

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAMAL SYDNEY KITTRELL,

Defendant-Appellant.

UNPUBLISHED

September 26, 2006

No. 260248

Wayne Circuit Court

LC No. 04-008675-01

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant shared a trial with Raphael Cortez Ferguson (“codefendant”), who was charged only with armed robbery. Codefendant was acquitted. Defendant was sentenced to 18 to 50 years’ imprisonment for the armed robbery conviction, two to five years’ imprisonment for the felon in possession of a firearm conviction, and two years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the evidence was insufficient to support the felony-firearm and felon in possession convictions. The focus of defendant’s argument is that there was insufficient evidence to show that an actual firearm, as contemplated by the Legislature for purposes of the firearm convictions at issue, was used during the robbery.¹ We disagree.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support 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 find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses. *Id.* at

¹ “The word ‘firearm,’ except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion[.]” MCL 8.3t.

514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Proving that a defendant possessed a firearm does not require the prosecutor to admit the firearm into evidence. *People v Cedric Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Here, the robbery victim attested that defendant put a “grayish black” handgun to her head; she could see the barrel of the gun. This evidence, when viewed in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to conclude that defendant possessed a firearm as defined by law. See *People v Perry*, 172 Mich App 609, 623; 432 NW2d 377 (1988). Moreover, as will be discussed in greater detail below, the handgun discovered in the car in which defendant was riding was admitted into evidence, and it was sufficiently linked to the robbery for the jury to infer that it was used in the crime. Defendant does not argue that the firearm admitted into evidence was not a firearm meeting the definitional requirements set forth in MCL 8.3t. Reversal is unwarranted.

Defendant next argues that the gun was inadmissible as irrelevant, highly prejudicial, and inflammatory because it was not directly identified as the one used in the robbery, defendant did not own and was not driving the car in which it was discovered, and the circumstances apparently indicated to the prosecution that defendant was not involved with this weapon as he was not charged with possessing the weapon in the vehicle.

The gun was discovered one day after the crime in a car fitting the description and license plate number of the car involved in the robbery. Defendant was sitting in the front passenger seat of the car, and the gun was found in a pocket behind this seat. The gun recovered from the car was a loaded .32 caliber blue steel revolver. When the victim was shown the gun at trial, she attested that she “believ[ed]” that the gun recovered was the one used in the crime; at a minimum, she agreed that it looked similar to the gun that was used. On the day of the robbery, the victim described the gun to police as “greyish black,” and she could see its barrel. Her statement to police on the day of the crime also noted that the gun was a .38 caliber revolver. At trial, however, she testified that she did not specifically describe the gun’s caliber to police because she was not familiar enough with guns to know the caliber. The officer taking her statement testified that either she told him it was a .38 caliber gun or she merely told him it was a small caliber gun and he “put .38 in there.” He also testified that .32 and .38 caliber guns are similar. They are small handguns with cylinders, and most people cannot tell the difference between the two because they have virtually identical appearances.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Any tendency to prove a fact in issue is sufficient. *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995), order mod 450 Mich 1212 (1995). Relevant evidence is generally admissible, but it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” MRE 402; MRE 403; see also *People v Sabin (After Remand)*, 463 Mich 43, 56-58; 614 NW2d 888 (2000).

Here, the gun was linked to the robbery based on its appearance and its presence in the car on the day after the crime. It was certainly relevant to whether the gunman – who was seen

getting into the car just after the robbery – possessed a firearm during the robbery. The fact that a gun similar to the one described by the victim was found in the car associated with the robbery, on the day after the crime, at a time when three men were in the car, including defendant who was positively identified by the two victims as one of the perpetrators, was highly probative of whether defendant was involved in the robbery. Therefore, the gun was relevant, and the probative value of the firearm was not substantially outweighed by the danger of unfair prejudice; there was no *unfair* prejudice. The fact that the prosecutor chose not to charge defendant with unlawfully possessing the gun in the vehicle has no bearing on our inquiry.² There are many reasons a prosecutor may have for not charging a defendant with a particular offense, and defendant does not otherwise explain how the circumstances suggested that defendant was not involved with the weapon. The trial court did not err in admitting the gun.

