

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD KEVIN MIDDAUGH,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 178127

Macomb Circuit Court

LC No. 93-001813

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Before: Gribbs, P.J., and Young and W.J. Caprathe,\* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of unarmed robbery, MCL 750.530; MSA 28.798, and conspiracy to commit unarmed robbery, MCL 750.157a and 750.530; MSA 28.354(1) and 28.798. Defendant was sentenced to eight to fifteen years of imprisonment for each conviction. However, because defendant pleaded guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083, those sentences were vacated and defendant was sentenced as an habitual third offender to ten to thirty years of imprisonment. We affirm.

Defendant raises four issues on appeal. Defendant first contends that his conviction for conspiracy to commit unarmed robbery was based on insufficient evidence. In reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). To establish a conspiracy, the prosecution must show a combination or agreement, express or implied, between two or more people, to commit an illegal act or to commit a legal act in an unlawful manner. *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995). Direct proof of the agreement is not required. "It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement." *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). The agreement may be established by circumstantial evidence or may be based on inference. *Id.*

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

At trial, defendant testified that he was compelled to cooperate with a robbery when a stranger forced his way into the home of the complainant, an acquaintance of defendant, and held a sharp object to defendant's neck. However, evidence presented at trial showed that defendant had several opportunities to escape from the robber or alert the police but did neither. Defendant was seen and photographed by the police in the company of the robber on several occasions within days of the robbery. When he was arrested, defendant had in his possession items taken during the robbery. Thus, there was sufficient evidence from which a reasonable juror could infer that defendant and the robber agreed to commit the robbery and acted in concert during its commission.

Defendant next argues that the prosecutor impermissibly vouched for the credibility of police witnesses in his closing argument. Defendant specifically contests the prosecutor's statements in closing that the police "know what they are doing," that what the "People are alleging is factual and true," and that he knew "what actually happened" based on the testimony of the police witnesses. Because defendant did not object to the challenged remarks, the issue may only be reviewed on appeal if a special instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

As an advocate, the prosecutor is permitted to make fair comments on the evidence, including "arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983); see also *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not vouch for the character of a witness or place the prestige of his office behind them. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). Viewing the remarks in context, the crucial inquiry is whether the prosecutor was attempting to vouch for the defendant's guilt. *Id.* at 398-399. Upon review of the challenged remarks, we conclude that the prosecution did not vouch for the defendant's guilt.

Instead, the prosecutor drew reasonable inferences that defendant's claims were contradicted by other evidence. Further, in response to defense counsel's argument that defendant's testimony was not impeached, the prosecutor urged that impeachment of defendant was unnecessary as his testimony was diminished by the testimony of the investigating officers. Viewed in context, the prosecutor fairly commented on the evidence in raising challenges to defendant's credibility. Thus, we find no error.

Defendant next argues that the trial court abused his discretion by allowing a police witness to offer opinion testimony. Because defendant did not object to the admission of this testimony, he has waived appellate review unless manifest injustice would result. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). We conclude that no injustice would result in not reviewing this issue. The challenged testimony occurred when the witness was explaining how the police conducted its investigation of defendant's involvement in this incident.

Defendant alternatively argues that the prosecution improperly referred to this testimony in its closing argument. Again, defendant raised no objection to this statement. Accordingly, we will not

review this issue as no injustice would result from our refusal to consider the issue. *Stanaway, supra*, 446 Mich at 687.

Finally, defendant contends that his sentence is excessively severe and violates proportionality because the underlying offenses did not pose a great danger to the victims. However, defendant was sentenced as an habitual third offender. Review of habitual offender sentences is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996); *People v Yeoman*, 218 Mich App 406, 418; 554 NW2d 577 (1996). Defendant had a prior record of five felony and two misdemeanor convictions. The trial court observed that defendant's actions endangered innocent people, and when considering that fact along with his prior record, defendant warranted a sentence of ten to thirty years of imprisonment for his conviction as a habitual third offender. Accordingly, we find no abuse of discretion and conclude that defendant's sentence is proportionate to the offense and the offender. *Milbourn, supra*.

Affirmed.

/s/ Roman S. Gibbs  
/s/ Robert P. Young, Jr.  
/s/ William J. Caprathe