STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL YOUNG,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 180263
LC No. 94-001560

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,* JJ.

PER CURIAM.

Following a bench trial in the Detroit Recorder's Court, defendant was convicted of armed robbery, MCL 750.529; MSA 29.797, kidnapping, MCL 750.349; MSA 28.581, unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, receiving and concealing stolen property in excess of $100 (RCSP), MCL 750.535; MSA 28.803, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was thereafter sentenced to the mandatory two years' imprisonment for felony-firearm, to be served consecutively with his sentences of eight to thirteen years for armed robbery, eight to thirteen years for kidnapping, two to five years for UDAA, and two to five years for RCSP. Defendant appeals as of right. We affirm.

Defendant raises five issues on appeal. He claims that the trial court abused its discretion in allowing the complainant to testify because she should have been found incompetent to testify as a witness. He also claims that there was insufficient evidence to sustain his convictions, that Offense Variable (OV) 2 was improperly scored, that his sentence of eight to thirteen years violates the principle of proportionality, and that his conviction of RCSP must be vacated because it violates double jeopardy where he was also convicted of UDAA and armed robbery where the same property (the automobile) was involved.

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

I

First, we address defendant's double jeopardy claim. Defendant argues that his conviction of RCSP must be vacated because he was also convicted of armed robbery and UDAA and all those convictions involved the same property (an automobile). We disagree.

Defendant relies solely on *People v Kyllonen*, 402 Mich 135; 262 NW2d 2 (1978) for the proposition that he cannot be convicted of RCSP where he was also convicted of UDAA and armed robbery involving the same vehicle.[1] The Supreme Court held that the RCSP statute should be strictly construed to exclude thieves who conceal property that they have stolen. *Id.*, p 148. After the decision in *Kyllonen*, the Legislature amended the RCSP statute. In *People v Hastings*, 422 Mich 267, 271; 373 NW2d 533 (1985), the Supreme Court held that, in light of the statutory amendment, prosecution of a thief for possessing or concealing stolen property "does not torture the language of the statute." Thus, *Kyllonen* is no longer good law and defendant's reliance on it is misplaced.

The prosecutor argues that there is no double jeopardy violation in this case because convictions for both UDAA and RCSP do not violate the intent of the Legislature.

This case involves the protection against multiple punishments for the same offense, which the double jeopardy protection guarantees against. *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). In cases involving the double jeopardy protection against multiple punishment, legislative intent is the controlling factor. *Id.*, p 708. In determining legislative intent, a court must identify the type of harm the Legislature was intending to prevent, and the amount of punishment authorized by it. *Id.*, p 709.

Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984). A court must identify the type of harm the Legislature intended to prevent. *Id.* Another source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. *Id.*

Armed robbery is primarily an assaultive crime, although it does contain the element of theft of property, or larceny. *People v Hendricks*, 446 Mich 435, 449; 521 NW2d 546 (1994). Robbery is most properly classified under the category of crimes against the person. *Id.*, p 450. Armed robbery is a specific intent crime, *People v Flowers*, 186 Mich App 652, 654; 465 NW2d 43 (1990), and it is punishable by imprisonment for a term of life or any term of years. MCL 750.529; MSA 28.797. UDAA is a property offense, but requires no larcenous intent. *Hendricks, supra*, p 450. UDAA is aimed exclusively at deterring and punishing joyriding. *Id.*, p 451. In *Hendricks, supra*, p 448, the Supreme Court noted that UDAA was originally enacted to protect against the unauthorized use of vehicles (a trespass), but was not aimed at preventing theft. In *People v Murph*, 185 Mich App 476, 480; 463 NW2d 156 (1990), rev'd with respect to sentencing issue (On Rehearing), 190 Mich App

707; 476 NW2d 500 (1991), this Court succinctly stated that ". . . UDAA is not a larceny." UDAA is a specific intent crime, but rather than requiring an intent to steal, it requires the specific intent to take possession of the vehicle unlawfully. *People v Davis*, 36 Mich App 164, 165; 193 NW2d 393 (1971); *People v Lerma*, 66 Mich App 566, 570; 239 NW2d 424 (1976). UDAA is punishable by imprisonment for a term of no more than five years. MCL 750.413; MSA 28.645. RCSP is a property theft crime and does not require a specific intent. *People v Ainsworth*, 197 Mich App 321, 325-326; 495 NW2d 177 (1992). However, RCSP focuses on the facts that follow a larceny, that is, whether the defendant obtained possession of stolen goods with knowledge that the goods were stolen. *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). It is not necessary to show that the defendant was the same person who committed the larceny. *Id.* RCSP is punishable by imprisonment for a term of no more than five years. MCL 750.535(1); MSA 28.803(1).

