STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY D. DOCTOR,

Defendant-Appellant.

UNPUBLISHED
December 1, 1998

No. 202911
Recorder's Court
LC No. 96-002553

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE L. CAVER,

Defendant-Appellant.

No. 202912
Recorder's Court
LC No. 96-002553

Before: White, P.J., and Markman, and Young, Jr., JJ.

PER CURIAM.

Defendants, Danny D. Doctor and Terrance L. Caver, were tried together in a consolidated bench trial and were convicted of two counts of armed robbery each, MCL 750.529; MSA 28.797, attempted carjacking, MCL 750.529a; MSA 28.797(a); MCL 750.92; MSA 28.287, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Doctor was sentenced to ten to twenty years' imprisonment for each of the armed robbery convictions, and Caver was sentenced to eight to twenty years' imprisonment. Both received two to five year sentences for the attempted carjacking convictions, and the mandatory two-year term for the felony-firearm convictions. Their appeals as of right were consolidated. We affirm.

The complainants, Heath Council and Ricco Ghee, testified that while attempting to get into Council's car, they were approached by defendants who were both armed. Doctor confronted Council, and Caver approached Ghee. At gun point, Doctor demanded the keys to Council's car. Council refused to turn over his keys and a physical altercation ensued over the control of Doctor's gun. During this "tussle," both Doctor and Council received gun shot wounds. In the meantime, Caver took Ghee's coat and money. Doctor testified that Council and Ghee were the aggressors and that the dispute arose over drug turf. Although Caver did not testify, he embraced this theory of defense.

First, Doctor contends that the trial court erred when it accepted his waiver of a jury trial without first determining on the record whether he had had an adequate time to consult with his attorney before the waiver. We disagree.

The trial court fully complied with the requirements of MCR 6.402. The court rule does not require that the trial court specifically inquire on the record whether the defendant had an opportunity to fully discuss his waiver with counsel. Instead, it provides that the trial court may only accept a waiver after the defendant has had or waived an arraignment on the information and has been offered an opportunity to consult with a lawyer. Doctor does not argue that he was denied the opportunity to consult with a lawyer, and the record reflects that several opportunities to consult with a lawyer were offered during pretrial proceedings. Further, Doctor and his counsel both signed a Waiver of Trial by Jury form wherein they attested to the fact that Doctor had had an opportunity to consult with counsel and counsel had advised Doctor of his constitutional right to a trial by jury. In addition, the record reflects that Doctor's waiver was knowing and voluntary. We find no merit in Doctor's argument.

Next, both defendants argue that the evidence presented at trial was insufficient to support their convictions. Doctor argues that the prosecution failed to present evidence on each element of the offenses, and that his own testimony was more credible than the complainants'; Caver also contends that the victims' versions of the events lacked credibility. We disagree with both contentions.

In determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution to 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996).

Doctor was convicted of two counts of armed robbery, one count involving Council, the other involving Ghee. The 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 with a dangerous weapon or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon. MCL 750.529; MSA 28.797; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1996). The assault element of armed robbery is satisfied if the defendant committed an unlawful act which placed the victim in reasonable apprehension of receiving an immediate battery. *People v McConnell*, 124 Mich App 672, 678; 335 NW2d 226 (1983). With respect to the charge of armed robbery of Council, Doctor contends that because Council struck Doctor during the

confrontation, Council could not have been in fear of injury, and, therefore, there was insufficient evidence of an assault.

We do not agree. There was testimony that Council took off running when Doctor first pulled the gun, and only returned when Doctor threatened to shoot Ghee if he did not come back. Further, Council hit Doctor when Doctor's hands were in Council's pockets searching for his car keys. There was ample evidence of an armed assault by Doctor.

Doctor also argues that there was no evidence that he was involved in the robbery of Ghee. Doctor seeks to portray the incident as two separate robberies taking place simultaneously. However, there was sufficient evidence to support Doctor's conviction of robbing Ghee on an aiding and abetting theory.

The elements necessary to support a finding that a defendant aided and abetted the commission of a crime are (1) the charged crime was either committed by the defendant or some other person, (2) the defendant gave encouragement or performed acts that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid and encouragement. *People v Beard*, 171 Mich App 538, 541-542; 431 NW2d 232 (1988).

