

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE FAISON,

Defendant-Appellant.

UNPUBLISHED

May 25, 1999

No. 202653

Genesee Circuit Court

LC No. 96-054498 FC

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. The trial court confirmed that defendant was an habitual offender, second offense, MCL 769.10; MSA 28.1082, and sentenced him to ten to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his armed robbery conviction because the prosecutor failed to prove that the chemical device containing tear gas and oleoresin capsicum used by their accomplice to spray two store employees constituted a "dangerous weapon" within the meaning of the armed robbery statute. Specifically, defendant contends that the prosecutor failed to prove that the mixture was capable of causing death or serious injury because the victims did not suffer permanent or long term injuries and only received limited medical treatment. We disagree.

In reviewing a challenge to the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, (3) while the defendant is armed with a dangerous weapon as described in the statute. *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). The third element requires the prosecutor to prove that the defendant was armed with "a dangerous weapon, or any

article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon.” MCL 750.529; MSA 28.797. Thus, to commit armed robbery, the robber must be armed with an article which is, in fact, a dangerous weapon or an article, harmless in itself, that is used or fashioned in a manner to induce the victim’s reasonable belief that the article is a dangerous weapon. *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997), quoting *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983); *People v Barkley*, 151 Mich App 234, 237; 390 NW2d 705 (1986).¹

The statute does not define the term “dangerous weapon.” *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991). However, a dangerous weapon has been described as either (1) a weapon designed to be dangerous and capable of causing death or serious injury (i.e. a loaded gun, knife, bludgeon); or (2) any other object capable of causing death or serious injury that the defendant used as a weapon (i.e. a screwdriver used as a knife). See CJI2d 18.1; *Barkley, supra* at 238. See also CJI2d 11.19; *People v Vaines*, 310 Mich 500, 504-506, 17 NW2d 729 (1945), and *People v Morris*, 8 Mich App 688, 690-692; 155 NW2d 270 (1967).² Whether an object is a dangerous weapon under the circumstances of a particular case is a question for the factfinder. *Barkley, supra* at 238, n 1; *People v McCadney*, 111 Mich App 545, 550; 315 NW2d 175 (1981); see also *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993).

In the present case, the victims testified that they experienced extreme eye pain and burning sensations which required some of them to seek medical treatment. In particular, William Henry testified that he experienced severe pain on his face and left eye and had to be taken to the hospital to have his eyes flushed. He further testified that as a result of the robbery, he needs glasses to read and has blurred vision in his left eye. Henry’s ophthalmologist testified that, although not permanent, Henry had a cornea defect in both eyes that was caused by a chemical injury. In addition, Dorothy Fox, who was also taken to the hospital to have her eyes flushed, testified that the spray permeated her clothing and caused a severe burning sensation that lasted, “several hours, not even until the morning hours until it started going away.” The spray had also penetrated and burned her lungs, making it difficult to breath. Kathleen Sharbo testified that although she did not go to the hospital after the incident, she was unable to wear her contacts for a month because the spray irritated her eyes. On this record, we find that the evidence, when viewed in a light most favorable to the prosecution, was sufficient to permit a reasonable jury to conclude that the tear gas mixture was a “dangerous weapon” under the statute.³

Next, defendant argues that the trial court erred in instructing the jury on accomplice testimony because it omitted a part of the plea agreement entered into between the prosecution and the testifying accomplice, whereby the accomplice’s habitual offender status was dismissed in exchange for his testimony. Defendant contends that he was denied a fair trial because without the complete plea agreement, the jury was unable to properly assess the credibility of the accomplice, who was the only witness who identified defendant as a perpetrator. However, defendant did not object to the allegedly inadequate accomplice instruction at trial. Therefore, we review this issue only to prevent manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

After a thorough review, we find no manifest injustice. Taken as a whole, the standard accomplice instruction sufficiently presented the issue of the accomplice’s credibility to the jury and

adequately protected defendant's rights. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Further, any error in excluding the habitual offender component of the plea agreement was harmless. The accomplice testified at trial regarding the complete plea agreement and specifically mentioned that the prosecutor had also agreed to dismiss the habitual offender charge that had been filed against him. In addition, the instruction provided that one of the factors the jury was to consider in deciding whether to believe the accomplice was whether he was "promised a lighter sentence."

Finally, defendant claims that he was denied the effective assistance of counsel when counsel failed to object to inadmissible hearsay testimony from two officers who read the contents of the chemical spray seized from the accomplice off the label, and because counsel failed to object to the trial court's instruction on accomplice liability. Although defendant moved for a new trial following the verdict, he did not challenge his trial counsel's representation, nor did he move for an evidentiary hearing on the issue.⁴ Therefore, our review of this issue is limited to any errors that are apparent from the record. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). After a thorough review of the record before us, we conclude that defendant has not sustained his burden of proving that counsel's alleged errors were objectively unreasonable or caused him prejudice. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *Torres, supra* at 424.

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

¹ In the present case, the second method of establishing armed robbery, specifically, whether the principal used or fashioned an article to resemble a dangerous weapon, is inapplicable. That method is applicable to factual situations where the objects used are not dangerous weapons, but are apt to lead the victim to reasonably believe them to be dangerous. *Barkley, supra* at 238; *People v McCadney*, 111 Mich App 545, 551; 315 NW2d 175 (1981). See also use note CJI2d 18.1. Accordingly, the relevant inquiry is whether the principal was armed with a "dangerous weapon" at the time he committed the robbery.

² Michigan case law does not provide a definition of "serious injury" for purposes of the armed robbery statute. However, we find the definition of "serious injury" employed for the aggravated assault statute, MCL 750.81a; MSA 28.276(1), instructive. "Serious injury" for purposes of that statute has been defined as "a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body." CJI2d 17.6(4); *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980).

³We note that while there are no Michigan cases directly on point, state and federal courts have held that mace and tear gas are considered dangerous weapons which may inflict serious bodily injury. See e.g., *Pitts v State*, 649 P2d 788, 791 (Okl Cr App, 1982) (while mace is substance designed as a defensive weapon, it may be used in such a manner as to cause great bodily harm; *United States v*

Dukovich, 11 F3d 140, 142-143 (CA 11, 1994) (tear gas sprayed by a bank robbery defendant as the victims were face down on the floor was a “dangerous weapon” justifying sentence enhancement under the United States sentencing guidelines for use of a dangerous weapon where the victims experienced eye pain, severe headaches, and burning sensation which caused some victims to seek medical treatment) and *United States v Robinson*, 20 F3d 270, 278-279 (CA 7, 1994) (mace and tear gas sprayed by a bank robbery defendant were “dangerous weapons” for the purpose of sentence enhancement where the victims experienced “pain which lasted for hours and had some residual effect for days”); see also *United States v Bartolotta*, ___ F3d ___ (CA 8, 1998) (mace constituted “dangerous weapon” justifying sentence enhancement under the United States sentencing guidelines) and *United States v Brown*, 508 F2d 427, 430 (CA 8, 1974) (loaded tear gas gun is “dangerous weapon” under statute which prohibits carrying dangerous weapons on aircraft because it can cause great bodily harm in the form of powder and chemical burns).

⁴ Defendant filed a motion for new trial following the verdict; however, he did not challenge the effectiveness of trial counsel’s representation in that motion. Instead, defendant challenged the verdict as being against the great weight of the evidence, and alleged prosecutorial misconduct, the erroneous admission of evidence, and objections to voir dire.