STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON J. GRIFFITH,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 178791
Ogemaw County
LC No. 93-000630-FH

Before: Corrigan, P.J., and Sullivan* and T.G. Hicks,** JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, and habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to two concurrent fifteen to forty year terms of imprisonment. We affirm defendant's convictions, but remand with directions to vacate the judgment of sentence imposed for the underlying felony.

After consuming a gallon of Southern Comfort and six cases of beer, defendant, Brian Coffel, and two other men decided to go to the victim's house and "scare him." Coffel armed himself with a broomstick and defendant grabbed an ice spud (a spadelike tool used for ice fishing). When they arrived at the home, one of the men told Coffel and defendant to "hospitalize" the victim. Coffel pushed his way inside the home when the victim answered the door. Defendant pointed the spud at the victim and told him to lie face down on the floor. Coffel beat the victim with the broomstick until it broke. As Coffel disconnected the wires to the television and the videocassette recorder, defendant struck the victim with the spud. Coffel and defendant took the items from the home as they left.

Defendant first claims that his attorney's performance was deficient for failing to cross-examine Coffel, who testified for the prosecution, about Coffel's plea bargain arrangement. Our review of a claim of ineffective assistance of counsel is de novo and limited to the facts contained in the record.

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

People v Hedelsky, 162 Mich App 382, 387; 412 NW2d 746 (1987). This Court presumes that counsel was effective, and a defendant bears the heavy burden of demonstrating otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To prevail, a defendant must show that counsel's performance fell below an objective standard of reasonableness and "that counsel's errors were so serious as to deprive . . . defendant of a fair trial, a trial whose result is reliable." *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995) (citations omitted). A defendant must also show a reasonable probability that, but for counsel's deficient performance, the result would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; ___ NW2d ___ (1996).

Even if the jury had been made aware of Coffel's plea bargain, the reliability of the outcome would not have been undermined in view of the overwhelming evidence of defendant's guilt. Defendant admitted his role in the crime and gave an audiotaped confession. Defendant's only defense was that he never intended to rob the victim, but only wanted to render the victim unconscious so Coffel would stop beating him. The jury apparently found this defense incredible. Defendant attacked the victim after Coffel had stopped beating the victim, which negates defendant's contention that he hit the victim only to make Coffel stop. Also, defendant hit the victim while Coffel was unplugging the television and videocassette recorder to take them. That fact counters defendant's assertion that he did not intend to rob the victim. Further contradicting defendant's defense is that he kept the videocassette recorder after the beating. Additionally, the record does not support defendant's claim that Coffel's testimony was influenced by his desire to shift the blame to defendant to avoid more severe punishment. Coffel's conviction for unarmed robbery is consistent with his testimony that the men formed the intent to steal after he hit the victim with the broomstick but before defendant hit the victim with the ice spud.

Defendant next claims that his counsel was ineffective for failing to object to the prosecutor's closing remarks. The trial court, however, sustained defense counsel's objection to the prosecutor's comment that defendant "had used mental illness to get off." The prosecutor did not pursue the subject. Even if the prosecutor's remarks were somewhat improper, the court's instruction to the jury that the attorneys' statements were not evidence dispelled any prejudice. Under such circumstances, this Court generally has held that a defendant was not denied a fair and impartial trial. See *People v Potra*, 191 Mich App 503, 513; 479 NW2d 707 (1991); *People v Dreyer*, 177 Mich App 735, 738-739; 442 NW2d 764 (1989).

Next, defendant claims that the prosecutor's characterization of defendant's confession as "self-serving" deprived him of a fair trial because it impermissibly shifted the burden of proof. When evaluated in the context of defendant's intoxication defense, as required under *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), the prosecutor's references to defendant's statements as "self-serving" merely confirmed that neither the evidence nor the testimony supported defendant's claim that he was too intoxicated to form the specific intent to rob. See *People v Wise*, 134 Mich App 82, 105 n 10; 351 NW2d 255 (1984). Moreover, the court's instructions to the jury regarding the burden of proof overcame any potential prejudice.

