S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2005
v	No. 255638 Wayne Circuit Court
ELEES JOSEPH LANTON, Defendant-Appellant.	LC No. 03-013764-02

Before: Gage, P.J., and Whitbeck, C.J., and Saad, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224F, and felony-firearm, MCL 750.227b.[1] Defendant appeals his conviction and sentence, and we affirm.

I. Bindover

Defendant says that the trial court erred by denying his motion to quash because there was insufficient evidence to bind defendant over for trial. As this Court explained in *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000):

> We review for an abuse of discretion a district court's decision to bind over a defendant. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). "The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same

[1] The trial court sentenced defendant to fifteen to thirty years in prison for the armed robbery conviction, forty to sixty months for the felon in possession of a firearm conviction and two years in prison for the felony-firearm conviction.

position as the circuit court when determining whether the district court abused its discretion.

A district court must bindover a defendant "[i]f it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith . . . ." MCL 766.13.

Bindover is proper if the district court finds " 'evidence regarding each element of the crime charged or evidence from which the elements may be inferred . . . .' " *Hudson, supra* at 278, quoting *People v Selwa*, 214 Mich App 451, 457; 543 NW2d 321 (1995). However, the court *must* bind a defendant over if the evidence conflicts or raises a reasonable doubt about the defendant's guilt. *Hudson, supra*, citing *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). The magistrate must also find that the prosecutor has established probable cause, and we will affirm a bindover, if, " 'by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged.' " *Hudson, supra* at 279, quoting *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

At the preliminary examination, the prosecutor presented evidence that on August 24, 2003, at approximately 4:50 a.m., two men entered the Days Inn Motel in Livonia and, after brandishing handguns, stole money from the cash drawer. The desk clerk testified that he believed that defendant was one of the men who committed the robbery.[2] He recalled that defendant was the first person to pull out his weapon and that defendant made the demand for the money. The clerk further stated that, after the perpetrators took the money, defendant demanded several packs of Newport cigarettes and the clerk handed them over.

The elements of armed robbery include: "(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 Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). The prosecutor presented testimony at the preliminary examination that clearly satisfied each element. The desk clerk identified defendant and described his participation in the armed assault and robbery. Any question regarding the strength of the clerk's recollection was necessarily an issue for a jury. Therefore, we find no abuse of discretion in the district court's bindover decision and affirm the circuit court's denial of defendant's motion to quash.

II. Sufficiency of the Evidence

Defendant maintains that, at trial, the prosecutor presented insufficient evidence to prove that he committed the armed robbery.[3] While defendant correctly asserts that, at trial, the desk

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[2] Contrary to defendant's argument on appeal, the record reflects that the motel desk clerk was referring to defendant, not a co-defendant, when he made his in-court identification before the magistrate.

[3] "In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Fennell*, 260

(continued…)

clerk was more equivocal about his identification of defendant, ample evidence nonetheless supported his conviction.

The desk clerk testified that the man who robbed the motel had lighter skin than defendant, but he recalled that the man wore pants decorated with NBA emblems. A photo taken after defendant's arrest shortly after the robbery showed that defendant wore pants decorated with NBA emblems. Other evidence established that, as soon as the perpetrators left the motel with the money and cigarettes, the clerk called the police and described the men involved and their vehicle, a late model Monte Carlo. Shortly thereafter, Livonia police spotted the vehicle, followed it, and the driver of the Monte Carlo attempted to flee by increasing his speed to approximately one hundred miles per hour. The car ultimately crashed into a light pole and three men fled the vehicle on foot. The police captured defendant in very close proximity to the car crash and the police officer who followed the vehicle identified defendant as one of the occupants who ran from the scene of the crash.

Evidence further established that the Monte Carlo was registered to close relatives of defendant's girlfriend and, inside the car, police found a prescription bearing the name of defendant's relative. More importantly, however, the police recovered a handgun in the car, Newport cigarettes, and an envelope of cash from the Days Inn. The amount of money inside the envelope precisely matched the amount of money stolen from the motel and police were able to partially link a thumbprint on the envelope to defendant. This evidence was more than sufficient to convince a rational trier of fact that defendant committed the armed robbery and, therefore, defendant's claim of error is without merit.

III. Prosecutorial Misconduct

Defendant complains that the prosecutor denied him a fair trial because, in his closing argument, he commented that poor lighting may have caused the desk clerk to describe the Monte Carlo as green instead of blue. Because defendant failed to object to the comment, he must prove that the prosecutor's conduct amounted to plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). In claims of plain error, "[w]e will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Id*., quoting *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

We find no error or prejudice. It is well-settled that "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman, supra* at 450. The prosecutor did not err by inferring from the facts that, at 4:50 a.m., the conditions outside would have been dark. Further, while no witness testified about the condition of the parking lot lighting, the prosecutor did not state, as a fact, that the parking lot was poorly lit. He merely offered a possible explanation for why it may have been difficult to see the precise color of the vehicle at that time of night.

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Mich App 261, 270; 677 NW2d 66 (2004).

Further, were we to find any error in the prosecutor's remark, we would nonetheless affirm because defendant has not shown that he suffered any prejudice. Defendant was clearly not innocent of the crime and ample evidence supported his convictions. Moreover, his own attorney described the discrepancy in the color of the car to be a "minute" issue in the case. We agree, particularly where substantial evidence clearly linked defendant to the armed robbery.[4]

IV. Sentencing

Defendant requests resentencing because he claims that the trial court misscored Offense Variable 1. Defendant failed to preserve this claim of error and, therefore, we review it under the plain error doctrine. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Offense Variable 1, MCL 777.31(1)(c), states that fifteen points should be scored if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." The record reflects that defendant pulled out a handgun at the motel and the desk clerk testified that defendant held the gun "on [him]" as defendant's partner took cash out of the drawer. The clerk further testified that, after the robbers drew their guns, he was "mortally scared for [his] life." Based on the evidence in the record, the trial court correctly scored OV-1 at fifteen points.[5]

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

[4] Defendant raises a claim of instructional error. However, we hold that defendant has waived this issue because defense counsel clearly expressed his satisfaction with the instructions as given by the trial court judge. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

[5] Defendant also says that his attorney was ineffective for failing to object to the alleged scoring error. Because the variable was scored correctly, any objection would have been properly rejected by the trial court. An attorney is not ineffective for failing to "raise meritless or futile objections." *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).