Defendant next argues that the trial court erred in giving a jury instruction that allegedly precluded the jury from considering witness identifications and descriptions that conflicted with defendant’s actual physical appearance and age. We are required to read jury instructions as a whole rather than extracting the instructions piecemeal to establish error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). “Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.* Jury instructions must include all of the elements of the charged crime and cannot exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *Id.* Instructional errors that directly affect a defendant’s theory of defense can infringe on his or her due process right to present a defense. *Id.* at 326-327.

Under MCL 769.26, no judgment or verdict shall be reversed or new trial granted “on the ground of misdirection of the jury,” unless, after examination of the entire case, “it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.” The defendant must establish that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The trial court gave the jury several instructions pertaining to witness identification of suspects, including instructions substantially identical to each of the five paragraphs of CJI2d 7.8. However, when the court reached the fourth paragraph of CJI2d 7.8, it explicitly referred only to codefendant. The identification instructions were read as follows:

Well, obviously one of the issues in this case is one of identification, identification of the Defendants as the perpetrators who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and the Defendants were the perpetrators.

In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before

² Apparently, defendant is suggesting that he could have been charged with carrying a weapon in a vehicle in contravention of MCL 750.227, the concealed weapons statute.

and how far away the witness was, whether the area was well lighted and the witness's state of mind at the time.

Also think about the circumstances at the time of the identification such as how much time had passed since the crime was committed, how sure the witness was about the identification and the witness's state of mind during the identification.

For the defendant Ferguson you may also consider any times that the witness failed - - or a witness failed to identify the Defendant or made an identification or gave a description that did not agree with her identification of the Defendant during the trial.

You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification because then it may be more reliable. However, you may use the identification testimony alone to convict either Defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the Defendant was the person who committed the crime. [Emphasis added.]

When defendant objected to the court's reference to only codefendant in the fourth paragraph, the court stated that it did not believe that it had done so and added that the record would speak for itself.³

Defendant argues that the court's inclusion of the fourth paragraph with reference only to codefendant suggested that the jury should not consider descriptions of defendant made by both witnesses on the day of the robbery that were inconsistent with defendant's actual appearance and age. He argues that this error requires reversal because it undermined his primary defense of misidentification, which was based on his claim that he merely looked more like the gunman than did the other men in the lineup viewed by both witnesses.

There was indeed evidence of descriptions of defendant given by witnesses that were somewhat inconsistent with the witnesses' trial identifications of defendant as the perpetrator, i.e., inconsistency between the pretrial, crime-scene descriptions and defendant's actual physical characteristics and age.⁴ Therefore, the trial court erred in limiting paragraph four of CJI2d 7.8

³ Unfortunately, this whole issue could have been effectively avoided had the trial court simply checked the record before allowing the jury to deliberate instead of relying on its memory in the face of a specific objection.

⁴ We do note, however, that the two victims always identified defendant as the perpetrator; there was never an inconsistency with respect to identifying defendant as the robber before trial and then at trial. The victims did not select anyone other than defendant during pretrial identification procedures. The language at the end of the fourth paragraph of CJI2d 7.8 that touches on misidentification would only have pertained to codefendant based on the evidence; therefore, there was no error in that respect. Additionally, when considering distinctions related to facial hair, it must be remembered that police testimony regarding defendant's appearance related to
(continued...)

to codefendant. The error, however, did not constitute a miscarriage of justice, and thus reversal is not appropriate.

The jury heard various instructions regarding witness credibility, ability to observe, length of observation, strength of memory, distractions, the reasonableness of testimony when considering other evidence, conflicting testimony, and other factors that necessarily touched on the evaluation of identification testimony. The jurors were informed that they were free to reject or accept a witness' testimony, in whole or in part. The untainted portions of CJI2d 7.8 clearly provided jurors with grounds to acquit defendant if they found that there had been unacceptable identifications of defendant. The court also read the following instruction:

Now, the statements of [the victims] were admitted into evidence for the limited purpose of allowing you to examine those statements to evaluate the extent to which their trial testimony conflicted with those earlier statements and to allow you to evaluate the importance of that conflict if you find there was any.

