STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CASUAL UNIQUE BANKS,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 185855
Jackson Circuit Court
LC No. 94-071012-FC

Before: Bandstra, P.J., and Hoekstra and S.F. Cox,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1). For those respective convictions, he was sentenced to six to twenty years' imprisonment and twelve to thirty years' imprisonment. He appeals as of right. We affirm defendant's convictions and his sentence for armed robbery, but remand for resentencing on the conspiracy conviction.

Defendant first claims the investigatory stop of the Mercedes in which he was a passenger was invalid and that the trial court erred in denying his motion to suppress the evidence seized from his person and the car following the stop of the vehicle. We disagree. Police officers may make valid investigative stops where they have a reasonable and articulable suspicion that "crime is afoot." *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Champion,* 452 Mich 92, 98; 549 NW2d 849 (1996). The totality of the circumstances test is to be used in cases involving investigative stops. *United States v Cortez,* 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981); *People v Nelson,* 443 Mich 626, 632; 505 NW2d 266 (1993). Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved. *People v Whalen,* 390 Mich 672, 682; 213 NW2d 116 (1973); *People v Christie (On Remand),* 206 Mich App 304, 309; 520 NW2d 647 (1994). Giving proper deference to Deputy Elder's eighteen years of experience, training and observations, and looking at the totality of the circumstances in this case, we conclude that the trial court did not err in determining that Deputy Elders had a reasonable, articulable, and particular suspicion to support the investigative stop. *Nelson, supra* at 635-636. The deputy's suspicion, based on behavior that when viewed discretely may appear innocent, is not offensive to the

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

constitution and can form the basis for a valid investigatory stop. *Id.* at 632. See, also, *People v Bordeau,* 206 Mich App 89, 92-93; 520 NW2d 374 (1994). The investigatory stop was valid, and the evidence obtained therefrom was admissible.

Defendant next claims there was insufficient evidence to support his convictions for armed robbery and conspiracy to commit armed robbery. We disagree. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Greenwood,* 209 Mich App 470, 472; 531 NW2d 771 (1995). Regarding defendant's armed robbery conviction, we find that a rational trier of fact could reasonably infer from the evidence presented that defendant was the knife-wielding robber. *People v Jolly,* 442 Mich 458, 466; 502 NW2d 177 (1993). To establish a conspiracy, direct proof of an agreement is not required and it is not necessary to prove a formal agreement. *People v Atley,* 392 Mich 298, 311; 220 NW2d 465 (1974). Viewing the evidence in a light most favorable to the prosecution, a rational jury could infer from defendant's actions and conduct that he knowingly cooperated with Taylor and Oliver in the planning of and participation in the bank robbery, thereby agreeing to commit the armed robbery, and that he did not merely assist or encourage others in the commission of the crime. *People v Blume,* 443 Mich 476, 483-485; 505 NW2d 843 (1993).

Defendant next raises various claims regarding the jury instructions. After reviewing the court's instructions to the jury in their entirety to determine if the instructions regarding the use of the police officers' testimony about radio dispatches fairly presented the issues to be tried and sufficiently protected defendant's rights, *People v Davis,* 216 Mich App 47, 54; 549 NW2d 1 (1996), we conclude that the jury was properly instructed. In addition, we conclude that the trial court did not err in refusing to instruct the jury on the offenses of receiving or concealing stolen property over $100 and accessory after the fact, both of which defense counsel requested be given as cognate lesser offenses of armed robbery. A cognate lesser included offense is one that shares some common elements and is of the same class or category as the greater offense, but has some additional elements not found in the greater offense. *People v Hendricks,* 446 Mich 435, 443; 521 NW2d 546 (1994). Before a cognate offense instruction is given, it is necessary that the lesser offense have an "inherent relationship" with the principal charge by being of the same class or category as the principal charge and that the evidence adduced at trial be reviewed to determine if it would support a conviction of the cognate offense. *Id.* at 444; *People v Bailey,* 451 Mich 657, 668; 549 NW2d 325 (1996), amended and remanded on other grounds 453 Mich 1204; 551 NW2d 163 (1996). There are no overlapping elements between armed robbery and receiving or concealing stolen property, and receiving or concealing stolen property is not a cognate lesser included offense of armed robbery. *People v Jackson,* 158 Mich App 544, 559; 405 NW2d 192 (1987); *People v Harris,* 82 Mich App 135, 137-138; 266 NW2d 477 (1978), overruled in part on other grounds sub nom *Hendricks, supra* at 450 n 20. Furthermore, the trial court correctly determined that the evidence at trial would not support an instruction to the jury on the charge of accessory after the fact. There was no evidence that defendant took any action after the robbery to hinder the detection, arrest, trial, or punishment of Taylor or Oliver. *People v Lucas,* 402 Mich 302, 304; 262 NW2d 662 (1978). Taylor drove the get-away car; defendant was merely a passenger in the back seat.

