

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALTONEY BAKER,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 271084

Wayne Circuit Court

LC No. 06-001879-01

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and sentenced to a term of 180 to 600 months' imprisonment. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his armed robbery conviction. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to 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 proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon described in the statute. *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). Here, defendant challenges the third element, arguing that there was insufficient evidence that he was armed with a dangerous weapon. To satisfy the "armed" element of armed robbery, the prosecutor was required to prove beyond a reasonable doubt that defendant was armed with "a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon." MCL 750.529. There must be objective evidence of the existence of a weapon or article to submit the issue to the jury. *People v Jolly*, 442 Mich 458, 468-469; 502 NW2d 177 (1993); *People v Taylor*, 245 Mich App 293, 297-298; 628 NW2d 55 (2001).

In this case, the evidence showed that defendant repeatedly demanded the victim to "give him the green" while pointing something at her that was in his pocket. According to another

victim, it looked as if defendant was holding a weapon in his hand that was in his pocket. Viewed in a light most favorably to the prosecution, there was sufficient objective evidence that defendant was armed with a weapon or an article fashioned in a manner to lead a person present to reasonably believe the article to be a dangerous weapon. Thus, the evidence was sufficient to support defendant's armed robbery conviction.

Defendant next argues that the prosecutor's conduct requires reversal. We disagree. Because defendant did not object to the prosecutor's argument that defendant threatened the victim, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). The prosecutor's argument was supported by Kennedy's testimony that defendant repeatedly demanded "the green" and acted as though he was pointing something at her from his pocket, and reasonable inferences arising from that evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Therefore, it was not plain error.

Defendant also argues that the prosecutor made an improper civic duty argument. Viewed in context, the prosecutor was commenting on defendant's police statement in which defendant stated that he was high on drugs when he committed the crime. To the extent that the prosecutor's remarks could be interpreted as an improper civic duty argument, i.e., as seeking a conviction to further the fight against drugs, see *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), any prejudice was cured by the trial court's instructions that the attorneys' arguments were not evidence and that the jury was to base its decision solely on the evidence properly admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Thus, reversal is not required.¹

Defendant also argues that offense variable (OV) 9 of the sentencing guidelines was improperly scored at ten points. Because defendant did not object to the scoring of OV 9, we review this unpreserved scoring issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The trial court is required to score ten points for OV 9 if there were between two and nine victims. MCL 777.39(1)(c). Each person who was placed in danger of physical injury or loss of life should be counted as a victim. MCL 777.39(2)(a); *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006). Here, there was evidence that defendant was armed with a dangerous weapon and that three persons were present when defendant committed the robbery. This evidence was sufficient to support a ten-point score for OV 9. See *People v Chesebro*, 206 Mich

¹ Although we are compelled to affirm because of the jury instructions, we note that the prosecutor's words could have been understood to be a suggestion to the jury to convict defendant to save him from his continued abuse of drugs and alcohol. To state the obvious, the only reason defendant should be found guilty is if the evidence convinces the jury beyond a reasonable doubt that he in fact committed the crime. He should not be sent to prison to save himself from the consequences of his drug use. We therefore caution the prosecutor from making such arguments in the future.

App 468, 473; 522 NW2d 677 (1994), and *People v Day*, 169 Mich App 516; 426 NW2d 415 (1988). Thus, there was no plain scoring error.

Finally, defendant argues that he was denied due process because he was subjected to an unduly suggestive on-the-scene identification procedure. Because defendant did not challenge the identification evidence in the trial court, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). In order to challenge an identification on the basis of lack of due process, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.*

Contrary to what defendant argues, this Court has explicitly approved of on-the-scene identifications:

Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability. [*People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997) (citations omitted).]

See also *People v Libbett*, 251 Mich App 353, 361-363; 650 NW2d 407 (2002). There is no basis in the record for concluding that the procedure used here was unduly suggestive. Accordingly, plain error has not been shown.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray