STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANCISCO ORTIZ,

Defendant-Appellant.

UNPUBLISHED
October 1, 1999

No. 204021
Ottawa Circuit Court
LC No. 97-020432 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE CRUZ ALONZO, JR.,

Defendant-Appellant.

No. 204023
Ottawa Circuit Court
LC No. 97-020498 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN JUNIOR GUAJARDO,

Defendant-Appellant.

No. 205775
Ottawa Circuit Court
LC No. 96-020630 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

In these consolidated appeals, defendants Ortiz, Alonzo and Guajardo were each convicted of armed robbery, MCL 750.529; MSA 28.797, carjacking, MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Guajardo was also convicted of kidnapping, MCL 750.349; MSA 28.581. Ortiz and Alonzo were each tried before a single jury, and Guajardo was tried before the trial court. Ortiz was sentenced to three to fifteen years each for the carjacking and armed robbery convictions, and a two-year term for the felony-firearm conviction, all sentences to run consecutively. Alonzo was sentenced to three to ten years each for the carjacking and armed robbery convictions, and a two-year term for the felony-firearm conviction, all sentences to run consecutively. Guajardo was sentenced as a second-felony habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of fifteen to thirty years each for the carjacking, armed robbery, and kidnapping convictions, and a consecutive two-year term for the felony-firearm conviction. All three defendants appeal as of right. We affirm.

Defendants' convictions arise from the carjacking and robbery of Jonathan Van Dyke, a sixteen year old high school student, who was driving a 1989 Mazda pickup truck. Van Dyke's truck slid on some ice into a curb in front of a vacant Handy Andy store, whereupon the passenger door opened and an unidentified male, dressed in dark clothes and a hood over his face, got in the truck. Van Dyke heard a clicking sound, which he believed was a gun. The male told Van Dyke, "I don't want to have to hurt you, so follow that car." Van Dyke saw a Ford Taurus in his rearview mirror, which came around to the front of the truck. Van Dyke believed he would be harmed if he didn't follow the Taurus. Van Dyke followed the Taurus to the rear of the Handy Andy parking lot, to an area by a berm where it was quite dark. He then got out of the truck and started to walk up the berm, away from the scene, but was ordered to stop. He turned around and saw two other men standing between the truck and car. Another man was in his truck, attempting to remove the stereo equipment. One of the men, who had two ski bands covering his face, ordered Van Dyke to give him his wallet, which he did. Van Dyke was then ordered to lay face down in the snow. While he was face down, he heard someone say, "Don't move or I'll pop you," "Give me the gun so I can pop him." He also heard one of the men ask if anybody knew how to drive a stick shift. Another voice said, "We don't have to kill him." As he heard the truck and Taurus drive away he was again told not to move, "or I'll pop you."

Van Dyke recognized one of the men from his driver training class, but did not know his name. That man was later identified as Jonathan Lampani, whose confession led to the arrest of the other three defendants. Lampani ultimately testified for the prosecution pursuant to a plea agreement.

Ortiz testified that he was present while the others committed the charged crimes, but denied any personal involvement, or knowledge ahead of time that the others were planning a robbery, and claimed that he remained in the car the whole time.

Docket No. 204012 - Ortiz

On appeal, defendant Ortiz argues that his right of confrontation was violated by the admission of the unredacted statement of his nontestifying codefendant, Alonzo. *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Defendant did not preserve this issue by objecting to the

admission of Alonzo's statement at trial. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994). The Michigan Supreme Court has recently held that the plain error rule applies to unpreserved claims of constitutional error. *People v Carines*, ___ Mich ___; 597 NW2d 130 (Docket No. 110218, issued July 27, 1999), slip op at 15. To avoid forfeiture under the plain error rule, a defendant must meet three requirements: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious under existing law, 3) and the plain error affected substantial rights, i.e. that the error affected the outcome of the lower court proceedings. *Id*. at 14.

In this case, defendant is unable to meet his burden of persuasion that the alleged error affected the outcome of his trial. *Id.* Here, although Alonzo's statement identified Ortiz as being present at the crime scene, this much was admitted by Ortiz during his testimony at trial. The critical issue at trial concerned what role, if any, Ortiz played in the commission of the crimes. Alonzo's statement was silent on this point. Rather, the evidence of Ortiz' involvement stemmed principally from the testimony of Lampani. We disagree with defendant that, absent Alonzo's statement, the trial would have come down to a credibility contest between Ortiz and Lampani. The record reveals that the victim's explanation of events and description of the perpetrators was "in line" with Lampani's testimony. Moreover, shoe prints were discovered at the crime scene which matched the shoes Ortiz' was wearing at the time of his arrest. Considered in this light, we believe that the prejudicial effect of Alonzo's statement was so insignificant in comparison to the properly admitted evidence of Ortiz' guilt that defendant cannot meet his burden of showing that the alleged erroneous admission of the statement affected the outcome of his trial. *Carines, supra* at 14. Because defendant has not met his burden to show prejudice, he forfeited his claim of error by not timely objecting to admission of the statement. *Id.* at 25.

Next, Ortiz argues that he was denied the effective assistance of counsel because his attorney failed to object to the admission of Alonzo's statement, and failed to move for a mistrial after the prosecutor improperly referred to Alonzo's statement during closing arguments. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant so as to deny him a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish prejudice, the defendant must show that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Because defendant did not move for a new trial or evidentiary hearing on this basis below, appellate review is precluded unless the record contains sufficient detail to support defendant's claims. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Barclay*, *supra* at 672.

We have already explained that the admission of Alonzo's statement did not affect the outcome of defendant's trial. Accordingly, defendant was not prejudiced by counsel's failure to object to the admission of the statement. Additionally, assuming the prosecutor improperly referred to Alonzo's statement during closing arguments, *People v Frazier (After Remand)*, 446 Mich 539, 565; 521 NW2d 291 (1994), defense counsel acted appropriately by immediately lodging an objection to the prosecutor's remarks. The trial court sustained the objection and then gave a second limiting

instruction. Accordingly, defendant was not denied the effective assistance of counsel. Further, under the circumstances, even if the prosecutor's reference to Alonzo's statement was improper, it did not deprive defendant of a fair trial. *People v Bahoda*, 448 Mich 261, 272; 531 NW2d 659 (1995).

Docket No. 204023 - Alonzo

Defendant Alonzo argues that the evidence was insufficient to support his armed robbery conviction. The essential elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed either with a dangerous weapon or with an article used or fashioned in such a way to lead a reasonable person to believe that it was a dangerous weapon. MCL 750.529; MSA 28.797; *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993).

Alonzo first argues that the prosecutor failed to establish the dangerous weapon element of armed robbery. We disagree.

In *Jolly*, *supra* at 468, our Supreme Court explained that "there must be some objective evidence of the existence of a weapon or article before a jury will be permitted to assess the merits of an armed robbery charge." In *Jolly*, the defendant's accomplice told the victim that the defendant would shoot the victim if he did not comply with the order to fill a bag with money. The victim observed a bulge under the defendant's vest in a place where a handgun could conceivably be concealed. The Court found that this constituted sufficient objective evidence of the existence of a weapon to submit the armed robbery charge to the jury. *Id.* at 470.

In this case, Van Dyke's testimony describing the nature of the threats against him and the existence of a clicking sound from an object thought to be a gun, together with Lampani's testimony indicating that he observed Guajardo pull a gun from the waistband of his pants and that Ortiz then got the gun from Guajardo and pointed it down over Van Dyke's back, viewed most favorably to the prosecution, was sufficient to prove the existence of a dangerous weapon or article beyond a reasonable doubt. *People v Banks*, 454 Mich 469, 472; 563 NW2d 200 (1997); *Jolly*, *supra*; *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995). Further, contrary to what Alonzo argues, the prosecution was not required to prove the "operability" of a weapon. See, e.g., *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991); *People v Pierce*, 119 Mich App 780, 781; 327 NW2d 359 (1982).

Alonzo further argues that the prosecutor failed to present sufficient evidence that he used any force or violence or made any threats of force or violence or that he personally used a weapon. However, even if Alonzo did not directly participate in an assault against Van Dyke, he properly could be convicted if he aided and abetted in the commission of the crime. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Testimony was presented that Alonzo had talked about taking the truck stereo equipment beforehand, that Alonzo drove Lampani's car when the group began following Van Dyke's truck, and that it was Alonzo who drove the victim's truck away. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to find that Alonzo aided and abetted in the commission of the crimes. *McMillan*, *supra*; *Turner*, *supra*.

Finally, Alonzo contends that the cumulative length of his sentences violates the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). This issue is without merit. In determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences. Rather, the proper inquiry is whether each sentence is individually proportionate. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998); *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998). Here, consecutive sentences were authorized by MCL 750.227b; MSA 28.424(2) and MCL 750.529a(2); MSA 28.797(a)(2). Alonzo was sentenced at the low end of the sentencing guidelines' recommended minimum sentence range for his armed robbery conviction and, therefore, his armed robbery sentence is presumptively valid. He has not presented any unusual circumstances to overcome the presumptive validity of this sentence. *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). We likewise conclude that Alonzo's identical sentence for carjacking does not violate the principle of proportionality. The trial court did not abuse its sentencing discretion.

Docket No. 205775 - Guajardo

Defendant Guajardo first claims that his double jeopardy rights were violated by his dual convictions for armed robbery and carjacking. However, where the evidence indicated that the victim was deprived of his truck and then later his wallet, defendant's convictions of both carjacking and armed robbery do not violate the constitutional protections against double jeopardy. *People v Parker*, 230 Mich App 337, 341-342; 584 NW2d 336 (1998).

Next, Guajardo claims there was insufficient evidence of asportation to support his kidnapping conviction. The evidence indicated that the victim was confined in his truck by means of force and threats of force and ordered to drive to a different, more secluded location. Such evidence, viewed most favorably to the prosecution, was sufficient to prove the asportation element of kidnapping beyond a reasonable doubt. MCL 750.349; MSA 28.581; *Green*, *supra* at 697.

Next, Guajardo claims that he was denied the effective assistance of counsel because his attorney did not object to the fact that he was in shackles, handcuffs and prison clothing during his trial. We find no merit to this argument. First, it is not apparent from the existing record that defendant was shackled during trial.[1] In any event, defendant was tried before the court, not a jury. The rationale behind freedom from shackling at a jury trial is not applicable at a bench trial. *People v Dunn*, 446 Mich 409, 424-426; 521 NW2d 255 (1994); *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996); *People v Williams*, 173 Mich App 312, 314-315; 433 NW2d 356 (1988).

Guajardo further argues that defense counsel was ineffective because he did not impeach Lampani's testimony. This claim is not supported by the record. Rather, the record indicates that defense counsel effectively impeached Lampani by eliciting evidence of prior inconsistent and contradictory statements. Guajardo was not denied the effective assistance of counsel. *Mitchell*, *supra*; *Pickens*, *supra*.

Finally, we find no merit to Guajardo's claim that he was denied a fair trial because Lampani gave perjured testimony. *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996).

Every self-contradiction by a witness in the heat of a contested trial is not perjury. *People v McCann*, 42 Mich App 47, 49-50; 201 NW2d 345 (1972). Here, the inconsistencies between Lampani's trial testimony and his previous statements or testimony were brought out and explored at trial. It was up to the trial court, as the trier of fact, to evaluate Lampani's credibility in light of these prior statements and explanations.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] The affidavit submitted by defendant on appeal is not part of the original lower court record and, therefore, we decline to consider it. MCR 7.210(A)(1); *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).