If you believe that a witness previously made a statement inconsistent with his or her testimony during the trial the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court – the earlier statement is not evidence – that what the witness said earlier is true and while I'm at it, remember I said you can only base your verdict on the evidence.

It is unreasonable to conclude that the jury was under the impression that it could not consider discrepancies in description relative to defendant after having hearing *all* of the instructions and viewing them as a whole. The jury had just sat through an entire trial in which there was a parade of evidence regarding the identifications and descriptions of defendant, which the jury was not told to disregard, followed by closing arguments, accepted without relevant objections, related to any identification discrepancies. Needless to say, the jury was aware, on the basis of the instructions, that the prosecution had to prove beyond a reasonable doubt that defendant committed the crime and that any evidence indicating that it may not have been defendant would bear against a finding of guilt. The misstatement by the trial court was brief and fleeting. And the fact that codefendant was acquitted has little import, given that one of the victims failed to identify codefendant before and at trial, while defendant was positively identified by the two victims before and at trial without fail.

That being said, we fully recognize that it is presumed that the jury followed the incorrect instruction, *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995), but considering the overwhelming evidence of defendant's guilt, we are not prepared to conclude that the instructional error resulted in a miscarriage of justice nor that it is more probable than not that the error was outcome determinative. The evidence of guilt included the positive identifications of defendant made by the two victims before and at trial, both of whom saw defendant up close for some time directly before and during the robbery. Additionally, defendant was subsequently found in a vehicle that was indisputably identified by license plate number and description as the

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his appearance in the evening on the day after the crime was committed.

vehicle in which the perpetrators fled. Moreover, police discovered a weapon in the vehicle, which weapon was located in a pocket directly behind the passenger seat in which defendant was sitting, and which weapon was comparable to the weapon identified by the victim who had the gun pointed at her head. Furthermore, the discrepancies between the descriptions and defendant's actual appearance and age are not that significant. Reversal is simply unwarranted.

Defendant next argues that the trial court erred in refusing to instruct the jury not to infer guilt because defendant was in jail garb. This argument is wholly without merit. Defendant was attired in jail garb on only the first day of trial, and this was because he refused to even try on any of the multiple suits that the court made available to him. Defendant chose to wear his jail greens, and we agree with the trial court's observation that any instruction on the matter at the end of trial would likely have done more harm than good because it would have reminded the jury of defendant's attire back on day one of the five-day trial, eight days previous, at a time when the jury was about to deliberate. Moreover, the trial court instructed the jury regarding the presumption of innocence and the prosecution's heavy evidentiary burden. Defendant's rights were sufficiently protected and not infringed. *Kurr, supra* at 327.

Next, defendant argues that the trial court erred in failing to adjourn the trial or to give a missing witness instruction, CJI2d 5.12, when an endorsed prosecution witness, a police officer, did not appear to testify because of illness. Defendant asserts that the witness would have provided testimony corroborating a critical aspect of his defense.

We find that the witness was properly excused and that there was no lack of due diligence on the part of the prosecutor; therefore, there was no error in failing to give the jury a missing witness instruction. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). With respect to the requested adjournment, we hold that the trial court did not abuse its discretion in denying the request as the testimony from the missing witness, as proffered and described by defendant, was not material. MCR 2.503(C)(2); *People v Jackson*, 467 Mich 272, 276-277; 650 NW2d 665 (2002); *People v Grace*, 258 Mich App 274, 276; 671 NW2d 554 (2003). Assuming that the officer would have testified as contended by defendant, the testimony would have been minimally relevant and would in all likelihood have made no difference as the testimony would still have placed defendant in the vehicle that was seen leaving the crime scene. Reversal is unwarranted.

Finally, we granted defendant's request to submit a pro per standard 4 brief. We have carefully scrutinized and examined the numerous legal arguments raised by defendant in the brief, and we conclude that the arguments are without merit as they lack legal and factual support. The arguments do not warrant reversal.

Affirmed.

/s/ William B. Murphy
/s/ Bill Schuette