# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANTHONY BROWN,

Defendant-Appellant.

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UNPUBLISHED
January 14, 1997

No. 186300
LC No. 94-000305-FC

Before: MacKenzie, P.J., Wahls and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of 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). Thereafter, he pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. His convictions stemmed from the robbery of an Arby's restaurant. Defendant was sentenced to three hundred to six hundred months' (twenty-five to fifty years') imprisonment for the armed robbery/habitual third conviction, to be preceded by a consecutive term of two years for the felony-firearm conviction. He appeals as of right. We affirm.

We disagree with defendant's assertion that there was insufficient evidence to support his armed robbery conviction. In reviewing the sufficiency of the evidence, we view the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). The elements of armed robbery are (1) an assault; (2) a felonious taking of property from the victim's person or presence; and (3) the defendant being armed with a weapon described in the statute. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The testimony of Willie Chappell, Jr. that he and defendant robbed the restaurant and that only defendant went inside was sufficient to establish identity. Testimony from an Arby's employee that the assailant pointed a gun at him and told him to put money in a bag was sufficient to establish that defendant committed the first and third elements of armed robbery. Chappell's testimony that defendant told him that he went in the building and got money, combined with the employee's testimony, is sufficient to establish that defendant committed the second

element of armed robbery. Thus, we find that the elements of this offense were proven beyond a reasonable doubt. *Lugo, supra*.

Defendant also asserts that his armed robbery conviction was contrary to the great weight of the evidence. Defendant's failure to move for a new trial on this basis below precludes appellate review of this question, however, because a claim that a verdict is against the great weight of the evidence can only be raised by a motion for new trial. See MCR 2.611(A)(1)(e); *Brown v Swartz Creek Memorial Post 3720 - Veterans of Foreign Wars, Inc*, 214 Mich App 15, 27; 542 NW2d 588 (1995); *People v Bush*, 187 Mich App 316, 329; 466 NW2d 736 (1991), aff'd in part and rev'd in part on other grounds, 443 Mich 693; 506 NW2d 482 (1993).

Next, defendant argues that the trial court improperly admitted testimony regarding two uncharged armed robberies. A trial court's decision to admit evidence should not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). MRE 404(b) does not preclude the admission of other acts evidence if it is relevant on a noncharacter theory. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993); *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). The prosecution called three witnesses who testified about a robbery that occurred during their employment at a Burger King restaurant in Lansing and another witness who testified about the robbery of an A & W restaurant in Holt where she was employed. Chappell also testified that he and defendant robbed the Burger King and A & W. There were important similarities between the charged robbery at the Arby's and the two uncharged robberies. In all three cases, employees were moved to the restaurant's walk-in freezer or cooler. All three robberies occurred in the greater Lansing area. Testimony about the appearance of the assailants in the Burger King and A & W robberies was similar to testimony about the assailant in the Arby's robbery, including the wearing of dark colored clothing. The testimony of the Burger King employees and the A & W employee was also highly relevant on a noncharacter theory because it tended to corroborate Chappell's testimony that he and defendant jointly robbed those two restaurants. This could reasonably be considered as making more plausible Chappell's testimony that he and defendant cooperated in robbing the Arby's. While there was some potential for prejudice because the jury may have improperly considered evidence that defendant committed the uncharged robberies to establish criminal propensity, a trial court's ruling on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Accordingly, in light of the significant probative value of the other acts evidence in question, we conclude that the trial court did not abuse its discretion by admitting this evidence.

Defendant asserts that the trial court should not have assessed him any points in scoring Offense Variables (OVs) 2, 5 and 9 of the sentencing guidelines. We will uphold guidelines scoring decisions for which there exists evidentiary support. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). The trial court's scoring of fifteen points under OV 5 was supported by evidence that the victims were held captive significantly beyond the time necessary to commit the offense because of the testimony that the Arby's employees were forced to move to the walk-in freezer or cooler in the restaurant. Based on Chappell's testimony about his involvement and defendant's involvement in the

robbery, the trial court's scoring of ten points under OV 9 for defendant acting as a leader in a multiple offender situation was supported by evidence.

The trial court applied a flawed rationale in assessing twenty-five points under OV 2 for subjecting the Arby's employees to terrorism, however. Instruction C to OV 2 provides, "Terrorism is conduct that is *designed* to increase substantially the fear and anxiety that the victim suffers during the offense." (Emphasis added.) See also *People v Kreger*, 214 Mich App 549, 552; 543 NW2d 55 (1995). Nevertheless, the trial court expressed in its remarks regarding its scoring of OV 2 that it did not know defendant's intent, but he should be held responsible for committing actions that may have subjectively made the Arby's employees, as his victims, feel terrorized. Because the trial court's rationale ignored whether defendant designed the conduct in order to substantially increase the victims' fear and anxiety, we conclude that its reasons for scoring twenty-five points under OV 2 based on terrorism were flawed as a matter of law. The trial court's error in scoring OV 2 was harmless, however, because even after subtracting the twenty-five points scored under that variable, defendant's scoring on the guidelines remains in Offense Level IV. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996); *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Defendant highlights certain comments made by the trial court during sentencing as indicating that the court focused inappropriately on deterrence, protection of society and societal fear of robberies. We disagree. The court considered the facts of this case as well as defendant as an individual offender in imposing sentence. *People v Hunter*, 176 Mich App 319, 320-321; 439 NW2d 334 (1989). We conclude that the trial judge's comments referencing a witness' testimony that he did not want to commit an armed robbery in Eaton County because he had heard about the stiff penalties and the trial judge were intended to emphasize the proper consideration of general deterrence. These comments did not indicate an intent to punish defendant more severely merely because his offense was committed in that county or to otherwise follow a local sentencing policy contrary to *People v Catanzarite*, 211 Mich App 573, 583; 536 NW2d 570 (1995).

In light of defendant's serious criminal record and the circumstances of the instant case, we conclude that defendant's twenty-five to fifty-year sentence for armed robbery/habitual third was not disproportionately severe. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). "The Legislature intended to afford the trial court discretion to punish more severely those who have committed more serious crimes and who have more extensive prior records of such crimes." *People v Terry*, 217 Mich App 660, 663; 553 NW2d 23 (1996). Thus, the trial court herein operated within its discretion in sentencing defendant.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey