

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 22, 2014

v

DARIUS LAMAR LEWIS,

Defendant-Appellant.

No. 314110
Saginaw Circuit Court
LC No. 12-037025-FC

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of one count of armed robbery, MCL 750.529, and one count of safe breaking, MCL 750.531. Defendant was found not guilty of two counts of possession of a firearm while committing a felony (felony-firearm), MCL 750.227b(1). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to 300 to 420 months for armed robbery and 140 to 240 months for safe breaking with 316 days credit for time served, both sentences to run concurrent. For the reasons discussed below, we affirm.

I. FACTS

On September 29, 2011, two men robbed Advance America, a cash advance store located in Saginaw County. Employee Joann Gidron and her coworker, Gerald Scales, were in the store that day. According to the store's security camera record, two men entered the store at 11:50 a.m. Gidron described the men as African-American and stated that "one of them was about six feet tall and the other was about five-eight." Gidron testified that "the shorter man" approached her and inquired about getting a cash advance loan. She told him what pieces of information he would need to provide, and that if he came back to the store with that information, she could process the loan for him. The two men then left the store.

Some time around 12:30 p.m., Gerald Scales left the store for lunch; Gidron remained. At 12:50 p.m., the two men returned to the store. The shorter man again approached Gidron and told her not to move and to give him the money. The taller man approached Gidron holding what appeared to be a semi-automatic handgun. Gidron testified that during the robbery the taller man held the gun to her back while the shorter man took the money out of the cash drawers. The shorter man then asked Gidron where the safe was, and she told him. The men took the money from the safe, tied Gidron's hands with zip ties, and then left the store.

When the police arrived Gidron described the robbers and police took photographs and dusted for prints. A set of prints recovered at the scene matched those of Andre Jackson, who was subsequently tried and convicted as one of the robbers. About a month after the robbery, Detective Russell Kolb asked Gidron to give a physical description of the shorter man to a police sketch artist.¹

Based on the fingerprints at the crime scene, Detective Kolb obtained a warrant for Jackson's arrest. Detective Kolb discovered Jackson's address, and he and Sheriff's Deputy James Houge observed the house from a distance to evaluate flight and safety risks. On October 26, 2011, Detective Kolb observed two men drive up, get out of the car, and go into the house. Kolb stated that one of the men appeared to be Andre Jackson. The men then came back out of the house with two other people, got back into the car, and drove away.

At Kolb's direction, Houge pulled the car over. The passengers in the back seat were Alana Jackson, Andre's sister, and Jerry Prince (or Print), while the front seat passenger was Andre Jackson, and the driver was defendant. Kolb testified that defendant looked like the man depicted in the drawing the sketch artist drew from Gidron's description. Andre Jackson was arrested and the other three were taken to the police station for questioning. Andre Jackson gave Kolb consent to search his house and his sister told police where he kept his gun. Gidron identified it as the weapon used in the robbery. The gun turned out to be a semi-automatic BB gun.

Detective Kolb subsequently showed Gidron a second photo line-up that included a photo of defendant. Gidron identified defendant as the shorter man who participated in the robbery. Defendant was later convicted as previously discussed.

II. ANALYSIS

Defendant asserts that he was denied a fair trial when Detective Kolb testified that the sketch drawn from Gidron's description appeared to be defendant. Defendant argues this statement was an impermissible opinion on his guilt or innocence and an impermissible opinion on the credibility of another witness. The trial court overruled defense counsel's contemporaneous objection to this testimony at trial. The issue is, therefore, preserved for review. MRE 103(a)(1); *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v McDade*, 301 Mich App 343, 352; 836 NW2d 266 (2013). "It is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*

It is "a settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant." *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). It is also "improper for a witness to comment or provide an opinion on the credibility of another witness since matters of credibility are to be determined by the trier of

¹ The sketch was admitted as an exhibit at trial.

fact.” *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985) (quotation marks and citations omitted); see also *Douglas*, 296 Mich App at 196-197.

Detective Kolb testified as follows:

Q. Now at the time of the traffic stop, you already had the sketch?

A. Yes.

Q. Did you notice anything about the sketch in comparison to any of the four people in the car that were stopped?

Defense Counsel: Objection, Your Honor, calls for speculation, conclusion, and opinion on the part of this witness.

The Court: I believe he’s entitled to give his opinion as to whether or not he observed anyone in the car and if it [sic] seemed similar to the photograph . . . so I’ll overrule the objection.

Plaintiff: Do you have an opinion if this drawing looked like anyone in the car?

A. I felt that it looked like the driver at that time.

Q. The driver being?

A. Darius Lewis.

As the trial judge stated, Kolb’s testimony had no bearing on whether Gidron gave a truthful and accurate description of the offender to police. Nor did it amount to opining on the ultimate issue of defendant’s guilt or innocence. Rather, the prosecutor’s question whether Kolb thought the sketch looked like any of the men in the car was in the context of the ongoing investigation. Kolb did not give an opinion regarding defendant’s identity as one of the offenders; he only gave his personal observation that the driver of the car looked like the sketch the artist had drawn from Gidron’s description. This gives context for why defendant was detained—nothing more.

Defendant next argues that the trial court erred in refusing to permit the late endorsement of a witness defendant offered to establish the foundation for a potentially exculpatory business record. This issue was properly preserved for review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). “A trial court’s decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *Id.*

On October 22, eight days before trial, defense counsel filed defendant’s witness list stating that defendant intended to have a Head Start representative give foundational testimony to admit a copy of a document defendant purportedly had signed indicating that he had picked his daughter up from Head Start at 11:30 a.m. on the day of the robbery. Defendant admits that

when the witness list was filed, the time had expired for giving notice of an alibi defense and for amendment of a general witness list without leave of the court. MCR 6.201(A). He nevertheless argues that he was not presenting an alibi witness, but was rather presenting evidence that (if believed) might persuade the jury that it was unlikely that defendant robbed Advance America right after picking up his daughter. In striking the witness list, the trial court stated:

No, I'm not going to allow that. That sends the jury on a whole 'nother wild goose chase if someone comes in and says, okay, she signed, he signed. I'm not going to allow that . . . he can get on the stand and tell us what he did. They can believe it or not believe it, but to introduce a record that's a late filing, I'm not going to do that, so it's denied.

Although a “defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses,” *Yost*, 278 Mich App at 379, “this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* (quotation marks and citation omitted). Here, defendant was merely denied the opportunity to call a foundation witness for a piece of physical evidence. The trial court did not prevent defendant from presenting a defense. If the sign-in sheet is accurate, then defendant would have known he was at Head Start at 11:30 a.m. and could have communicated that to his attorney, who in turn could have pursued the records much earlier and filed a timely witness list in support of that argument.

Defendant next argues that the trial court erred in refusing to instruct the jury on the necessarily included lesser offenses of unarmed robbery and larceny from a person. This issue was also properly preserved for review. *Fast Air, Inc.*, 235 Mich App at 549. “[D]etermination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.” *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The trial court did not abuse its discretion in refusing to instruct the jury on the offenses of unarmed robbery and larceny from a person.

MCL 768.32(1) states as follows:

[U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

This statute applies only to necessarily included lesser offenses and not to cognate offenses. *People v Mendoza*, 468 Mich 527, 532-533; 664 NW2d 685 (2003). “[A]n inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense[.]” *Id.* at 533. A lesser-included-offense instruction is only proper where a “rational view of the evidence” supports it. *Id.*

“Unarmed robbery is clearly a necessarily included lesser offense of armed robbery.” *People v Reese*, 466 Mich 440, 446-47; 647 NW2d 501 (2002). Hence, the only issue is whether

a rational view of the evidence supported instructing the jury on the lesser included offense. There was no evidence to support the theory that a weapon was not used in the commission of the robbery. There was some dispute as to the nature of the weapon and the number of weapons used, but there was no dispute as to whether one of the assailants was armed. A rational view of the evidence did not support giving an instruction on the lesser included offenses.² See also *People v Smith-Anthony*, 494 Mich 669, 687 n 53; 837 NW2d 415 (2013) (acknowledging that as a result of the 2004 amendments to the robbery statute, MCL 750.530, the elements of which are incorporated by reference in the armed robbery statute, MCL 750.529, “larceny-from-the-person is no longer a necessarily included lesser offense of robbery”).

Finally, defendant argues that the trial court erred in improperly scoring offense variables (OV) 4 and 14 under the sentencing guidelines, MCL 777.1 *et seq.* This issue was not preserved for appeal and is reviewed for plain error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We reverse only when the defendant is “actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

Ten points are scored under OV 4 where the victim sustained “[s]erious psychological injury requiring professional treatment[.]” MCL 777.34(1)(a). Ten points are scored under OV 14 where the defendant “was a leader in a multiple offender situation.” MCL 777.44(1)(a). No plain error occurred in scoring defendant 10 points for OV 4 or 10 points for OV 14.

Gidron testified that she was “scared” and “nervous” during the robbery and was fearful that she would be shot during the robbery. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (opinion by GAGE, J.) instructs that “[t]here is no requirement that the victim actually receive psychological treatment. Because the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court’s decision to score OV 4 at ten points.” Accordingly, it was not plain error to score defendant 10 points for OV 4.

As for OV 14, there is sufficient evidence in the record that defendant was a leader. *Gidron’s* account of the robbery indicates that defendant was the one who made the initial

² Defendant argues that the fact that jury acquitted him on the two felony-firearm charges indicates “jury compromise,” and suggests that the jury likely would have found defendant guilty of a lesser charge if it had been available. Armed robbery can be committed with any dangerous weapon or article used in a manner to make the victim reasonably believe it was a dangerous weapon (e.g., a BB gun that looks just like a semi-automatic handgun). MCL 750.529. A felony-firearm conviction requires the defendant to actually possess a firearm. MCL 750.227b. Under MCL 750.222(d), “‘Firearm’ means a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BBs not exceeding .177 caliber.” The jury was instructed on this definition. If the jury believed that the BB gun introduced into evidence was the weapon used in the robbery, it would not have been logically inconsistent for the jury to find that the BB gun did not meet the statutory definition of a firearm but did constitute a dangerous weapon.

contact and who did all the questioning during the initial encounter. Upon their return, it was defendant who again initiated the contact, who declared the robbery, and made the demand for the money. Defendant also pulled money from the cash drawer, though it was his accomplice who held a gun on Gidron. We conclude that the trial court did not, under these facts, commit plain error in scoring 10 points under OV 14.

Affirmed.

/s/ Donald S. Owens

/s/ Christopher M. Murray

/s/ Michael J. Riordan