

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT J. MORTON,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 232232
Wayne Circuit Court
LC No. 00-007838

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction on one count of armed robbery, MCL 750.529, one count of third-degree fleeing and eluding a police officer, MCL 750.479a(3), and two counts of resisting and obstructing a police officer, MCL 750.479. The trial court sentenced defendant to a term of 50 to 100 years' imprisonment for the armed robbery conviction, a term of six to ten years' imprisonment for the fleeing and eluding conviction, and a term of three to ten years' imprisonment for each conviction of resisting and obstructing a police officer. We affirm.

Defendant's conviction arises from an incident that occurred when defendant and Marion Mitchell entered a Livonia store.¹ At trial, defendant testified on his own behalf, admitting that he pulled a knife on the store owner, that they fought, and that defendant hit the owner with both his fist and a hammer. Mitchell also testified on defendant's behalf, admitting that he stole cartons of cigarettes while defendant fought with the store owner.² While Mitchell admitted that he entered the store with an intent to commit a larceny, defendant denied any intent to rob the store and denied actually stealing anything from the store.

¹ Although Mitchell was also charged in this matter, he pleaded guilty to reduced charges before the instant trial began. Defendant called Mitchell as a witness at trial, and Mitchell testified favorably on defendant's behalf.

² Police recovered several garbage bags full of cartons of cigarettes when they arrested Mitchell.

I. Cautionary “Accomplice” Instruction

Defendant first argues that the trial court erred when it issued a cautionary “accomplice” instruction regarding Mitchell’s trial testimony. The trial court read a modified version of CJI2d 5.6, reflecting the fact that Mitchell testified favorably on defendant’s behalf. On appeal, defendant argues that such a cautionary instruction may only be used when an accomplice testifies for the prosecution, not when an accomplice testifies on the defendant’s behalf.

In the present case, defense counsel not only failed to object to the giving of the instruction, but helped modify the language of the standard instruction and ultimately expressed satisfaction with the instruction as given. Therefore, we conclude that this issue has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). One who waives his rights may not seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. *Id.*³

II. Lesser Included Offense Instruction

Defendant next argues the trial court erred when it refused his request to instruct the jury regarding the offense of larceny from a person. This Court reviews a claim of an instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). We review jury instructions in their entirety to determine whether error requiring reversal occurred. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), *aff’d* 460 Mich 55 (1999). Instructions that are somewhat imperfect are acceptable, as long as they fairly present the issues to the jury and sufficiently protect the defendant’s rights. *Id.*

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), our Supreme Court significantly changed the law with regard to jury instructions on lesser included offenses.⁴ The Court ruled that MCL 768.32(1) permits a trial court to instruct a jury only on necessarily included lesser offenses, not cognate lesser offenses. *Cornell, supra* at 359; *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Further, the Court ruled that a trial court may instruct the jury regarding a necessarily included lesser offense only “if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it.” *Cornell, supra* at 357.

In the present case, defendant was charged with armed robbery. Defendant timely requested that the trial court instruct the jury regarding the lesser offenses of unarmed robbery and larceny from a person. The trial court granted defendant’s request regarding the unarmed robbery instruction, but denied the request regarding the larceny from a person instruction. On appeal, defendant challenges the trial court’s refusal to instruct the jury regarding larceny from a person. We conclude that the trial court’s decision was proper.

³ Even if counsel had not waived this issue, we would conclude that the trial court properly instructed the jury regarding Mitchell’s testimony. See *People v Heikkinen*, 250 Mich App 322; 646 NW2d 190 (2002).

⁴ The Court issued its decision in *Cornell* after the parties submitted briefs in the present case.

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force, violence, assault or putting in fear, (3) while unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). The two crimes are distinguished only by the use of a weapon or an article used as a weapon. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). Therefore, unarmed robbery is a necessarily included lesser offense of armed robbery. *Id.*

The elements of larceny from a person are: (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) done with felonious intent, (4) the subject matter was the goods or personal property of another, and (5) the taking was without the consent or against the will of the owner. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992). Armed robbery is distinguished from the crime of larceny by the use of a weapon and force, violence or intimidation. *People v Beach*, 429 Mich 450, 484 n 17; 418 NW2d 861 (1988); *People v Bart (On Remand)*, 220 Mich App 1, 14; 558 NW2d 449 (1996). Thus, "every robbery would necessarily include larceny from the person and every armed robbery would necessarily include both unarmed robbery and larceny from the person as lesser included offenses." *Beach*, *supra* at 484 n 17.

Because larceny from a person is a necessarily included lesser offense of armed robbery, we must decide whether the charged offense of armed robbery required the jury "to find a disputed factual element that is not part of the lesser included offense" of larceny from a person. *Cornell*, *supra* at 357. "[A] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and the greater offenses." *Id.* at 356, quoting *Sansone v United States*, 380 US 343, 349-350; 85 S Ct 1004; 13 L Ed 2d 882 (1965).

Here, defendant testified on his own behalf, admitting that he pulled a knife on the store owner, that they fought, and that defendant hit the owner with both his fist and a hammer. Further, Mitchell testified that defendant fought with the store owner and that he saw defendant with a knife. Based on the record before us, it is clear that neither the use of a weapon nor the use of violence was in dispute. Rather, defendant's trial strategy was to argue that his struggle with the store owner occurred independently of the larceny. Defendant claimed that he did not know of Mitchell's intent to steal cigarettes, and that he did not fight with the store owner in order to assist Mitchell in committing the robbery. Thus, defendant contested the felonious taking of property, an element common to both armed robbery and larceny from a person. A rational view of the undisputed evidence in this case requires us to conclude that the trial court did not err in refusing to give an instruction on larceny from a person. See *Reese*, *supra* at 448.⁵

IV. Ineffective Assistance of Counsel

⁵ Additionally, we note that, under the new standard articulated in *Cornell*, the trial court should not have granted defendant's request to instruct the jury regarding unarmed robbery.

Defendant next argues that his trial counsel rendered ineffective assistance. Because defendant did not move for a new trial or an evidentiary hearing below, our review is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In order to establish prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different. *Id.* at 302-303. Further, a defendant must show that the resultant proceedings were fundamentally unfair or unreliable. *Rodgers, supra* at 714.

Effective assistance is presumed and a defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id.* When claiming ineffective assistance due to counsel's unpreparedness, a defendant is required to show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview witnesses standing alone will not establish inadequate preparation. *Id.* at 642. Instead, it "must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.*

Defendant argues that his trial counsel rendered ineffective assistance because counsel failed to initially move for a private investigator, failed to investigate the case, and failed to interview certain witnesses who might have corroborated defendant's intoxication defense. Defendant has not shown prejudice flowing from these alleged failures. There is no evidence in the record to indicate any potential information from these sources.⁶ Further, although defense counsel admitted that he did not interview Mitchell before trial, we note that Mitchell testified favorably on defendant's behalf. Defendant is not entitled to relief based on the ineffective assistance of counsel.

V. Trial Court's Actions

Defendant argues that the trial court improperly examined witnesses at trial, essentially taking on the role of prosecutor. We disagree. A trial court may interrogate witnesses, but should conduct the trial with the goal of eliciting the truth and attaining justice between the parties. *People v Davis*, 216 Mich App 47, 49; 549 NW2d 1 (1996). It may be appropriate for a trial court to interject itself into the trial, in order to clarify a confused issue or ask a material question. *Id.* at 49-50. In such instances, "the court may have good reason to question a witness in order to enhance the role of the criminal trial as a search for substantive truth." *Id.* at 50.

⁶ In any event, this type of evidence would have been cumulative of Mitchell's testimony regarding defendant's intoxication.

In the present case, a review of the record indicates that the trial court allowed testimony regarding defendant's invocation of his right to remain silent, but refused to allow either party to elicit testimony regarding what defendant said to police *after* invoking his right to remain silent. Further, the trial court questioned the police witness in order to determine whether certain of defendant's statements were made before or after he invoked his right to remain silent. We find no error in the trial court's questioning of the witness at issue, and no error in the trial court's efforts to clarify the testimony.

Finally, defendant argues that the trial court erroneously refused to allow defense counsel to question Mitchell about his alleged plea agreement with the prosecutor. A witness' motivation is always relevant and a defendant is entitled to have the jury consider facts that might have influenced the witness' testimony. *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Therefore, a trial court is required to allow a defendant to elicit testimony that an accomplice was granted immunity in exchange for testimony. *Id.* In the present case, Mitchell did plead guilty to reduced charges. However, it is not evident from the record that the prosecutor offered Mitchell any type of agreement in exchange for favorable testimony. Therefore, the court did not err in refusing to allow the questioning.⁷

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

⁷ Even if the trial court did commit error in this regard, we would find the error harmless. Defendant has not shown that he would have been acquitted, had this evidence been admitted. In fact, Mitchell testified on defendant's behalf, providing evidence to support defendant's intoxication claim. Allowing defense counsel to raise a motive for Mitchell to lie would not have helped defendant.