Defendant also contends that a new trial is warranted because of the prosecutor's statements during closing argument that defense counsel was trying to "fragment the evidence" and "distract" the jury. A prosecutor may not question the veracity of defense counsel. *Wise*, *supra* at 101-102. The *Wise* Court nonetheless affirmed the defendant's conviction in view of the strong evidence of guilt, including his confession. *Id.* at 105-106. More recently, in *People v Minor*, 213 Mich App 682, 688-689; 541 NW2d 576 (1995), this Court held that even where a prosecutor's remarks are improper, reversal is not required where the remarks could not have affected the trial's outcome. Although defense counsel here did not object or request a cautionary instruction, the court instructed the jury that the attorneys' statements were not evidence and were not to be considered and that the prosecution was required to prove beyond a reasonable doubt that defendant specifically intended to commit robbery when he committed the assault. Defendant was not denied a fair and impartial trial because the jury instructions adequately dispelled any potential prejudice. See *Potra*, *supra* at 513; *Dreyer*, *supra* at 738-739.

Defendant also claims that the trial court abused its discretion when it admitted testimony regarding the prior consistent statements of other witnesses. The admission of hearsay testimony is harmless error when the testimony merely is cumulative. *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992). "The Court of Appeals and the federal courts repeatedly [have held] that improperly admitted hearsay evidence constitutes harmless error when it is merely cumulative of other properly admitted evidence." *Solomon v Shuell*, 435 Mich 104, 146; 457 NW2d 669 (1990). The trial court's statements on the record indicate that the court applied this authority. Additionally, the victim's statement to the police was admissible under MRE 801(d)(1)(C) as a prior statement of identification because the victim reaffirmed that statement at trial. *People v Malone*, 445 Mich 369, 386; 518 NW2d 418 (1994). Moreover, admission of the disputed testimony could not have prejudiced defendant in the presentation of his defense because he was not contesting the facts to which the witnesses testified. Defendant disputed only the specific intent element of the crime. None of the testimony to which defendant objects was probative of this element. Therefore, admission of this evidence was harmless error.

Defendant next argues that this Court should reverse his conviction for assault with intent to commit armed robbery because the prosecutor presented insufficient evidence of the specific intent to rob. Viewing the evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was introduced at trial to justify a rational trier of fact in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1993). A police detective testified that defendant admitted that the men planned the robbery before entering the victim's house. Coffel stated that the men decided to rob the victim before defendant hit him with the ice spud. This version of events was supported by the victim, who testified that defendant hit him when he tried to raise his head as Coffel was unplugging the video equipment. "[Q]uestions of the credibility of the witnesses are for the trier of fact." *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). Therefore, sufficient evidence was introduced to support defendant's conviction of assault with the intent to rob while armed.

Finally, defendant argues that his sentence of fifteen to forty years is disproportionate in comparison to the sentences received by his codefendants. Under the standard endorsed in *People v Wright*, 432 Mich 84, 93; 437 NW2d 603 (1989), the greatest minimum sentence possible for conviction under the habitual offender statute, MCL 769.10; MSA 28.1082, is two-thirds of the statutory maximum for the underlying felony. In this case, the underlying felony of which defendant was convicted, assault with intent to commit armed robbery, carries a maximum sentence of life in prison. MCL 750.89; MSA 28.284. Defendant's minimum sentences of fifteen years do not exceed the *Wright* standard. Moreover, defendant has an extensive criminal history and was charged while on bond for the instant offense with delivery of an imitation controlled substance, malicious destruction of property and escape while awaiting trial.

Notwithstanding the above proportionality analysis, this case must be remanded on a sentencing issue. Although the trial court recognized at sentencing that it was sentencing defendant "on one charge, habitual offender," it also stated that "it is the sentence of this court *on both charges* [that defendant be incarcerated by] the Michigan Department of Corrections for not less than 15 nor more than 40 years." The judgment of sentence reflects that the court ordered defendant to serve two concurrent sentences of fifteen to forty years: one for the assault conviction, and one for the habitual offender conviction. "The habitual offender statute does not create a substantive crime that is separate from and independent of the principal charge." *People v Connor*, 209 Mich App 419, 426; 531 NW2d 734 (1995). We direct the court to amend defendant's judgment of sentence to vacate his sentence for the underlying felony.

Affirmed and remanded for action in accordance with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Joseph B. Sullivan
/s/ Timothy G. Hicks