxication. To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that his counsel's representation prejudiced defendant so as to deprive him of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant Minter did not request an evidentiary hearing or move for a new trial on this issue. Therefore, our review of this issue is limited to the record. *Barclay*, *supra* at 672.

Where defense counsel has at least two choices for a defense strategy, which are inconsistent with each other, and neither of which has a significant chance of success, counsel's choice of one over the other does not constitute ineffective assistance of counsel. *LaVearn*, *supra* at 214-216. In this case, Minter's attorney argued the defense of "mere presence," stating that there was substantial doubt as to whether Minter actually participated in the armed robberies. Although the defense of lack of specific intent due to voluntary intoxication was not necessarily inconsistent with the defense of mere presence, it could have been viewed as such by the jury. As a result, the decision not to present such a defense must be considered a matter of trial strategy. *Id*. at 216. Given the evidence, the defense of mere presence was reasonable. See *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). Moreover, because defendant Minter failed to request a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), there is no indication as to why a defense of involuntary intoxication was not presented during trial. Therefore, Minter failed to overcome the presumption that the challenged action constituted sound trial strategy. *LaVearn*, *supra* at 216.

Next, defendant Minter argues that the trial court erred in allowing his statement to police to be admitted into evidence because it was not voluntarily made. In determining whether a statement was voluntarily made, this Court must consider factors such as the age of the accused, his lack of education

or intelligence, the extent of his previous experience with the police, the repeated and prolonged nature of the questioning, the length of the detention of the accused before he gave the statement in question, the lack of any advice to the accused of his constitutional rights, whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession, whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement, whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused, and whether the suspect was threatened with abuse. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

At the *Walker*[1] hearing, defendant Minter's testimony conflicted with the testimony of the police officers. The trial court stated that it did not find defendant's testimony to be believable. When witnesses offer conflicting testimony, this Court defers to the trial court's superior ability to assess the credibility of the witnesses. *People v Eggleston*, 149 Mich App 665, 671; 386 NW2d 637 (1986). The record indicates that Minter was a high school graduate, that he was unlikely to have been intoxicated because he had been in custody between seventeen and eighteen hours prior to making his statement, and that he indicated in his statement that he was advised of his constitutional rights and was making the statement freely and voluntarily without being threatened or promised anything. Minter also indicated in the statement that he had not been deprived of food, water, sleep, or a telephone call, and that he was not intoxicated. Moreover, the police officers' testimony indicates that Minter never requested an attorney or a telephone call. Finally, the police officers stated that Minter was not continuously interrogated for eighteen hours and that he was given the opportunity to sleep. Therefore, the trial court did not clearly err in finding that defendant's statement was voluntarily made. See *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994).

Defendant Minter next argues that the police asked him improper questions, such as "Where did you guys go after you robbed the man?" Minter claims that such questions elicited answers that did not represent the stated proposition of the witness that he had not participated in the robbery. However, the form of the questions asked is not a factor in determining whether the statement was voluntarily made under the totality of the circumstances. See *Cipriano, supra*.

Next, defendant Minter argues that the evidence presented at trial was insufficient to support his conviction for the armed robbery of Charles Hale because Hale testified that defendant Minter did not participate in the attack on him. Generally, in an appeal based upon insufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and 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 Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994).

The essential elements of the crime of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon described in the statute. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). A weapon, for purposes of the armed robbery statute, is any "dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous

weapon." MCL 750.529; MSA 28.797. In order to find a defendant guilty on a theory of aiding and abetting, the prosecution must show that (1) a crime was committed either by the defendant or by another, (2) that defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991).

In this case, Richards picked Minter out of a lineup the day following the robbery. Richards testified at trial that Minter was one of the three men he saw jump out of the car that had forced Richards' car into a snow bank. In addition, although Hale did not identify Minter as hitting or kicking him, Richards saw two men attacking Hale, and identified one of them as Minter. The jury could have believed that Hale did not see Minter, or that Minter was merely behind Davidson, the other attacker, encouraging him with his presence. It is the jury's role to weigh the evidence and determine the credibility of the witnesses. The appellate court may not interfere with this function. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). In addition, Hale stated that as he was running away he saw three men pushing Richards' car out of the snow bank. Although Hale did not specifically identify Minter, Richards identified Minter as one of the three at the scene. Therefore, the jury could have inferred that Minter assisted in pushing the car out of the snow bank. Finally, Minter left the scene of the armed robbery as a passenger in the stolen car, and when the car was pulled over by police, Minter ran from the scene. Evidence of flight can be evidence of purpose, intent, or knowledge. *People v Cutchall*, 200 Mich App 396, 399; 504 NW2d 666 (1992). We conclude that, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant Minter's conviction for armed robbery of complainant Hale.

Finally, defendant Minter argues that the trial court abused its discretion in sentencing him to twenty to forty years' imprisonment for armed robbery. However, defendant's sentences are within the guidelines and are therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the principle of proportionality. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

People v Davidson

On appeal, defendant Davidson argues that the evidence at trial was insufficient to support his convictions of UDAA and armed robbery as to complainant Richards. We disagree. The evidence at trial indicated that Richards' car was forced off the road and driven away without his permission. In addition, there was evidence that Davidson was carrying a handgun. Further, complainant Hale testified that, as he was running from the scene, he saw three men pushing Richards' car out of the snow bank. Although Hale did not specifically identify Davidson as one of the men pushing the car, Richards and Hale identified Davidson as one of the three men at the scene. Therefore, the jury could have inferred

that Davidson assisted in pushing the car out of the snow bank, so that it could be taken by defendants. Therefore, we conclude that, viewed in a light most favorable to the prosecution, the evidence was sufficient to support Davidson's conviction of UDAA as to complainant Richards. See *Johnson*, *supra*.

