

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN FLY,

Defendant-Appellant.

UNPUBLISHED

July 25, 1997

No. 193195

Recorder's Court

LC No. 95-001942

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, J.J.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for 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). Defendant was sentenced to five to fifteen years for the armed robbery conviction, and two years for the felony-firearm conviction, the two sentences to run consecutively. We affirm.

Defendant's first claim on appeal is that the trial court erred in reaching a verdict against the great weight of the evidence and abused its discretion by denying defendant's motion for new trial. We disagree. The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done. *People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989). On a motion for new trial, the judge acts as the "thirteenth juror" by evaluating the credibility and demeanor of the witnesses. *People v Herbert*, 444 Mich 466, 476; 511 NW2d 654 (1993). We review the trial court's decision to deny a motion for a new trial for an abuse of discretion. *Id.* at 477. We will find an abuse of discretion only where the denial of the new trial motion was manifestly against the clear weight of the evidence. *Simon, supra*.

To support a conviction for armed robbery, the prosecution must prove the following elements: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. MCL 750.529; MSA 28.797; *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant

intended to permanently deprive the owner of property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Specific intent may be inferred from circumstantial evidence. *People v Denton*, 138 Mich App 568, 573; 360 NW2d 245 (1984).

The evidence showed that the complainant identified defendant as having been the perpetrator with the shotgun. Moreover, the complainant indicated that he had been frightened by defendant's weapon. The complainant testified that defendant forcibly, and against complainant's will, took eighty dollars out of his pocket. The trial court reasonably inferred that defendant intended to permanently deprive the complainant of his money from defendant's acts of pointing the shotgun at the complainant, demanding money, forcibly taking money from the complainant, hitting the complainant on the head with the shotgun, kicking the complainant, and driving away. While we acknowledge that there were some inconsistencies in the evidence presented at trial, the overwhelming evidence of defendant's guilt greatly outweighed their significance. Moreover, we note that the complainant acknowledged the minor inconsistencies between his prior statements and his testimony, and offered reasonable explanations as to why his accounts of the crime had changed. Any remaining issue as to the complainant's credibility was left to the trial court to resolve. *Herbert, supra*. Indeed, the trial court stated that it found the complainant's testimony to have been very credible. Accordingly, we hold that the trial court did not abuse its discretion, because its denial of defendant's new trial motion was not manifestly against the great weight of the evidence.

We further conclude that defendant's conviction for armed robbery was not against the overwhelming weight of the evidence. To obtain a conviction for felony-firearm, the prosecutor must show that the defendant possessed a firearm during the commission or attempt to commit a felony. MCL 750.227b; MSA 28.424(2); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The complainant testified that defendant pointed a shotgun at him. We therefore hold that since the trial court believed the complainant it did not abuse its discretion in finding that the overwhelming weight of the evidence did not favor defendant as to the felony-firearm offense.

Defendant next claims that the five-year minimum sentence imposed for his armed robbery conviction, although falling within the guidelines range, was disproportionate. We disagree. This Court reviews the trial court's sentence for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). Where, as here, a sentence falls within the guidelines range, an abuse of sentencing discretion is shown upon a demonstration of unusual circumstances that make the sentence disproportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Before sentencing, the defendant must apprise the trial court of the unusual circumstances that would render a sentence within the guidelines range disproportionate. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Because defendant did not do so, he has failed to preserve this issue for appellate review. *Id.* at 506. Accordingly, we refuse to address this issue further.

Defendant's final claim on appeal is that the five-year minimum sentence for his armed robbery conviction constituted cruel and unusual punishment under the federal and state constitutions. US Const, Am VIII; Const 1963, art 1, §16. To test the merit of this contention, we must (1) look at the gravity of the offense and harshness of the penalty, (2) compare the penalty to those imposed for other crimes in Michigan, (3) compare the penalty to those imposed for the same offense by other states, and

(4) consider the goal for rehabilitation. *People v Launsbury*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

Defendant pointed a shotgun at the complainant's head, demanded money, forcibly took money from him and then physically assaulted him. Defendant's act was severe. The five-year minimum sentence seems necessary to rehabilitate and discipline him, as well as protect society from defendant and deter others from committing the same crime. See *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). We therefore hold that defendant's five-year minimum sentence for his armed robbery conviction did not constitute cruel and unusual punishment.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Roman S. Gibbs