Doctor and Caver approached Council and Ghee together, with each confronting a different man. The two then engaged in their respective assaults and fled together. Doctor threatened to shoot Council's "boy" – Ghee – if Council did not return. Clearly, Doctor and Caver where involved in a joint enterprise. There was sufficient evidence to convict Doctor of two counts of armed robbery; one as a principal and the other as an aider and abettor.

Next, Doctor argues that there was insufficient evidence to convict him of attempted carjacking because there was no evidence that Doctor came near enough to accomplishing the crime, and there was insufficient evidence that Doctor wanted to take the motor vehicle. Doctor argues that the vehicle was never actually stolen or moved and that there was no evidence that Doctor or Caver even entered the vehicle. Doctor also argues that while there was evidence that he demanded keys, there is no evidence that he was demanding the car keys.

The elements of carjacking are (1) the defendant stole or took a motor vehicle from another person; (2) the defendant did so in the presence of that person, a passenger in the motor vehicle, or any other person in lawful possession of the motor vehicle; and, (3) that the defendant did so by force or violence, by threat of force or violence, or by putting another in fear. MCL 750.529a; MSA 28.797(a); CJI2d 18.4a.[1] In this case, because the theft of the car was thwarted, Doctor was charged and convicted of attempted car jacking. The Supreme Court has explained the crime of attempt:

> An attempt consists of: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." 2

> LaFave & Scott, Substantive Criminal Law, § 6.2, p. 18; see also *People v Adams*, 416 Mich 53, 58, n. 5; 330 N W 2d 634 (1982). Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime. *People v Pippin*, 316 Mich 191, 195; 25 NW2d 164 (1946). [*People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993)]

The actions taken by Doctor were sufficient to sustain a conviction of attempted car jacking. In confronting Council and demanding and searching for his keys,[2] Doctor took direct movement toward the commission of the crime.

Finally, Doctor contends that the felony-firearm conviction fails because there was insufficient evidence to support his convictions of the underlying felonies. Because we have concluded to the contrary, we affirm the felony-firearm conviction.

Caver challenges the sufficiency of the evidence solely by attacking the credibility of Council and Ghee. The trial court had an opportunity to assess Doctor's credibility and noted the implausibility of Doctor's version of the events. Evidently the court found Ghee and Council more credible. Assessing the credibility of the testifying witnesses is a matter for the trier of fact, and this Court will not resolve credibility issues anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

In addition to their attacks on the sufficiency of the evidence, both defendants argue that the verdicts were against the great weight of the evidence. However, defendants set forth no argument in support of their positions. However, given the trial court's opportunity to observe the witnesses and evaluate their credibility, we are unable to say that the convictions were against the great weight of the evidence.

Next, Doctor argues that the trial court committed error when, after concluding that the prosecutor failed to exercise due diligence in producing an endorsed res gestae witness, the court did not impose any sanctions for this conduct.[3] We disagree.

The court acknowledged that having found a lack of due diligence, it would have to instruct itself pursuant to CJI2d 5.12,[4] providing for a permissive inference that the missing witness' testimony would be unfavorable to the prosecution's case. We are satisfied that the court understood that it could infer that the store clerk's testimony would support defendants' claim that the complainants were in fact the aggressors, but that the court rejected that inference in light of all the evidence in the case, including evidence that Carver had Ghee's keys. Further, it was questionable whether the missing witness actually saw the confrontation.

Lastly, Doctor argues that his sentences of ten to twenty years for the armed robbery convictions, while within the guidelines' recommended range, are disproportionate. We disagree.

Because Doctor's sentences fall within the guidelines' recommended range of eight to twenty years, his sentences are presumed to be proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Doctor has failed to present unusual circumstances that would overcome the presumption of proportionality. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Doctor's alleged minimal criminal history and claimed lack of culpability are not unusual circumstances overcoming the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Nor is he entitled to a lesser sentence simply because he was injured himself.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.

[1] CJI2d 18.4a was adopted by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions in March, 1995, and was intended to set out the elements of the new offense of carjacking, MCL 750.529a; MSA 28.797(a), effective October 1, 1994.

[2] Contrary to Doctor's representations, there was evidence that he demanded Council's car keys. Council specifically testified: "He [Doctor] said I'm not bullshitting, give me your keys to your car." "And he [Doctor] responded again I'm going to shoot you, give me the keys to your car. And he went into my left pants pocket."

[3] Carver also mentions the failure to produce the store clerk, but does not raise it as a separate issue.

[4] CJI2d 5.12 reads:

> _____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.