STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MEARL ELTON JONES, a/k/a JAMES E. LEWIS,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 191257
Recorder's Court
LC No. 95-004065-FC

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and was sentenced as an habitual offender, fourth offense, MCL 769.13; MSA 28.1085, to a prison term of twenty to forty years. Defendant appeals as of right. We affirm.

Defendant raises five issues on appeal. First, defendant contends that the prosecution failed to present sufficient evidence that defendant threatened complainant with a gun while taking his money to support the armed robbery conviction. We disagree.

To support an armed robbery conviction, the prosecutor must present sufficient evidence that the defendant was armed either with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery. *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993); *People v Barkley*, 151 Mich App 234, 237; 390 NW2d 705 (1986). Evidence was presented that defendant, after arriving at a Hudson's warehouse with complainant, told complainant that defendant would need "the rest of the money" before delivering the promised goods. When complainant refused, defendant said, "Well, I know you got the rest of the money," and reached down to pick up a bag off the floor of complainant's truck. When defendant reached down, complainant saw what looked like the butt of a gun sticking out of defendant's left coat pocket. Defendant put his hand in the pocket containing the gun. Complainant asked if defendant was robbing him and defendant replied, "What you think?" Complainant gave defendant $210 he had been carrying and defendant fled. Complainant described the object in

defendant's pocket as dull, black, square and small enough to fit in the palm of the hand and testified that he knew what guns looked like because his uncle was a police officer. Finally, complainant testified that he gave defendant the $210 because he was scared and felt that defendant "had the upper hand." This evidence was sufficient to show that defendant used a gun to take the $210 from complainant to allow the jury reasonably to convict defendant of armed robbery. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

Next, defendant argues that the trial court erred in failing to instruct the jury that it could find defendant guilty of larceny by trick as a lesser offense of armed robbery. We disagree. Defendant did not request the instruction, and the evidence presented at trial did not support such an instruction. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994).

Defendant also claims that he was deprived of a fair trial by the prosecutor's introduction of defendant's preliminary examination testimony, and by comments on defendant's prior criminal acts in closing argument. Contrary to defendant's contention, his testimony from the preliminary examination was admissible at trial despite his assertion of his right not to testify at trial. *People v James*, 29 Mich App 522, 526; 185 NW2d 571 (1971). Further, the evidence of defendant's other crimes contained in the preliminary examination testimony was offered and admitted for the proper purpose of establishing defendant's method and motive for luring complainant to the Hudson's warehouse in order to rob him, and was more probative than prejudicial to defendant. *People v VanderVliet*, 444 Mich 52, 72; 508 NW2d 114 (1993); *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). The contested comments were based on defendant's preliminary examination testimony, and did not jeopardize defendant's right to a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v McElhaney*, 215 Mich App 269, 280, 283; 545 NW2d 18 (1996).

Defendant next argues that counsel was ineffective for failing to request an instruction on the offense of larceny by trick, and for failing to object to the prosecutor's leading questioning of the police officer who first spoke to the complainant. With regard to the former argument, we have already concluded that the evidence would not have supported such an instruction. Further, it was defense counsel's strategy to offer the jury the option of convicting of only one offense in the hope of an acquittal. With regard to the latter, we conclude that defense counsel did not commit an error so serious as to prejudice defendant's right to a fair trial by failing to object to the prosecutor's questioning of the officer who took the complaint. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Finally, defendant argues that his twenty to forty-year prison sentence for his armed robbery conviction, as enhanced by his habitual offender status, is disproportionate. We disagree. Defendant had an extensive criminal record, including convictions for larceny from a person, larceny from a building, accepting the earnings of a prostitute, an attempted felonious assault and two parole violations. The sentence imposed is proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald