

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR DEMON McGOUGHY,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 190482

Jackson Circuit Court

LC No. 95-071752 FC

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2). Defendant was sentenced to twenty to thirty years' imprisonment for the armed robbery conviction, forty to sixty months for the possession of a short-barreled shotgun conviction, to be served consecutively to the two-year mandatory sentence for felony-firearm. He appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial because the trial court refused to instruct the jury on the lesser included offense of attempted armed robbery and because the trial court denied his motion for a directed verdict. Specifically, defendant argues that the element of movement of property was not satisfied because the perpetrator never reached a place of safety.

Defendant correctly states that robbery is a continuous offense, *People v Velasquez*, 189 Mich App 14; 472 NW2d 289 (1992); however, defendant misplaces the application of the rule. Although the *perpetrator* must reach safety to complete the offense, it has not been held that the *property* taken must still be in the perpetrator's possession when the suspect reaches safety. Because attempted armed robbery is a cognate lesser offense of armed robbery, *People v Adams*, 416 Mich 53, 56; 330 NW2d

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

634 (1982), the court was obligated to instruct on that offense only if it found that there was evidence on the record to support it. *Id.* The evidence did not support a conviction on attempted armed robbery; therefore, the trial court properly denied defendant's request for instruction on the lesser offense.

Defendant's motion for directed verdict was also properly denied by the trial court. A ruling on a directed verdict motion is reviewed under a sufficiency of evidence analysis. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Defendant argues that the evidence was insufficient to prove all of the elements of robbery because the property taken never reached a place of safety. However, as stated above, it is only necessary that the perpetrator of the crime, not the property taken, reach a place of safety. Therefore, the trial court's ruling was proper because the prosecution presented evidence which, viewed in its favor, would be sufficient to convince a reasonable trier of fact that all the elements of the robbery were proved beyond a reasonable doubt. *Id.*

II

Defendant's next argument is that he was denied a fair trial because a witness was permitted to give an improper personal opinion on the guilt of defendant and because the prosecutor's statement in closing regarding the witness' testimony was unsupported by the evidence.

Defendant correctly states that it is improper for a witness to give an opinion on the guilt of the defendant, and that police officers are held to even higher scrutiny. *People v Suchy*, 143 Mich App 136; 371 NW2d 502 (1985); *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). Defendant argues that the police officer's testimony that a tracking dog was not released to find the suspects in this case because the police "believed [they] had the suspects in custody and that was that" was unresponsive and prejudicial testimony requiring reversal. We disagree. The officer's testimony was in defense of the police techniques used to locate the suspect and did not result in prejudice to defendant. Further, defendant waived review by failing to object below, and we find no abuse of discretion by the trial court in allowing the testimony.

Defendant also argues that, although he did not object below, a miscarriage of justice occurred when the prosecutor stated in closing argument, "Ladies and gentlemen, I don't believe there's any doubt in the case. . . ." An allegation of prosecutorial misconduct must be reviewed in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We find that in reviewing the above statement in context, the prosecutor's statement was merely referencing the burden of proving the elements beyond a reasonable doubt. Therefore, the challenged statement was not improper and did not result in a miscarriage of justice.

III

Defendant's next argument is that he was denied a fair trial based on prosecutorial misconduct, asserting that the prosecutor improperly questioned defendant about the truthfulness of another witness and about defendant's explanation for gunpowder on his hands.

The issue of whether questions regarding the credibility of another witness are proper was addressed in *People v Buckey*, 424 Mich 1; 378 NW2d 432 (1985). The Supreme Court found error in questioning in that case but held that it did not result in unfair prejudice to the defendant, because the defendant handled the questions well and no harm to the defendant was shown as a result of the questions. *Id.*, pp 16-17. The same analysis applies in this case. We find that defendant was able to reasonably explain that he was not accusing another witness of lying, but rather, that the witness' notes, claimed to have been based on statements attributed to defendant, were actually based on statements made by someone else. Defendant waived review of this issue by failing to object below, and because defendant was not harmed by the line of questioning, we find no miscarriage of justice resulted from the prosecutor's conduct.

We also disagree with defendant's argument that reversal is required because the prosecutor erred in asking him to explain the gunpowder found on his hand. Although it has been held to be error for a prosecutor to force a defendant to explain damaging evidence thereby shifting the burden of proof, *People v Heath*, 80 Mich App 185; 263 NW2d 58 (1977), where a prosecutor comments on the validity of a defense theory that, if true, would exonerate the defendant, the burden is not improperly shifted to the defendant, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). In the present case, defendant testified in his own defense and offered testimony contradictory to the prosecution's case. Because defendant made certain assertions which made the fact that gunpowder was found on his hands unexplainable, it was not error for the prosecution to ask defendant for an explanation.

IV

Defendant next argues that the trial court abused its discretion in denying his request for substitute counsel and that he was denied effective assistance of counsel by his attorney's failure to move to suppress evidence of his confession which he argues resulted from an illegal arrest.

We review claims that the trial court erred in refusing substitute counsel for an abuse of discretion. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989). An abuse of discretion is found only where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, defiance of judgment, or the exercise of passion or bias, *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and that standard is applied more strictly in a criminal case, *People v Williams*, 386 Mich 565, 573; 194 NW2d 337 (1972). That standard was not met in this case.

This Court has held that in order to properly review and rule on a defendant's request for new counsel, the trial court need not hold a full adversary hearing; the review is sufficient where the trial court elicited testimony from both the attorney and client to gauge the truth of the matter. *People v Ceteways*, 156 Mich App 108, 119; 401 NW2d 327 (1986). The review requirement was satisfied in this case where, outside the presence of the jury, the trial court heard testimony from both defendant and his counsel, and found that counsel was adequately representing defendant. We find, upon review of the arguments made by defendant and his counsel at trial, that the trial court properly denied defendant's request and did not abuse its discretion in doing so.

We also disagree with defendant's argument that he was denied effective assistance of counsel because his attorney failed to move to suppress defendant's confession. This Court's review of such claims is limited to the facts contained on the record, and to prevail, defendant must show both that counsel's performance was deficient and that the deficiency resulted in prejudice to defendant in the outcome of the case. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant incorrectly argues that his confession was the fruit of an illegal arrest. We have reviewed the record and conclude that the police had probable cause and that exigent circumstances existed to warrant the arrest. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Therefore, we find no deficiency in trial counsel's performance. Further, the record indicates that defendant's counsel considered the issue of whether the arrest was lawful, concluded that it was, and decided not to pursue the motion. We therefore find that counsel was not ineffective and was not required to argue a motion where it would have been frivolous or meritless. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, we affirm the trial court's finding that defendant's counsel was effective.

V

Finally, defendant argues that he should be resentenced because of the prosecutor's improper remarks at sentencing that defendant was guilty of perjury.

First, any factor considered in sentencing need only be proven by a preponderance of the evidence. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). There was sufficient evidence on the record to prove defendant's guilt of perjury by a preponderance; therefore, we find that it would not have been improper for the court to consider defendant's perjurious testimony.

More important, however, is the fact that defendant has failed to show that the trial court even considered the prosecutor's statement regarding defendant's perjurious testimony when imposing the sentence. The trial court indicated the factors which were considered relevant to defendant's sentence, which included defendant's lengthy record, the seriousness of the crime, and the guidelines, but did not include the prosecutor's statement. Therefore, we find that the sentence in this case was appropriate to the circumstances and the trial court did not abuse its discretion.

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper