STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEODIS WITCHER,

Defendant-Appellant.

UNPUBLISHED
August 20, 1996

No. 177293
LC No. 94-049735

Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,* JJ.

PER CURIAM.

Defendant, Leodis Witcher, was convicted of bank robbery, MCL 750.531; MSA 28.799 and receiving stolen property over the value of $100, MCL 750.535; MSA 28.803, by a jury in Genesee County Circuit Court. On July 6, 1994, defendant was sentenced to fifteen to thirty years' imprisonment on the bank robbery conviction and two and one-half to five years for the receiving stolen property conviction. The sentences were concurrent to each other. with credit for 218 days served. Defendant appeals of right. We affirm.

On November 30, 1993, defendant and two other bandits entered a branch bank in Flint. A robbery was announced and the two bandits with defendant, who were wearing masks, jumped over the counter into the tellers' stations and scooped up the money from the drawers. The third bandit who was not wearing a mask, and who was identified as defendant by three bank employees, stood and observed the scene and gave orders to the victims and the other bandits.

After rifling the money drawers the bandits ran outside to the getaway car. The bank employees observed the getaway car and the license number. Police were called and the getaway vehicle with its license number was described. The car had been reported to police as stolen. Shortly after the robbery the police found the abandoned getaway car with a flat tire and the engine still running. In the vehicle were items from the robbery, including money covered with red dye and a money bag. All of the bandits were arrested shortly thereafter. Defendant denied his involvement but did admit to

* Circuit judge, sitting on the Court of Appeals by assignment.

being in the bank earlier in the day to transact business. Defendant was tried with the other two suspects, however, a separate jury was impounded for defendant's trial. The other two suspects were tried by a second jury. This jury acquitted one suspect and convicted the other.

At sentencing the court exceeded the sentencing guidelines recommended range in imposing sentence on defendant. The court attached a departure evaluation sheet to the sentence information report. The court wrote:

> Co-defendant Pascoe was given 240 mos. to 480 mos. and the Court feels Pascoe was the follower and defendant Witcher was the leader. Though co-def [sic] Pascoe has a worse criminal record, the Court feels the leader should be sentenced to closer to the follower's sentence than the guidelines provide.

The sentence information report completed by the court indicates that the court calculated the guidelines sentence range at 24 to 72 months and imposed actual sentence length, 180 to 360 months. The minimum sentence exceeds the guidelines by two and one-half times.

I

Defendant claims the sentence imposed violates the principles of proportionality and that the court abused its discretion in its sentence., because the trial court's reason for its departure was based in part on defendant's leadership role in this crime. The trial court had already assigned points under Offense Variable 9, which encompasses a defendant's role as a leader in an offense. Additionally, defendant has no serious criminal history as he has never been convicted of a felony, and this was an ordinary robbery, where no extreme violence of injury occurred.

This Court reviews claims of disproportionate sentences under an abuse of discretion standard where a given sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). But see *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), where a three times twenty year departure was sanctioned.

The record supports a finding that defendant was the leader. Several witnesses testified that defendant appeared to be in charge of the other robbers. It was defendant who announced the robbery and gave commands while the other two men actually robbed the tellers. The approximate value of cash taken from the tellers' drawers was estimated between $6,150 and $7,100.

The court may consider the sentence of a co-defendant participant in a crime insofar as it may reflect culpability, background potential for rehabilitation, need for punishment and any other factors that relate to sentencing. *People v Weathington*, 183 Mich App 360; 454 NW2d 215 (1990). The court justified its sentence of defendant after describing its experience

with victims of bank holdups and the fear and fright that the victims continued to feel several years after the event. The court commented that "someone who shows that little concern for other people is a danger to society, and the Court[sic] needs protection from them".

A sentence may depart from or adhere to the recommended guidelines range as long as it "reflects the seriousness of the matter." *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The court's statements on the record, addressed to the defendant, gave sufficient reason for departing from the guidelines recommended range. *People v Kreger*, 214 Mich App 549 543 NW2d 55 (1995). This Court cannot say that the sentence is disproportionate to the seriousness of the crime and the defendant who committed it. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

II

Defendant next claims that he was denied a fair trial by the prosecutor's questioning to a prosecution witness as to whether she had visited defendant in the county jail. Defendant did not object to this improper question and did not request an instruction to cure the alleged error. Later defense counsel moved for a mistrial on the basis of the improper question. The court properly denied this motion as counsel failed to object timely. The court ruled:

> THE COURT: I agree that he said that. And, I expected an objection. You did not make one. I think for you to sit now and not have raised it earlier is improper. You can't sit on an objection and then raise it later on because it does not give me an opportunity to say anything to the jury whatsoever that could correct it. And, you have to ask it timely, and you did not. So, I overrule the objection and deny the mistrial.

A motion for mistrial is reviewed on appeal for an abuse of discretion and should be granted only for an irregularity that is prejudicial to defendant and impairs a fair trial. *People v Haywood*, 209 Mich App 217;530 NW2d 497 (1995). Defendant must make an affirmative showing of prejudice resulting from an abuse of discretion. *People v Vettese*, 195 Mich App 235; 489 NW2d 514 (1992).

The witness involved was defendant's girlfriend and was called as a prosecution witness. She was questioned about defendant's whereabouts on the day of the crime, about her interview by the police and also about her visits with defendant at the jail. Defendant's counsel argued to the court that he did not raise an objection because he did not want to draw further attention to the witnesses' answers. Defendant's counsel did cross-examine this witness and did not take the opportunity to make his objection at a side bar conference. This Court finds no abuse of discretion in the trial court's denial of a mistrial.

III

Defendant claims his conviction for receiving and concealing stolen property is against the great weight of the evidence. This issue has not been properly preserved for appellate review. Defendant failed to move for a new trial which is a necessary prerequisite. *People v Johnson*, 168 Mich App 581; 425 NW2d 187 (1988). Defendant did not include a "sufficiency" argument in his statement of issues, thereby waiving this argument for purposes of appeal. MCR 7.212(C)(4); *Preston v Dept of Treasury*, 190 Mich App 491,; 476 NW2df 455 (1991). Defendant also failed to cite authority relating to his sufficiency argument. *People v Pintrowski*, 211 Mich App 527; 536 NW3d 293 (1995).

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen B. Miller

I concur in result only

/s/ Richard A. Bandstra