This Court has held that the protection against double jeopardy is violated where a defendant is convicted of both larceny and RCSP. *People v Johnson*, 176 Mich App 312; 439 NW2d 345 (1989); *Ainsworth, supra*. However, neither armed robbery nor UDAA are properly classifiable as larceny offenses. Further, in *Flowers, supra*, p 654, this Court held that there was no double jeopardy violation where the defendant was convicted of both armed robbery and RCSP where the two offenses on different days were not part of the same transaction. More importantly, this Court also concluded that the harm or evil to be prevented by the armed robbery statute and the RCSP statute are substantially different. *Id.*

Accordingly, we conclude that there is no double jeopardy violation in this case. Armed robbery, UDAA, and RCSP are not of the same class of offenses, and the statutes are intended to prevent substantially different harms. Therefore, we conclude that the Legislature intended to prevent different types of harm and intended to punish these three crimes separately.

II

Next, defendant argues that the trial court abused its discretion when it permitted the complainant to testify when she stated that she could not recall specific events due to an epileptic seizure and taking medication. Defendant contends that she was incompetent to testify, and that the trial court should not have permitted her to testify from her police statement and preliminary examination testimony where the documents refreshed her memory only "somewhat."

A trial court's decision regarding whether a person is competent to testify is reviewed for an abuse of discretion. *People v Kasben*, 158 Mich App 252, 257; 404 NW2d 723 (1987); *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Under MRE 601, every person is presumed competent to testify unless the court finds after questioning that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably. The test of competency of a witness does not focus on whether a witness is able to tell right from wrong, but whether a witness has the capacity and sense of obligation to testify truthfully and understandably. *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). Further, where a potential witness

is mentally disabled, the trial court's decision to admit the testimony does not constitute reversible error because the weight and credibility of the testimony is for the jury. *Id.*, p 775.

During the evening before she testified at trial, the complainant admitted that she had suffered an epileptic seizure. The complainant also conceded at trial that she did not fully remember the events of the robbery because she had suffered the seizure. We find no error in the trial court's decision to allow the complainant to testify. There is no indication that the complainant did not have the capacity and sense of obligation to testify truthfully and understandably. Any gaps in the complainant's memory would relate to her credibility and the weight to be given to her testimony, not its admissibility. Weight and credibility of the testimony would be for the trier of fact to determine. *Id.*; *People v Edgar*, 113 Mich App 528, 535; 317 NW2d 675 (1982); *People v LaPorte*, 103 Mich App 444, 447; 303 NW2d 222 (1981).

Because the complainant was competent to testify at trial, and the trier of fact was to assess her credibility based on her own admission that she could not recall all the events of the offense, there was no error in the trial court's decision to allow the prosecutor to refresh the complainant's memory with the use of her police statement and her preliminary examination testimony. MRE 612, 613.

III

Next, defendant argues that there was insufficient evidence to sustain his convictions of armed robbery, kidnapping, UDAA, RCSP, and felony-firearm. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We find that there was sufficient evidence presented by the prosecutor to sustain defendant's convictions.

A

With respect to the conviction of armed robbery, the elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. MCL 750.529; MSA 28.797; *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Taken in a light most favorable to the prosecutor, there was sufficient evidence presented for the trial court to find that the elements of armed robbery were proven beyond a reasonable doubt.

The complainant testified that she was sitting in the front passenger seat of a Monte Carlo while parked in a parking lot outside of a convenience store. Five men came from an alley to the car. The complainant identified defendant as one of the men, and he had a gun. Defendant entered the driver's side of the car and demanded the car keys and the complainant's jewelry. The complainant gave defendant the keys because he had a gun. Defendant drove off with the complainant still in the car. Defendant drove the car for a few blocks, and then pushed the complainant out of the car. Defendant

drove off in the car, and had jewelry and money that belonged to the complainant as well. This evidence is sufficient to prove that defendant committed an armed robbery.

B

With respect to the conviction of kidnapping, the elements of kidnapping are (1) a forcible confinement of another within the state, (2) done willfully, maliciously, and without lawful authority, (3) against the will of the person confined or imprisoned, and (4) an asportation of the victim which is not merely incidental to an underlying crime unless the crime involves murder, extortion, or taking a hostage. Asportation incidental to these types of crimes is sufficient asportation for a kidnapping conviction. *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984). Taken in a light most favorable to the prosecution, there was sufficient evidence presented for the trial court to find that the elements of kidnapping were proven beyond a reasonable doubt.

