

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AL JUNIOR PINARD,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2005

No. 250587

Oakland Circuit Court

LC No. 03-189373-FC

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530, as a lesser offense to a charge of armed robbery. He was sentenced to a prison term of 1 ½ to 15 years, and now appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he was denied a fair trial by remarks made by the prosecutor in closing argument regarding whether the complainant, Tarik Thabata, fabricated the incident because he was afraid defendant would act violently toward him in the future. We disagree. Because there was no objection to the prosecutorial remarks at issue, review of those remarks is limited to whether they involved plain error affecting substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003).

To place the remarks in the larger context of the trial, defense counsel described Thabata as a “fence” and as “running a fencing operation out of that pizza place” in his opening statement. The crux of the prosecutor’s argument in the challenged remarks was that, even if Thabata was involved in “fencing” stolen property, his allegation that defendant robbed him was still credible because the fact that a robbery occurred—and, thus, providing Thabata with reason to be scared of defendant—was a plausible explanation for Thabata contacting the police and thereby risking that his alleged involvement with stolen property would come to light. A prosecutor may comment on the credibility of a prosecution witness during closing argument provided that the prosecutor does not vouch for the witness by implying possession of special knowledge of the witness’ truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Further, a prosecutor has “great latitude to argue the evidence and all inferences relating to his theory of the case.” *Id.* at 456. The prosecutor argued that, if Thabata was selling stolen property, he would be unlikely to contact the police and allege a robbery by defendant.

That argument was a proper response to defense counsel's statements. Thus, there was no plain error with regard to the prosecutorial remarks at issue.

Defendant next argues that the trial court erred by failing to sua sponte instruct the jury on the lesser offense of larceny by trick. We disagree. An instruction on a lesser offense is appropriate only if the lesser offense is necessarily included in the charged crime. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). To be a necessarily included lesser offense, all the elements of the lesser offense must be included in the greater offense. *Id.* Larceny by trick is not a necessarily included lesser offense of armed robbery because armed robbery does not contain an element of trick or fraudulent contrivances. *People v Styles*, 61 Mich App 532, 534-535; 233 NW2d 70 (1975). Thus, even without considering the lack of preservation of this issue, there was no error in the trial court's failure to give a lesser offense instruction on larceny by trick.

Defendant next claims there was insufficient evidence to submit the armed robbery charge to the jury and insufficient evidence to support his unarmed robbery conviction because Thabata's testimony was not credible. We disagree. This Court will not decide the credibility of witnesses in assessing the sufficiency of the evidence. Rather, all conflicts in the evidence must be resolved in favor of the prosecution for this purpose. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004).

Finally, defendant claims that his unarmed robbery conviction was against the great weight of the evidence because Thabata's testimony was incredible. In particular, defendant refers to Thabata's testimony that he would have given defendant three hundred dollars if defendant had asked for it. Defendant asserts that this "leads to the conclusion that [Thabata] was not robbed, since that, clearly, would have been unnecessary." We disagree.

Because defendant did not move for a new trial based on the great weight of the evidence below, review of this question is only for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). The test for whether a verdict is against the great weight of the evidence is if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 218-219. In *Musser*, this Court held that defendant failed to show plain error affecting his substantial rights with regard to whether his convictions were against the great weight of the evidence because it could not state "that the complainant's testimony was deprived of all probative value or that the jury could not have believed it, or that the testimony contradicted indisputable physical facts or defied physical realities." *Id.* at 219.

At trial, Thabata clearly testified that defendant robbed him. This case does not involve circumstances in which that testimony was blatantly incredible so as to be deprived of all probative value, unreasonable for the jury to believe, or contrary to indisputable physical facts or realities. In this regard, there is no inconsistency or implausibility in Thabata's statement that he would have willingly given money to defendant (who he apparently considered a friend) and his testimony that he was robbed by defendant.

Further, other evidence could reasonably have been viewed by the jury as providing significant corroboration to Thabata's testimony that he was robbed. In particular, while Alexandria Hill could not positively identify defendant, the fact that she remembered a man

having a discussion with Thabata about a laptop computer that he wanted to sell on the day of the incident combined with the fact that a laptop computer was found in the vehicle with defendant corroborates aspects of Thabata's version of events.<sup>1</sup> Testimony indicating that the exact denominations of currency that Thabata reported to the police as having been taken were found in defendant's vehicle further corroborates Thabata's account of the robbery. Additionally, testimony that the money was found concealed in the odd location of a cup where it was submerged in soda pop reflects an attempt to hide the money which is additional support for a conclusion that it was obtained unlawfully. Moreover, testimony from a police investigator that defendant denied knowing anything about a laptop computer and claimed to have received no money from Thabata may readily be viewed as substantially contradicted by Hill's testimony and the apparent attempt to hide the money in a cup of soda pop. Defendant's conviction was not against the great weight of the evidence, let alone plainly so.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello

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<sup>1</sup> Notably, Hill testified that she no longer worked with Thabata at the time of her testimony because he "had sold the store and then corporate had taken over." Thus, it appears that Hill had no motive to conform her testimony to Thabata's version of events in order to protect her employment.