

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JOHN BRADLEY,

Defendant-Appellant.

UNPUBLISHED

June 23, 2000

No. 216238

Dickinson Circuit Court

LC No. 98-002226-FH

98-002227-FH

98-002228-FH

98-002249-FH

Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of various felony convictions.¹ He appeals as of right, and we affirm, but remand to the trial court to vacate defendant's conviction for escape from jail through violence.

Defendant and Robbie Cootware were serving time in the Dickinson County Jail. The two men conspired to escape from jail and flee to Mexico. Defendant removed a metal soap dish from the showers. When evening lock down arrived, defendant alerted corrections officer Timothy Giguere to a leak in the faucet. Cootware then came behind Giguere and struck him with the soap dish held inside a sock. Giguere grabbed Cootware when he was struck from behind again. Giguere identified defendant as the only person behind him capable of inflicting the blow. When Giguere was down, the two men proceeded toward corrections officer Vanessa Kuzak. In addition to the soap dish, the men also obtained a broom. Kuzak managed to remove herself from harms way as the two men escaped out a garage door. The escape was accomplished because Cootware had learned the code to the exit door.

Upon escaping from jail, the men managed to obtain a ride to a friend's home where they received clothing. The two men then proceeded to a camping area where they broke into various trailers seeking weapons and other provisions. Cootware testified that the men had planned to use rope and weapons found in a camp to rob the Sagola bank, then proceed to Mexico. However, an area resident noticed that his trailer had been broken into and telephoned police. Police were able to trail the men, who fled in separate directions, and arrest them.

Defendant claims that the trial court erred in failing to grant defendant's motion for separate trials. We disagree. We review a trial court's decision to join related offenses for an abuse of discretion. *People v McCune*, 125 Mich App 100, 104; 336 NW2d 11 (1983). Joinder is permitted when the offenses are based on the same conduct, or on a series of acts connected together or constituting parts of a single scheme or plan. *People v Tobey*, 401 Mich 141, 150; 257 NW2d 537 (1977). A series of acts connected together refers to multiple offenses that are committed to aid in accomplishing another, such as burglary and larceny or kidnapping and robbery. *Id.* at 151-152, n 15. This also includes offenses that occur within a close time-space sequence. *Id.* In the present case, the various offenses were committed within a close time-space sequence and were committed to aid in accomplishing the next offense. That is, one week prior to the commission of the offenses, the plan to escape from jail and the means necessary to flee to Mexico was decided and agreed upon by defendant and Cootware. The assault occurred in order to allow defendant to escape from jail. Defendant then traveled to the camping area in order to obtain weapons in order to commit the robbery. The money used from the robbery would assist defendant in fleeing the country. Pursuant to *Tobey, supra*, the trial court did not abuse its discretion in denying defendant's motion for separate trials.

Defendant also claims that there was insufficient evidence or the resulting verdict was against the great weight of the evidence for the conspiracy to commit bank robbery, breaking and entering of the "Urbany" camp, and the assault with intent to do great bodily harm less than murder convictions. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "A new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Our review of the record reveals that there was sufficient evidence to support the contested convictions and the jury verdict was not against the great weight of the evidence.²

Defendant alleges that his convictions for jail escape, MCL 750.195; MSA 28.392 and escape from jail through violence, MCL 750.197c; MSA 28.394(3), violate the Double Jeopardy Clauses of the Federal and Michigan Constitutions. Although this issue was not raised in the trial court, the question of double jeopardy involves a constitutional claim and will nevertheless be addressed on appeal. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). However, appellate courts do not decide constitutional questions when the issue raised can be decided on alternative, nonconstitutional grounds. *People v Gauntlett*, 134 Mich App 737, 747; 352 NW2d 310 (1984) modified 419 Mich 909 (1984). While the escape from jail statute punishes a defendant sentenced to jail for a felony who escapes from jail, the escape from jail through violence statute punishes two different types of conduct. Specifically, the statute creates two types of offenses: (1) assaulting a jail/prison employee and (2) breaking jail and escaping or attempting to escape using violence, threats of violence, or a dangerous weapon. MCL 750.197c; MSA 28.394(3). In the present case, the prosecutor could have avoided any implications of a double jeopardy violation by presenting to the jury the theory that the violation alleged under MCL 750.197c; MSA 28.394(3), was for the assault of corrections officer Vanessa Kuzak. While the information clearly charged defendant under the

