STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE ARLENE LEWIS,

Defendant-Appellant.

UNPUBLISHED
January 14, 1997

No. 185245

Detroit Recorder's Court
LC No. 94-010494

Before: Saad, P.J., and Holbrook, Jr., and G.S. Buth,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.787, and she subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. She appeals as of right and we affirm.

Defendant first argues that the evidence presented at trial only supported a conviction of unarmed robbery because the one victim who was robbed of her money did not see the toy gun that was used to assault the other victim. We find this argument to be without merit. In determining whether sufficient evidence has been presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of an armed robbery are (1) an assault and (2) a felonious taking of property from the victim's presence while (3) the defendant is armed with a weapon described in the statute. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). For purposes of the second element, the pertinent question is whether, at the time of the defendant's use of force, the victim's right to possession was greater than that of his assailant, but actual physical possession of the property is not required. *People v Beebe*, 70 Mich App 154; 245 NW2d 547 (1976).

Here, victims Mawby and Witimer were both assaulted, although separately, during one sequence of events. Witimer was assaulted when one assailant pointed a gun at her. The money that

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

was feloniously taken by codefendant Fomby was within the "possession" of both victims for purposes of the armed robbery statute. *Beebe, supra.* See also *People v Halliburton,* 114 Mich App 47, 51-52; 318 NW2d 602 (1982) (in order to convict a defendant of armed robbery, it is irrelevant that the complainant was not the victim of the assault). Furthermore, we reject defendant's claim that use of a toy gun cannot support a conviction of armed robbery. *People v Barkley,* 151 Mich App 234; 390 NW2d 705 (1986). Accordingly, we conclude that a rational trier of fact could have found that the elements of armed robbery were proven beyond a reasonable doubt.

Defendant next argues that the prosecutor's improper remark during rebuttal argument denied her a fair trial. Defendant claims that the prosecutor's comment as to defendant's inexplicable presence at the police station to inquire about her accomplice, impermissibly shifted the burden of proof to defendant to explain her presence there and, as such, violated defendant's right to remain silent. We disagree. Because the record indicates that the prosecutor's comments during rebuttal closing argument was a "fair response" to defense counsel's closing argument, we find that defendant's right to remain silent was not violated. *People v Fields*, 450 Mich 94, 110-111; 525 NW2d 457 (1995). Accordingly, we conclude that defendant's claim on this issue must fail because the prosecutor's comment did not deny defendant a fair trial. *People v Hermiz*, 207 Mich App 449, 452; 526 NW2d 1 (1994).

Defendant next argues that her Sixth Amendment right to confrontation was violated when the prosecutor elicited testimony implying that both of her nontestifying codefendants had implicated her. We disagree. This Court will review defendant's unpreserved evidentiary claim because it raises an issue of constitutional dimension. *People v Miller (After Remand),* 211 Mich App 30, 42; 535 NW2d 518 (1995). MRE 103(a)(1). In *People v Todd*, 186 Mich App 625, 629-630; 465 NW2d 380 (1990), this Court found that where the defendant took the stand and testified that he pulled the trigger, he was not prejudiced by a witness' testimony that a codefendant told him that the defendant pulled the trigger. Accordingly, the *Todd* Court concluded that because the defendant was not prejudiced, it need not decide whether the defendant's Sixth Amendment right was violated. *Id.* at 629-630. Likewise, in the present case, by virtue of defendant's own confession, which was heard by the jury, it was clear that she orchestrated this crime. Therefore, we conclude that defendant was not prejudiced by testimony which inferred that defendant's codefendants had implicated her, and we need not consider whether defendant's Sixth Amendment right was violated.

Finally, defendant argues that the trial court erred in failing to suppress defendant's statement because it was not made voluntarily. We disagree. In reviewing a trial court's determination regarding the voluntariness of a defendant's statement, we are required to examine the whole record and make an independent determination of the ultimate issue of voluntariness. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972). If after such a review we do not possess a definite and firm conviction that a mistake has been committed by the trial court, we will affirm that court's ruling. After reviewing the entire record, we find that the evidence presented supports a finding that defendant voluntarily waived her constitutional rights. Therefore, we affirm the trial court's denial of her motion to suppress.

Affirmed.

/s/ Henry W. Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth