

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL THOMPKINS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2001

No. 220538

Wayne Circuit Court

LC No. 98-005522

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a bench trial of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to ten to twenty years' imprisonment for the armed robbery conviction, a concurrent term of fifteen to thirty years' imprisonment for the conspiracy conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred by allowing the trial to proceed on the conspiracy to commit armed robbery charge because the charge was not reflected in the written information and defendant was not formally arraigned on the charge prior to trial. This issue presents a question of law. This Court reviews questions of law de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000).

In Michigan, a prosecution must be based on an information or an indictment. *People v Manning*, 243 Mich App 615, 624; 624 NW2d 746 (2000). Once a defendant undergoes or waives a preliminary examination, the bindover authorizes the prosecutor to file an information against the defendant in circuit court. *People v Hunt*, 442 Mich 359, 362-363; 501 NW2d 151 (1993). The information issued after the preliminary examination is predicated facts disclosed at the preliminary examination. *Id.* at 363.

Here, the record reveals that the prosecutor moved to add a conspiracy charge at the preliminary examination and that the district court bound defendant over on the conspiracy charge. Therefore, the prosecutor was authorized at that point to file a written information in the circuit court charging defendant with conspiracy. *Id.* The prosecutor admitted, however, that she

inadvertently failed to add a conspiracy charge against defendant on the written information. Nevertheless, the information was indeed effectively amended by the actions of the trial court in discussing the charges on the record, holding an arraignment before trial, and instructing the jury on the conspiracy charge. See, e.g., *People v Price*, 126 Mich App 647, 650; 337 NW2d 614 (1983), abrogated in part on other grounds as stated in *People v Fortson*, 202 Mich App 13 (1993).

Defendant contends that this amendment should not have been allowed. We disagree. Generally, an information may be amended at any time before, during, or after trial unless the amendment would unfairly surprise or prejudice the defendant and unless it charges a new crime. *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). Prejudice occurs when the defendant does not admit guilt and is not provided an opportunity to defend against the crime. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). Here, the amendment of the information did not unfairly surprise or prejudice defendant. Indeed, because defendant was bound over on a charge of conspiracy to commit armed robbery, he was aware of the conspiracy charge as of his preliminary examination. Therefore, he was on notice of the charge and was provided an opportunity to defend against it. In addition, we cannot conclude that the amendment of the information added a “new crime” because defendant was effectively charged with conspiracy as of the date of his preliminary examination.¹ Moreover, while defendant contends that he was “never formally arraigned and charged in Circuit Court on th[e conspiracy] charge,” the record reveals that the trial court did indeed arraign defendant on the charge just before trial. We find no basis for reversal.

We emphasize that prosecutors should take care to conform written informations to the bindovers that occur. Nevertheless, as noted above, we do not find error requiring reversal in this case. As indicated in *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995), “due process is satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond.” See also *People v Ritter*, 186 Mich App 701, 709, n 3; 464 NW2d 919 (1991) (“Due process requires only that the defendant receive notice reasonably calculated to apprise him of the charges and an opportunity for a hearing.”). Here, defendant was adequately informed of the nature of the charges against him and was given an adequate opportunity to defend against them. Under all the foregoing circumstances, we find no basis for reversing defendant’s conspiracy conviction.

Next, defendant argues that the prosecutor committed misconduct requiring reversal by eliciting testimony about an immunity agreement from prosecution witness Elisia Brockington. However, defendant did not object to the prosecutor’s allegedly improper conduct. “Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant’s claim for plain error.” *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 310 (2000). Accordingly, to warrant relief

¹ Indeed, even though the written information did not reflect the charge, the charge was evident from the record made at the preliminary examination and bindover.

defendant must show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may not intimate that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a mere reference to a plea agreement containing a promise for truthfulness does not in itself require reversal. *Bahoda*, *supra* at 276. Although such agreements should be admitted with great caution, their admission is not error unless used by the prosecutor to suggest that the government had some special knowledge that the witness was testifying truthfully. *Id.*; *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995).

Contrary to defendant’s argument, the prosecutor’s questioning of Brockington on direct examination did not constitute an obvious error. The prosecutor did not suggest that she had some special knowledge, unknown to the jury, that Brockington was testifying truthfully. *Bahoda*, *supra* at 276; *Turner*, *supra* at 585. Rather, the prosecutor simply reminded Brockington that she was required to testify truthfully pursuant to the immunity agreement. The prosecutor’s questioning in this regard does not require reversal.²

Next, defendant argues that the prosecutor presented insufficient evidence to support his armed robbery and felony-firearm convictions. When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence for a rational trier of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt. See, e.g., *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998).

The elements of armed robbery include “(1) an assault and (2) a felonious taking of property from the victim’s person or presence (3) while the defendant is armed with a dangerous weapon described in the statute.” *People v Lee*, 243 Mich App 163, 168; NW2d (2000).