assaulting a jail/prison employee portion of the escape from jail through violence statute, the prosecutor appeared to argue the escape from jail using violence portion of the statute during closing arguments. The defense attorney, on the other hand, argued that there was the “assault and escape” that concerned Kuzak, indicating that the assault of a jail employee was the theory under which the prosecutor was proceeding. Further confusion was caused by the escape from jail through violence instruction that was presented to the jury. The instruction as read to the jury indicated that the prosecutor was proceeding under the escape from jail through the use of violence theory. However, the trial court then proceeded to read the elements of assault and battery directed toward Kuzak as a lesser offense of escape from jail through violence.³ Because of the lack of clarity in the correlation between the information, the evidence, the arguments of counsel, and the instructions given, we vacate defendant’s conviction and sentence for escape from jail through violence. *People v Biegajski*, 122 Mich App 215, 228; 332 NW2d 413 (1982). The conviction and sentence for escape from jail is affirmed.⁴ *Id.*

Defendant alleges that he was denied the right to a fair trial based on prosecutorial misconduct. We disagree. Defendant did not object to the prosecutor’s elicitation of testimony from the witnesses and the comments made in closing arguments and did not request a curative instruction. Therefore, review of the alleged prosecutorial misconduct is foreclosed unless the misconduct was so egregious that no curative instruction could have removed the prejudice or manifest injustice would result from our failure to review the issue. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The prosecutor’s comments regarding the truthfulness of witnesses were not improper because the prosecutor was not vouching for the credibility of the witnesses, but was arguing, from the facts, that the witnesses were credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Additionally, the prosecutor’s elicitation of testimony regarding defendant’s financial resources and lack of legitimate employment opportunity was not objected to by defense counsel and does not appear to be a studied attempt by the prosecutor to demonstrate that persons in dire financial straits are predisposed to break the law. *People v Fowlkes*, 130 Mich App 828, 838; 345 NW2d 629 (1983). We note that it appears that defense counsel’s failure to object to this testimony was purposeful because defense counsel also inquired into this same area on cross-examination. In fact, it appears that defense counsel elicited the testimony to establish her theory that defendant had financial resources available, irrespective of the source of the money, such that he did not agree to rob a bank, but merely sought to flee prison in order to avoid facing additional charges pending in other jurisdictions. Finally, review of the testimony in context reveals that the prosecutor did not circumvent a preliminary ruling that no reference could be made to any obstruction of justice charge against defendant. Rather, the prosecutor inquired about a statement given by Cootware and whether Officer Scott Metras believed the statement. Officer Metras testified that he did not believe Cootware’s statement and felt that Cootware was lying because of the fear of repercussions. Consequently, measures were taken to protect Cootware. Defendant was not denied a fair and impartial trial. *Paquette, supra*.

Defendant claims that the trial court erred in failing to instruct the jury regarding CJI2d 4.1 that addresses out of court statements made by a defendant. We disagree. Defendant did not request this instruction and did not object to the instructions given. Therefore, this issue is unpreserved, and defendant must demonstrate plain, prejudicial error in order to avoid forfeiture of this issue. *People v Mass*, 238 Mich App 333, 338-339; 605 NW2d 322 (1999). Defendant has failed to meet this

standard. In any event, we review jury instructions as a whole to determine whether there is error requiring reversal. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Somewhat imperfect instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. *Id.* at 143-144. Although the trial court did not provide the instruction regarding defendant's statements, CJI2d 4.1, the trial court did apprise the jury of the cautionary instruction regarding accomplice testimony, and defendant's statements were introduced through accomplice testimony. Accordingly, the issues tried were fairly presented to the jury, and defendant's rights were protected. Furthermore, defendant has failed to demonstrate that, but for counsel's failure to request CJI2d 4.1, the outcome of the trial would have been different. *People v Torres (On Remand)*, 222 Mich App 411, 424; 564 NW2d 149 (1997). Accordingly, defendant's claim of ineffective assistance of counsel is without merit.

