

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANTRELL DEVERES GARDNER,

Defendant-Appellant.

UNPUBLISHED

October 5, 1999

No. 208426

Muskegon Circuit Court

LC No. 97-140898 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant Shantrell Gardner appeals as of right his jury convictions of armed robbery, MCL 750.529; MSA 28.797, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent terms of fifteen to fifty years' imprisonment for the armed robbery conviction and five to ten years for the assault, preceded by a mandatory two-year sentence for the felony-firearm conviction. We affirm.

I

This case arises out of an early morning armed robbery and shooting that occurred at the K-Discount store located in the city of Muskegon Heights on June 19, 1997. According to Michael Hunter, one of the store clerks on duty that night, he was waiting on a customer sometime between 12:30 a.m. and 1:00 a.m., when an individual wearing a heavy black coat and mask entered the store and then stepped behind the counter where Hunter and George Saqqa, a second clerk, were standing. The individual told Saqqa to open his register, then pulled out a small-caliber pistol. At that point, Saqqa attempted to open the register but had trouble doing so. The masked individual then cocked the gun and shot Saqqa in the leg. The shooter turned toward Hunter and demanded that he open the other register. Hunter opened the register and then stepped back while the perpetrator removed the money. The individual put the money in his pocket and ran out the door.

II

On appeal, defendant first argues that the prosecution failed to produce sufficient evidence of his guilt. When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201; 489 NW2d 748 (1992).

In this case, there was no dispute at trial that a robbery occurred nor that one of the store's clerks was shot during the course of that robbery. The sole issue at trial was the identity of the perpetrator. Identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). On appeal, defendant argues that because the prosecution was unable to produce any direct evidence identifying him as the assailant, his conviction must be reversed. Defendant claims that the evidence was insufficient because none of the three witnesses present during the robbery could, with any certainty, identify defendant as the masked individual who had robbed the store. We disagree. The evidence as a whole, when viewed in the light most favorable to the prosecution, was sufficient to support defendant's convictions.

At trial, Hunter testified that before the robbery on June 19, 1997, defendant had been a frequent customer of the store, coming in nearly every day, and each time wearing the same outfit. Hunter testified that although he did not immediately recognize the similarity, the outfit worn by the armed robber was the same as the outfit he had seen defendant wear on those daily visits to the store. Hunter also stated that the mask worn by the gunman was identical to the one Hunter had on several previous occasions asked defendant to remove while inside the store, and that based upon these factors as well as the height and build of the assailant, Hunter believed defendant to be the perpetrator.

Hunter also identified the perpetrator's weapon as a small-caliber pistol, and upon being shown the gun that had been taken from defendant at the time of his arrest, Hunter stated that it appeared, based on its size and distinctive pearl handle, to be the same gun held by the perpetrator during the robbery.

A store customer who was present during the robbery also provided testimony linking defendant to the crime. According to Sharlene Shelton, she was at Hunter's counter purchasing beer when an individual approximately the same height as defendant entered and robbed the store. Shelton testified that the gun used by the perpetrator to shoot Saqqa closely resembled that taken from defendant at the time of his arrest, and further stated that she thought it was odd that she was not stopped or robbed by the masked assailant, because she left the store immediately after the clerk was shot and before the assailant fled. During her testimony, Shelton revealed that she was acquainted with defendant inasmuch as his sister and her brother had a child together. Although Shelton stated that she did not recognize the perpetrator's voice as that of defendant, her testimony provided further evidence to justify a reasonable trier of fact in concluding that defendant committed the robbery.

The prosecution also offered additional evidence implicating defendant. The manager of a hotel located across the street from the store testified that she saw defendant wearing a hooded sweatshirt and hanging around in the parking lot of the store shortly before the robbery. The manager recalled

seeing defendant running from the back of the store between 12:30 a.m. and 1:15 a.m., shortly before the police and ambulance arrived.

A former employee of the K-Discount store also testified that approximately a week before the robbery defendant had approached her and inquired about security measures in the store. In addition, a resident of the hotel across the street testified that on the night of the robbery, she went to K-Discount to make a purchase and, while entering the store, saw defendant in the back parking lot and recalled that he was wearing a coat similar to the one alleged to have been worn by the perpetrator. After making her purchase, the resident returned to the hotel and, approximately three to four minutes later, was informed by the manager that a robbery had just occurred at K-Discount.

More directly, Aeron Sims, another acquaintance of defendant, testified that after the robbery defendant approached him regarding the purchase of crack cocaine. Sims stated that defendant told Sims that he robbed the store, and that he shot the clerk because he did not open the cash register fast enough. Further, defendant told Sims he received approximately \$400 from the robbery, then paid Sims \$100 for the cocaine. We note that the amount defendant boasted of taking closely coincides with the amount claimed by the store's owner to have been taken in the robbery. At trial, the owner testified that after the robbery he determined that an amount between \$500 and \$600 had been stolen.

The prosecution also presented evidence indicating that defendant had attempted to hide his identity as the perpetrator by inducing others to fraudulently provide him with an alibi. Travonda Hall, an acquaintance of defendant, testified that while she was incarcerated in the Muskegon County jail she received a letter, which she believed was from defendant. Hall stated that she recognized the handwriting on the letter as that of defendant and further indicated that the letter was signed "Trell." Hall refused to read the letter during trial, but stated that, in the letter, defendant asked her to lie for him by alleging that someone else had robbed the store. The letter, admitted into evidence, requested that Hall tell the authorities that she was with defendant outside K-Discount at the time of the robbery and that the two of them saw another unknown individual, wearing a mask and a black winter coat, run past them. On questioning by the prosecutor, Hall admitted that she was not with defendant at the time of the robbery.

The prosecution also presented evidence linking the pistol found on defendant at the time of his arrest with the pistol used in the robbery. An expert in firearms identification testified that the bullet removed from Saqqa's leg had been fired from the same .25-caliber pistol found on defendant at the time of his arrest.

This evidence, and all reasonable inferences drawn therefrom, was sufficient to sustain defendant's convictions of armed robbery, assault, and felony-firearm. See *People v Godbold*, 230 Mich App 508, 522-523; 585 NW2d 13 (1998).

III

Defendant next argues that in effecting his arrest, the police violated his state and federal right to be free from unreasonable seizures. US Const, Am IV; Const 1963, art 1, § 11.¹ We again disagree.

The trial court held a suppression hearing where defendant unsuccessfully argued that the gun found on defendant was discovered as a result of an illegal arrest. On appeal, defendant renews this argument, contending that his arrest without a warrant was unconstitutional because the police did not have probable cause to arrest him.

This Court reviews a trial court's findings of fact in deciding a motion to suppress for clear error, but reviews de novo the trial court's ultimate decision regarding a motion to suppress. *People v Powell*, 235 Mich App 557, 560; ___ NW2d ___ (1999).

A

“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment.” *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). “A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony.” *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998); MCL 764.15(c); MSA 28.874(c). “In reviewing a challenged finding of probable cause, [this Court] must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony.” *Kelly, supra* at 631, citing *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). “The standard is one of objective reasonableness without regard to the underlying intent or motivation of the officers involved.” *People v Holbrook*, 154 Mich App 508, 511; 397 NW2d 832 (1986).

In this case, the record reveals that the officers presented substantial evidence from which it was possible to identify defendant as the perpetrator of an armed robbery and shooting that had occurred ten days before the present incident. The testimony of the detective investigating the matter established that several witnesses had positively identified defendant as either being the perpetrator or being present near the scene immediately before and after the robbery. In addition, the officer had interviewed another individual who said that defendant had boasted of committing the crime. “Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.” *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Given the abundance of information linking defendant to the robbery, we find that the officers had probable cause on which to base defendant’s warrantless arrest.

B

Defendant also appears to argue that because the arresting officer did not himself have personal knowledge of the facts underlying the investigating officer’s request to apprehend defendant, the arrest was constitutionally invalid. This argument lacks merit.

Initially, we note that at the hearing on the motion to suppress, the arresting officer testified that the detective who requested defendant’s arrest had informed him that one of the robbery victims positively identified defendant as the perpetrator. This knowledge alone was likely sufficient for probable cause to arrest defendant on suspicion of the robbery.

That notwithstanding, under the “police team” theory of probable cause, the additional factual knowledge held by the investigating officer may be imputed to the arresting officer. *People v Dixon*, 392 Mich 691, 696-699; 222 NW2d 749 (1974) (collective perceptions of officers working on a case may be combined to satisfy the presence requirement for a misdemeanor arrest); *People v Mackey*, 121 Mich App 748, 753-754; 329 NW2d 476 (1982) (information from a fellow officer may properly be used as the basis of a warrant affidavit); *United States v McManus*, 560 F2d 747, 750 (CA 6, 1977) (probable cause for arrest may rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest).

In this case, the arresting officer was acting on the basis of both his limited personal knowledge of the factual basis underlying probable cause to believe defendant was the armed robbery perpetrator, as well as the facts uncovered by the investigating officer through his initial investigation of the crime. As such, the arrest was properly based upon probable cause and admission of the gun into evidence was not error.

C

Next, defendant argues that he was illegally arrested solely for questioning. “[A]n arrest for questioning [is] an illegal police practice long condemned by the United States Supreme Court and the appellate courts of this state.” *Kelly, supra* at 633. However, based upon our finding that the officers possessed probable cause to effect an arrest of defendant as a suspect in the armed robbery, we find the arrest was proper. See, e.g., *People v Cook*, 153 Mich App 89, 91; 395 NW2d 16 (1986); see also *Kelly, supra* at 633 (“an officer’s characterization of an arrest is not determinative of its legality”).

IV

Defendant’s final argument is that the trial court erred in allowing the prosecution to present rebuttal testimony. Generally, the decision to admit evidence in rebuttal rests within the trial court’s discretion. *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996). However, in this case, defendant’s objection at trial was based upon the prosecutor’s failure to endorse the rebuttal witness, not that such testimony would constitute improper rebuttal. An objection based on one ground is insufficient to preserve an appellate attack based on a different ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Failure to preserve this allegation of error at trial precludes appellate review absent a showing of plain error that affected substantial rights. *People v Grant*, 445 Mich 535, 545-546, 552-553; 520 NW2d 123 (1994); *People v Rice (On Remand)*, 235 Mich App 429, 441-442; 597 NW2d 843 (1999). In light of the nature of the alleged error and the substantial evidence against defendant, we are unpersuaded that such prejudice would result from our refusal to review this issue.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ Defendant presents this same argument in a separate appeal to this Court, Docket No. 211081, on the same facts. Our resolution is identical in both cases.