

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE R. BRANCH,

Defendant-Appellant.

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UNPUBLISHED

September 20, 1996

No. 172125

LC No. 93124249 FC

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

PER CURIAM.

Defendant was convicted of armed robbery and pleaded guilty to habitual offender, second offense. MCL 750.529; MSA 28.797, MCL 769.10; MSA 28.1082. The trial judge sentenced him to thirty to sixty years' imprisonment.

Defendant appeals as of right. He argues that the trial judge erred in denying his motion for a directed verdict where there was insufficient evidence to support the conviction. He asserts that he was denied a fair trial due to prosecutorial misconduct. Finally, he argues that his sentence is disproportionate. We affirm.

I

When reviewing a trial judge's ruling on a motion for a directed verdict, we consider the evidence presented up to the time the motion was made in a light most favorable to the prosecution. We determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In order to obtain a conviction for armed robbery, the prosecution must establish the following elements: (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant was armed with a weapon described in the statute. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). Circumstantial evidence and reasonable inferences

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

arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

Defendant agrees that the evidence supported a finding that a robbery had been committed. However, he argues that the identification evidence was insufficient to link him to the robbery.

The identification evidence in this case was entirely circumstantial. However, we believe it was sufficient to allow the charge to go to the jury. Defendant was dating Lewis, one of the store employees. He had trespassed in and been told to leave “authorized personnel only” areas of the store on several occasions. The robbery was believed to have been perpetrated by someone who knew the store layout and the employee pay distribution procedure. It could be inferred that defendant used his relationship with Lewis to learn (1) the layout of the store, (2) that the payroll was distributed in cash and (3) what time of day it was distributed.

Even though defendant claims to have been in Ohio on the day of the robbery, his alibi witness could not substantiate his claim. Additionally, one of the store employees testified that she saw defendant in the store approximately one hour before the robbery.

Additional circumstantial evidence was defendant’s conversation with a store employee, Cooks, a friend of Lewis, one month before the robbery. Defendant told Cooks that he was going to “hit” K-Mart. Defendant asked Cooks if there were phones or cameras in the personnel office, and how Mazur, who distributed the pay, would react. Cooks told Defendant that she did not care what he did as long as she got paid. Defendant assured her that she would get her check plus more. It could be inferred, based upon the testimony, that defendant intended to rob K-Mart.

Cooks also testified that, after defendant was charged, he called her and asked if she was going to testify. When she told him that she was going to tell the truth, defendant said her testimony would not only hurt him, but Lewis as well. Furthermore, after talking with Lewis, Cooks felt that if she testified her safety would be threatened.

Defendant also called other witnesses to find out what their testimony would be. He implicitly threatened one witness, Holloway. Defendant told her that he knew people in jail, and when they got out, they would look her up.

Moreover, the robber fled in a white car, and there was evidence that defendant had access to a white car on the day of the robbery. Hudson, defendant’s neighbor, testified that he often would rent cars for defendant’s mother. According to Hudson’s statement to the police, at the time of the robbery he had rented a new white Topaz for defendant.

We realize that there is no direct identification testimony from any of the witnesses. However, the circumstantial evidence in this case is sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was the one who committed the robbery.

## II

Next, defendant argues that he was denied a fair trial where the prosecutor called Lewis to the stand solely to impeach her with her previous statements to the police. Defendant failed to object to the prosecution's calling of Lewis as a witness. No manifest injustice would result in our failure to review this issue. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

Defendant also argues that he was denied a fair trial when the prosecutor argued during closing argument that Lewis' statement to the police could be used as substantive evidence of defendant's guilt. Questions of prosecutorial misconduct are decided on a case-by-case basis. We review the record and evaluate the prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *Allen, supra*.

After reviewing the record, we find that the prosecutor implicitly, if not directly, told the jury to find defendant guilty based upon Lewis' statement to the police. Because the statement could be used only for credibility purposes and not as substantive evidence, the prosecutor's comments constituted misconduct. Defendant did not object to the improper comments. Therefore, we will reverse only if the misconduct was so egregious that no curative instruction could have removed it or if manifest injustice would result from our failure to review. *Allen, supra*.

Here, a unique situation was presented. Even though defendant did not object to the prosecutor's statements, the jurors sent a note to the judge asking specifically whether the content of Lewis' statement could be used as substantive evidence. The judge instructed them that the statement could be used only as evidence of Lewis' credibility and not as evidence that defendant committed the crime. Therefore, we must assume that the jurors followed the judge's instructions. The misconduct by the prosecutor was cured by the subsequent instructions.

## III

Finally, defendant argues that his sentence is disproportionate. Because defendant was sentenced as an habitual offender, the sentencing guidelines are inapplicable. *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). Therefore, our review is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

We conclude that defendant's sentence was proportionate to the crime and defendant's background. *Milbourn, supra*. This was a serious crime. Defendant pointed a gun at two employees of K-Mart and demanded that they give him the payroll money. He has been involved with the criminal justice system since the age of fifteen and shows few signs of reformation. He threatened witnesses and bragged that he could not be convicted. The judge did not abuse his discretion in imposing a thirty year minimum sentence. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

Affirmed.

/s/ Marilyn Kelly

/s/ Myron H. Wahls

/s/ M. Richard Knoblock