

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARK KENNEDY ALEXANDER,

Defendant-Appellant.

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UNPUBLISHED

September 27, 1996

No. 175036

LC No. 93-049099-FC

Before: White, P.J., and Griffin and D. C. Kolenda,\* JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of attempted larceny from a person, MCL 750.357; MSA 28.589 (larceny from a person); MCL 750.92; MSA 28.287 (attempt), two counts of assault with a dangerous weapon, MCL 750.82; MSA 28.277, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant also pleaded guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to concurrent sentences of incarceration for 5 to 7½ years for the attempted larceny from a person conviction, four to six years for each conviction of assault with a dangerous weapon, and twenty to thirty-five years for the armed robbery conviction. These sentences were enhanced pursuant to defendant's habitual offender, second offense, guilty plea. Defendant was also sentenced to a two-year term of incarceration for the felony-firearm conviction to be served before his concurrent sentences. We affirm.

We do not agree with defendant's first argument that his conviction for armed robbery was supported by insufficient evidence. Although defendant did not challenge the sufficiency of the evidence supporting his armed robbery conviction by moving for a directed verdict at trial, we may still review this issue. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748, modified 441 Mich 1201 (1992); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of

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

the crime were proven beyond a reasonable doubt. *People v Turner*, 213 Mich App 558, 565; 540 NW2d 728 (1995).

Defendant argues that Clyde Hayes' initial failure to identify him as the person who robbed him at gunpoint was fatal to the prosecution's effort to convict him of armed robbery. Immediately after the crime, Hayes gave a description of the perpetrator to police, which defendant matched when he was apprehended. A day after the crime, however, Hayes identified another man as the perpetrator in a lineup. At trial, Hayes attributed this mistake to his glaucoma and identified defendant as the armed robber.

While Hayes' misidentification at the first lineup and his subsequent identification of defendant at trial raised an issue concerning his credibility as a witness, see *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995), the jury obviously resolved the credibility issue in the prosecution's favor by convicting defendant of armed robbery. We will not interfere with the jury's assessment of the credibility of witnesses. *Wolfe, supra* at 514-515. Aside from the identification issue, we conclude that a rational trier of fact could have found that the prosecution proved the essential elements of armed robbery beyond a reasonable doubt. The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while defendant is armed with a dangerous weapon. MCL 750.529; MSA 28.797; *Turner, supra* at 569. Hayes testified that defendant pointed a gun at him and said, "Give it up old man or I'll blow your . . . brains out." Defendant then reached into Hayes' pants, removed money from Hayes front pocket, and stole his wallet from his back pocket. From this evidence, a rational jury could determine beyond a reasonable doubt that defendant was guilty of armed robbery.

Next, defendant argues that prosecutorial misconduct denied him a fair trial. Because defendant failed to object to each instance of alleged prosecutorial misconduct or request a curative instruction, we need not address the alleged misconduct unless the misconduct was so egregious that no curative instruction could have removed the prejudice to defendant or if manifest injustice would result from our failure to review the alleged misconduct. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). On review of the record, we find that the allegedly improper comments were permissible and that any resulting prejudice would have been cured had defendant timely requested a curative instruction. Further, manifest injustice will not result from our failure to review the alleged misconduct.

Next, defendant argues in the alternative that he received ineffective assistance of counsel because his lawyer failed to object to the prosecutor's alleged misconduct. However, defendant failed to preserve the issue appeal because it was not set forth in his statement of questions. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Thus, we decline to address this issue on appeal. Further, even if we were to review this issue, we would conclude that defendant did receive effective assistance of counsel. We have already concluded that the allegedly improper prosecutorial comments were entirely permissible and, hence, unobjectionable. Defendant cannot base his claim of ineffective assistance of counsel on his attorney's failure to advance meritless objections at trial. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Lastly, defendant argues that he should be resentenced because the trial court's imposition of a twenty- to thirty-five-year enhanced sentence of imprisonment for armed robbery violated the principle of proportionality. We disagree. Because the sentencing guidelines do not apply to habitual offender sentences, appellate review of such sentences is limited to whether the trial court abused its discretion in imposing the sentence. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 664-667; 461 NW2d 1 (1990).

After a thorough review, we hold that defendant's twenty-year minimum sentence for armed robbery does not violate the principle of proportionality. Defendant committed armed robbery while he was on probation for carrying a concealed weapon and receiving and concealing stolen property. His armed robbery offense was serious and part of a sizable criminal history that defendant accumulated in a relatively short period of time. Most significantly, he used a gun to terrorize a group of elderly men. Although defendant argues that the trial court abused its discretion by failing to consider defendant's long history of mental problems, the trial court's direction to the Department of Corrections to place defendant "where he may have psychotherapy" belies this claim. Moreover, there is no indication that defendant's psychological problems contributed to his urge to commit armed robbery. In light of the seriousness of defendant's crime and his criminal history, we conclude that defendant's twenty-year minimum sentence for armed robbery does not violate the principle of proportionality.

Affirmed.

/s/ Helene N. White  
/s/ Richard Allen Griffin  
/s/ Dennis C. Kolenda