This Court also finds that the evidence submitted by the prosecution at trial was sufficient to support Davidson's conviction of armed robbery as to complainant Richards on a theory of aiding and abetting. See *Rockwell*, *supra*. Evidence was presented at trial that Davidson assisted in the crime in that he was in the car that forced Richards' car off the road, he was carrying a gun, was one of the three men at the scene, and three men were observed pushing Richards' car out of the snow bank. When Richards' car was returned to him, there was money missing from the car. Therefore, the evidence was sufficient to show that a crime was committed, that defendant Davidson performed acts or gave encouragement that aided or assisted in the commission of the crime, and that defendant Davidson intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement.

Next, defendant Davidson argues that he was sentenced pursuant to incorrectly scored guidelines. We agree. The trial court scored twenty-five points for Offense Variable (OV) 2 for bodily injury of the victim. However, there was no evidence of bodily injury at trial. Such an error affects the recommendations of the sentencing guidelines, although Davidson's sentences for armed robbery would still be within the corrected guidelines range. Therefore, we remand the matter to the trial court for the limited purpose of determining if defendant's sentences for armed robbery would be changed in light of the corrected guidelines. *People v Chesebro*, 206 Mich App 468, 473-474; 522 NW2d 677 (1994).

Defendant Davidson next argues that his sentences were disproportionate to the seriousness of the offense and the offender. However, because defendant's sentences are within the corrected guidelines, they are presumptively proportionate. *Broden*, *supra*. Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the principle of proportionality. *Eberhardt*, *supra*. Defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn*, *supra*.

Finally, defendant Davidson argues that he was denied effective assistance of counsel by his attorney's failure to present a defense of diminished capacity and by his attorney's consent to the amendment of the information at trial from the misdemeanor charge of unlawful taking and using of a motor vehicle, MCL 750.414; MSA 28.646, to the felony charge of UDAA, MCL 750.413; MSA 28.645. During the *Ginther* hearing, Davidson's attorney indicated that she questioned Davidson regarding whether he was intoxicated at the time of the crimes. Based on her experience, she determined that the level of intoxication would not have supported a valid defense of diminished capacity because Davidson was able to recall details of the robbery. Therefore, it is clear that defense counsel did not think that diminished capacity was a substantial defense. The failure to present evidence constitutes ineffective assistance of counsel only where it deprives a defendant of a substantial or meritorious defense. A substantial defense is one which would have made a difference in the outcome

of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). It is clear from defense counsel's testimony that the defense of diminished capacity would not have made a difference in the outcome of the trial in this case. Therefore, Davidson was not denied effective assistance of counsel by his attorney's failure to raise the defense.

However, we agree that defendant Davidson was denied effective assistance of counsel by his attorney's consent to the amendment of the information at trial from the misdemeanor charge of unlawful taking and using of a motor vehicle, MCL 750.414; MSA 28.646, to the felony charge of UDAA. MCL 767.76; MSA 28.1016 does not allow changing an offense or adding a new charge by amendment. *People v Willett*, 110 Mich App 337, 343; 313 NW2d 117 (1981). A review of the record reveals no apparent reason for defense counsel's consent to the amendment. Had defendant Davidson's counsel not agreed to such an amendment, defendant could not have been convicted of UDAA, but only of the misdemeanor crime of unlawful taking and using of a motor vehicle. Therefore, defendant was prejudiced by his attorney's action. *Barclay*, *supra* at 672. We conclude that defendant Davidson was denied effective assistance of counsel with regard to the UDAA conviction. Accordingly, we reverse the conviction on that count. The prosecutor may proceed with the misdemeanor charge of unlawful taking and using of a motor vehicle.

People v Williams

On appeal, defendant Williams argues that the evidence presented at trial was insufficient to support his armed robbery convictions. We disagree. Richards testified that, after his car was forced off the road, defendant Williams pointed a shotgun at him and told him not to run. Richards testified that he subsequently saw his car being driven away by defendant Williams. Therefore, the evidence was sufficient to support the finding that defendant Williams was a principle in the armed robbery of Richards. *Allen*, *supra* at 100.

In addition, the evidence was sufficient to support the conviction for the armed robbery of complainant Hale on the theory of aiding and abetting. Hale testified that defendant Williams came over to the passenger side of the car, where Hale had fallen, and spoke with co-defendant Davidson during the time that Davidson was robbing Hale. Hale also observed defendant Williams carrying a shotgun. Therefore, it appears that Williams encouraged Davidson in the armed robbery by his very presence and by his actions. Further, the jury could have inferred that Williams had knowledge of Davidson's intent to rob Hale at the time that he participated in the crime. *Rockwell*, *supra* at 411. We conclude that the evidence presented at trial was sufficient to support defendant Williams' conviction of armed robbery with regard to complainant Hale.

Defendant Williams also argues that the trial court erred in assessing twenty-five points under OV 2 for bodily injury of the victim. We agree. A review of the record fails to reveal any evidence of bodily injury. This error affects the recommended sentencing guidelines range, causing Williams' minimum sentences for armed robbery to fall outside the guidelines. Because Williams' sentences are outside the guidelines, they are presumptively disproportionate. *Milbourn*, *supra* at 660. Therefore,

we remand this issue to the trial court for reconsideration of his armed robbery sentences under the corrected guidelines. *Chesebro, supra*.

Conclusion

We reverse defendant Davidson's conviction and sentence for UDAA. In addition, we remand the cases of Davidson and Williams for reconsideration of their sentences for armed robbery under the corrected guidelines and resentencing if necessary. We affirm the remainder of the convictions and sentences. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Harold Hood
/s/ John J. McDonald

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).