The evidence showed that defendant entered the vehicle where the complainant was sitting while he was armed with a gun. The complainant gave defendant the car keys because he was armed. Defendant then drove the car for a few blocks with the complainant in the car. The complainant was forced to stay in the car against her will while defendant drove the car away from the convenience store. This evidence is sufficient to show that defendant committed the offense of kidnapping.

C

With respect to the conviction of UDAA, the elements of UDAA are: (1) the possession of the vehicle must be taken; (2) there must be a driving away; (3) done willfully; and (4) possession and the driving away must be done without authority. *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986). Taken in a light most favorable to the prosecution, there was sufficient evidence presented for the trial court to find that the essential elements of UDAA were proven beyond a reasonable doubt.

According to the complainant, defendant took possession of the car and drove it away from the convenience store while she was still in the car. Defendant obtained possession of the car because he had a gun. Even by defendant's own testimony at trial, he admitted to taking possession of the car and driving it away without authority or permission. There was sufficient evidence presented to sustain defendant's conviction of UDAA.

D

With respect to the conviction of RCSP, the elements of RCSP are: (1) that the property was stolen; (2) the value of the property; (3) the receiving, possession, or concealment of such property by the defendant with the defendant's knowledge that the property was stolen; (4) the identity of the property as being that previously stolen; and (5) the guilty constructive or actual knowledge of the defendant that the property received or concealed had been stolen. *Ainsworth*, *supra*, 324. There was sufficient evidence presented for the trial court to find that the elements of RCSP were proved beyond a reasonable doubt.

Approximately eighteen days after the armed robbery was committed, defendant was seen by the complainant's brother entering the stolen Monte Carlo. The police apprehended defendant. The vehicle identification number had been altered, and the keys belonging to the complainant's brother fit

the locks in the car. By the complainant's testimony, defendant stole the property by forcing her at gunpoint to turn over the keys to the car, and he then drove off with the car. A police officer testified that the value of the car was over $100. Defendant had possession of the stolen property, and because he was the one who committed the armed robbery, he clearly knew that he was in possession of stolen property. Accordingly, defendant was properly convicted of RCSP.

E

Finally, with respect to the conviction of felony-firearm, there was sufficient evidence presented to sustain this conviction. The complainant testified that defendant was armed with a gun when he approached the car and entered it. She believed that the gun was an automatic weapon. There was evidence that defendant possessed the gun while he committed the armed robbery and the kidnapping. Accordingly, there was sufficient evidence presented to show that defendant committed the offense of felony-firearm. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992).

IV

Last, defendant raises two sentencing issues. He first claims that OV 2 was improperly scored, and he claims that his sentence of eight to thirteen years for armed robbery violates the principle of proportionality. We disagree on both grounds.

A

In this case, a sentencing information report was prepared for the conviction of armed robbery. The trial court scored OV 2 (physical attack and/or injury) at twenty-five points (bodily injury and/or subjected to terrorism). We uphold the trial court's score in this regard because there is record evidence to support it. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

Although the complainant was not subjected to bodily injury during the course of the armed robbery, she was subjected to terrorism. The sentencing guidelines define terrorism as conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense. According to the complainant, defendant approached the car and entered it while armed with a gun. Defendant stated, "Bitch, open the door," and once inside the car told the complainant to be quiet or he would hurt her. He then demanded the keys, and drove off with the complainant still in the car. A few blocks away from the store, defendant forced the complainant out of the car. According to the presentence report, defendant forced the complainant to remove her coat and shoes before she was pushed out of the car.

Under these circumstances, we conclude that defendant subjected the complainant to terrorism because he engaged in conduct designed to increase substantially the fear and anxiety that the complainant suffered during the offenses.

B

Last, defendant argues that his sentence of eight to thirteen years for the conviction of armed robbery violates the principle of proportionality. The sentence is within the guidelines range of three to eight years, therefore, it is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In considering the very serious nature of the offenses involved, and defendant's background (including three adjudications of felonious assault as a juvenile), we find that defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Denise Langford-Morris

[1] Defendant does not contend that his convictions of UDAA and armed robbery violate the prohibition against double jeopardy. In light of *People v Hurst*, 205 Mich App 634; 517 NW2d 858 (1994), we would be compelled to find that there was no double jeopardy violation for convictions of both UDAA and armed robbery, even where the only property taken is an automobile.