As his fourth issue, defendant asserts that he should have been sentenced as a juvenile rather than as an adult. A review of the record reveals that the trial court considered each of the factors set

forth in MCR 6.931(E)(3)(a)-(f); MCL 769.1(3)(a)-(f); MSA 28.1072(3)(a)-(f), and balanced them, "giving each weight as appropriate to the circumstances" in this case. MCL 769.1(3); MSA 28.1072(3). Contrary to defendant's assertion on appeal, the court did not ignore the sentencing guidelines' range in its decision to sentence him as an adult. Rather, the court properly considered defendant's need for supervision after release. *People v Stone*, 195 Mich App 600, 607; 491 NW2d 628 (1992). Further, the court did consider the delinquency service worker's opinion that defendant was amenable to treatment in the juvenile system; the court simply reached a contrary conclusion that was in accord with the recommendation made by the probation agent and the prosecutor. Given the seriousness of the matter and because the record supports the conclusion that, on balance, the best interests of the juvenile and the public would be better served by sentencing defendant as an adult, it cannot be said that the trial court's decision to do so was an abuse of discretion. *People v Lyons (On Remand)*, 203 Mich App 465, 467-468; 513 NW2d 170 (1994).

Finally, we consider the sentences imposed upon defendant. It is apparent from the court's stated findings and conclusions at the juvenile and sentencing hearings that the court appropriately considered the factors of punishment, rehabilitation, deterrence, and protection of society. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Moreover, the court satisfied the articulation requirement by stating that it was following the guidelines for the armed robbery offense. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987). Although the sentence imposed for the armed robbery offense is at the high end of the guidelines, defendant has not pointed to any circumstances so unusual that the sentence should be deemed violative of the principle of proportionality. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant's sentence for armed robbery is proportionate and is affirmed. *Milbourn, supra; Broden, supra* at 354-355. However, we conclude that defendant's sentence for conspiracy to commit armed robbery is disproportionate. There are no sentencing guidelines for the conspiracy offense; however, the sentence is subject to our review under the proportionality standard. *People v Potts*, 436 Mich 295, 302; 461 NW2d 647 (1990). Defendant's conspiracy conviction was already factored into the guidelines' calculation for the armed robbery offense, and the negative circumstances of defendant's background and of the instant offense were considered in the sentence imposed for the armed robbery, jusitifying the sentence at the high end of the guidelines for that offense. That being the case, we see no justification for imposing a minimum sentence for planning the armed robbery that is twice that of the sentence imposed for the armed robbery itself. Under the circumstances, the trial court abused its discretion in sentencing defendant to a term of twelve to thirty years' imprisonment on his conviction for conspiracy to commit armed robbery. The sentence on the conspiracy conviction is vacated, and defendant is to be resentenced on that conviction only. Our review of this matter indicates that resentencing before a different judge is unnecessary. *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

Defendant's convictions and his armed robbery sentence are affirmed, but his sentence for conspiracy to commit armed robbery is vacated and the case is remanded for resentencing on that conviction only. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Sean F. Cox