Defendant alleges that the trial court abused its discretion when it refused to reread trial testimony requested by the jury in violation of MCR 6.414(H). We disagree. We review the trial court's denial of the jury's request to review transcripts for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 519-520; 583 NW2d 199 (1998). Defense counsel expressly acquiesced to the court's handling of the jury's request by failing to object to the course of action taken. A defendant may not waive objection to an issue before the trial court and then raise it as error before this Court. *Id.* at 520. To hold otherwise would allow defendant to harbor error as an appellate parachute. *Id.*

Defendant alleges that the trial court abused its discretion in sentencing defendant. We disagree. The trial court was not required to mention each goal of sentencing when imposing sentence. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Furthermore, review of the record reveals that the trial court did, in fact, individualize defendant's sentence. Finally, the sentence imposed was proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Lastly, defendant claims that he was denied a fair trial due to the cumulative effect of prejudicial errors. We disagree. Because we have determined that no actual errors occurred, we reject defendant's claim. *Rice, supra* at 448.

Affirmed and remanded to the trial court to vacate defendant's conviction for escape from jail through violence. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Peter D. O'Connell

¹ In lower court docket number 98-002226-FH, defendant was convicted of and sentenced as follows: escape from jail, MCL 750.195; MSA 28.392, three to six years' imprisonment, conspiracy to escape from jail, MCL 750.157a; MSA 28.354(1), three to six years' imprisonment, assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, eight to sixteen years' imprisonment, and conspiracy to commit assault great bodily harm, four to ten years' imprisonment. In lower court docket number, 98-002227-FH, defendant was convicted of four counts of breaking and entering, MCL

750.110; MSA 28.305, for which he was sentenced to one to ten years' imprisonment for each offense. In lower court docket number 98-002228-FH, defendant was convicted and sentenced as follows: one count of inducing a minor to commit a felony, MCL 750.157c; MSA 28.354(3), two to four years' imprisonment, a second count of inducing a minor to commit a felony, MCL 750.157c; MSA 28.354(3), five to ten years' imprisonment, and conspiracy to commit bank robbery, five to ten years' imprisonment. In lower court docket number 98-002249-FH, defendant was convicted of assaulting a prison employee, MCL 750.197c; MSA 28.394(3) for which he was sentenced to two to four years' imprisonment.

² Defendant also argues that the trial court erred in failing to grant defendant's motion to quash regarding the breaking and entering of the Urbany camp. Even if defendant's motion to quash had been timely filed to allow the trial court the opportunity to review the preliminary examination transcript, any error is harmless due to the sufficiency of the proofs presented at trial. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

³ The confusion is further compounded by the judgment of sentence that provides that defendant was convicted under the assault portion of the escape from jail through violence statute. Finally, we note that neither party takes issue with the propriety of instructing assault and battery as a lesser included offense of escape from jail through violence. Accordingly, we do not reach a conclusion regarding the lesser included instruction.

⁴ We decline to reach the ultimate issue of whether the escape from jail and escape from jail through violence statutes violate double jeopardy. Whether a double jeopardy violation will occur is contingent upon whether an assaultive crime or escape crime is the principle allegation arising out of a violation of the escape from jail through violence statute. Furthermore, there is no violation of double jeopardy protections if one crime is complete before another takes place, even if the offenses share common elements or one constitutes a lesser offense of the other. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). Accordingly, if the prosecutor had argued that the violation of the escape from jail through violence statute was the assault of Kuzak knowing that she was a prison employee, any assault against her was completed prior to the escape from prison, and arguably, there would be no double jeopardy violation.