² Contrary to defendant’s argument, this instant case is distinguishable from *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988) and *People v Rosales*, 160 Mich App 304, 310; 408 NW2d 140 (1987), cases in which this Court reversed the defendants’ convictions. Indeed, in *Enos*, the prosecutor’s questioning included repeated threats against a witness who lied on cross-examination, and in *Rosales*, numerous errors occurred that cumulatively required reversal. See *Bahoda*, *supra* at 280 n 35. Moreover, we acknowledge that in *Bahoda*, in which the Court affirmed the defendant’s conviction, the prosecutor’s elicitation of testimony occurred during redirect examination in response to defense arguments, whereas in the instant case, the challenged questioning of Brockington occurred during the prosecutor’s direct examination. We do not find this distinction to require reversal here. Indeed, *Bahoda* makes clear that testimony about a plea agreement does not require reversal as long as it does not “convey a message to the jury that the prosecutor had some special knowledge or facts indicating the witness’ truthfulness.” *Bahoda*, *supra* at 277. The questioning of Brockington in this case, even though it occurred on direct examination, did not convey such special knowledge.

Because armed robbery is a specific intent crime, the prosecutor also must prove that the defendant intended to permanently deprive the owner of the property. *Id.* To establish felony-firearm, the prosecutor must prove that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Circumstantial evidence and reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of an offense. *Lee, supra* at 167-168.

Defendant argues that although he may have discussed committing the armed robbery with the coconspirators, there was insufficient evidence that he actually participated in the robbery such that his convictions for armed robbery and felony-firearm could be sustained. We disagree. Indeed, the inferences arising from the evidence supported defendant's convictions on both charges. See *id.* Brockington testified that defendant discussed the robbery with Carlos Jenkins, Jarmaine Carroll, and defendant's brother, William Thompkins, on the morning of its occurrence. She further testified as follows: Defendant asked Brockington if she would lure Samir Dawood, the manager of the Eagle Market, out of the store by telling Dawood that someone had broken his car window. When Brockington left the apartment, defendant, along with William, Carroll, and Jenkins, left shortly afterward and were dressed in black. Defendant, Carroll, and William were also wearing masks over their faces. They got into a blue Dodge Neon, which Brockington saw parked just outside the store before the robbery. Brockington saw defendant throwing a rock at Dawood's car and heard glass breaking. She knew that defendant was the person who threw the rock because, while at the apartment, he said that he would break Dawood's car window. After Brockington left the store, she looked back and saw three men dressed in black run out of the store to the blue Neon, and it appeared that Carroll was holding a rifle in his hand.

Dawood testified that all three men who entered the store were carrying guns. Further, two packages of lottery tickets were eventually found in a blue Neon located in front of the store, and \$958 in mostly small bills was recovered from William's person.

The above evidence was sufficient to support defendant's armed robbery and felony-firearm convictions. While Dawood was unable to identify the perpetrators, the reasonable inferences arising from the above evidence showed that defendant participated in the robbery along with Carroll and William and that firearms were used during the robbery. Reversal is unwarranted.

Next, defendant argues that his sentence for his conspiracy conviction is disproportionate. We again disagree. We review sentencing decisions for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). If the principle of proportionality – which dictates that a sentence be proportionate to the seriousness of the crime and the defendant's prior record and circumstances – is violated, an abuse of discretion has occurred. *People v Bennett*, 241 Mich App 511; 616 NW2d 703 (2000).

We conclude that the circumstances of the crime justified the court's conspiracy sentence in this case.³ Although the court admitted that it did not know which of the coconspirators had shot Dawood, the court properly recognized that the armed robbery culminated with one of the coconspirators shooting Dawood in the leg while Dawood was on the floor cooperating with them. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). The court also considered the evidence that the coconspirators aided and abetted each other in striking George Matti, another Eagle Market employee, in the face with a gun and pistol-whipping him. The court found that all three defendants participated in conspiring to commit the armed robbery and that all three defendants planned the offense together and carried it out. As such, the court imposed an identical sentence upon each defendant for the conspiracy convictions. Although defendant had no prior criminal record, the trial court found the circumstances of the offense itself serious enough to justify the imposition of defendant's fifteen-year minimum sentence. The circumstances surrounding defendant's criminal behavior were a proper consideration in determining his sentence. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). We cannot say that the trial court abused its discretion in sentencing defendant.

Finally, defendant argues in a supplemental brief filed *in propria persona* that his attorney rendered ineffective assistance of counsel in failing to read defendant's preliminary examination transcript in preparing for trial and thereby failing to present a substantial defense to the conspiracy charge. To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that the deficiency reasonably affected the outcome of the case. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). An attorney is presumed to provide effective assistance of counsel; therefore, a defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. Here, because no evidentiary hearing on the ineffective assistance of counsel claim took place in the lower court, our review is limited to the facts available from the existing record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant has not met his burden for relief. Indeed, contrary to defendant's assertions, there is no evidence that counsel failed to read the preliminary examination transcript in preparation for trial and thereby failed to present an adequate defense to the conspiracy charge. While counsel did make an argument, discussed earlier, that the information should not have been amended at the time of trial and that the preliminary examination and bindover was insufficient to provide defendant with legal notice of the charges against him, she did not affirmatively state that she had failed to read the preliminary examination transcript. In fact, the record reveals that she referred to the relevant transcript in cross-examining Brockington. Accordingly, defendant has failed to overcome the strong presumption that his attorney rendered effective assistance of counsel.⁴

³ We note that there were no sentencing guidelines for the conspiracy conviction.

⁴ Nor has defendant established a basis for us to remand this case for an evidentiary hearing on the issue of ineffective assistance of counsel. Moreover, we note that to the extent that defendant mentions additional attorney errors in his supplemental brief, they are not properly presented for
(continued...)

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

McDonald, J. did not participate.

(...continued)

review because they are not included in the statement of questions presented. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999), and MCR 7.212(C)(5).