STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAUL RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 163842
Recorder's Court
LC No. 92-007287

Before: Bandstra, P.J., and Neff and M.E. Dodge,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. He was sentenced to 180 months to 600 months in prison. Defendant now appeals as of right, and we affirm.

First, defendant contends that the prosecutor improperly bolstered the credibility of witness Gilbert Gutierrez by eliciting testimony regarding his promise to testify truthfully as part of a plea agreement and by referring to that testimony during closing argument. Defendant did not object at trial. Appellate review of allegedly improper remarks is generally precluded absent a timely objection by counsel unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the record, we find no miscarriage of justice.

Had defendant objected to testimony regarding the plea agreement or to the prosecutor's initial reference to Gutierrez' promise to testify truthfully, any prejudice could have been cured by a cautionary instruction. Moreover, the challenged remarks, read in their entirety, were directed at defendant's theory of the case and the evidence submitted at trial. Neither the questioning nor the commentary conveyed a message that the prosecutor had some special knowledge of facts indicating that the witness

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

was testifying truthfully. See, e.g., *People v Bahoda*, 448 Mich 261, 276-282; 531 NW2d 659 (1995); *People v Williams*, 123 Mich App 752, 756; 333 NW2d 577 (1983).

Defendant also argues that the prosecutor bolstered Gutierrez' credibility by eliciting evidence that he agreed to take a polygraph test and by suggesting during closing argument that the test was not administered because the police were able to verify his testimony by other means. This issue is not preserved for appeal because it was not raised in defendant's statement of questions presented. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Further, although defendant objected when the prosecutor referred to the polygraph test during closing argument, he did not specify the same ground for objection that he now asserts on appeal. Even if we concluded that the issue was preserved for appeal, reversal would not be warranted. It was defense counsel who first elicited testimony regarding the polygraph examination. Moreover, this was a bench trial. A judge is presumed to possess an understanding of the law which allows him to understand the difference between admissible or inadmissible evidence or statements of counsel. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Defendant next contends that the trial court failed to secure a proper waiver of his right to a jury trial. We disagree. If anything, the colloquy conducted in the instant case was more thorough than the waiver procedure approved of by this Court in *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 2d 711 (1993).

Defendant argues that he was coerced into waiving his right to a trial by jury because he was brought to court in jail clothing. We disagree. At the hearing on defendant's motion for a new trial, defendant testified that he would not have waived his right to a jury trial had he been dressed in civilian clothes. Defendant's attorney testified that he discussed the waiver issue with defendant before trial was scheduled to commence and admitted that he told his client to waive his right to a jury. However, he denied that his recommendation was the result of the clothing issue. In denying defendant's motion for a new trial, the trial court determined that defendant's testimony was not credible. A trial court may evaluate the credibility of a witness in deciding a motion for new trial. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994).

Next, defendant contends that the waiver was invalid because the trial court failed to inform him of the nature of the right to a jury trial. According to defendant, the trial court should have explained that the verdict of the jury must be unanimous and that defendant had the right to participate in jury selection. We disagree. Although knowledge of the basic attributes of a jury trial is sufficient to satisfy the "knowing and intelligent" requirement, *US v Martin*, 704 F2d 267, 273 (CA 6, 1983), it is not constitutionally mandated, *US v Sammons*, 918 F2d 592, 597 (CA 6, 1990). The type of colloquy suggested by defendant is not required in Michigan. See, e.g., *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992).

Although defendant testified that he was never informed of the basic elements of a jury trial, he has never contended that he would have made a different decision had the judge conducted the

suggested colloquy. See *United States ex rel Williams v DeRobertis*, 715 F2d 1174, 1181 (CA 7, 1983). In fact, defendant testified at the evidentiary hearing that his decision to waive a jury trial was based primarily on the fact that prison officials had lost his clothes. Under these circumstances, defendant's challenge to the waiver procedure is without merit.

Next, defendant argues that he is entitled to a new trial because the prosecutor elicited evidence regarding an unnamed prior conviction. We disagree. Defendant did not object to the challenged exchange, thus precluding appellate review absent a miscarriage of justice. *Stanaway*, *supra*. After reviewing the record, we conclude that there was no miscarriage of justice.

It does not appear that Gutierrez was referring to a prior unnamed conviction. Rather, it is more likely that the witness was attempting to explain that he had contact with defendant until he was jailed for the murder and robbery of Charles King in May of 1992. In fact, when the prosecutor asked Gutierrez how long he had known Kenneth Matsey, the other alleged participant, the following exchange occurred:

> Q (by the prosecutor): *And had you also known Kenneth Matsey for some time before that May 5th* --
>
> A (by Gutierrez): I've known him for about, like, for three months.
>
> Q: And once again, *we're talking about three months before all of this happened*; is that correct?
>
> A: *Yes*. [Emphasis added.]

Based on this exchange, we conclude that the witness was not referring to any unnamed prior conviction when he indicated that defendant was "locked up."

Even if the witness' reference to the fact that defendant was "locked up" was improper, any error was harmless in light of the fact that this was a bench trial. Unlike a jury, a judge is presumed to possess an understanding of the law which allows him to understand the difference between admissible and inadmissible evidence. *Wofford*, *supra*. Accordingly, reversal is not warranted on this basis.

Defendant next argues that he is entitled to a new trial because the prosecutor referred to the fact that defendant was in a gang. This issue is not properly before this Court because defendant failed to raise it in his statement of questions presented. *Hartsuff*, *supra*; *Yarbrough*, *supra*. Further, defendant did not object to testimony elicited by the prosecutor from a witness regarding defendant's gang activity.

Next, defendant contends that the sentencing information report upon which the trial court relied was improperly scored. According to defendant, the trial court erred in scoring one hundred points under offense variable two ("OV 2"). We disagree. A sentencing judge has discretion in determining the number of points to be scored as long as evidence exists to support a particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). Once a defendant has challenged a

factual assertion contained in the PSIR or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987). Because the standard of proof differs from that necessary for a criminal conviction, a fact can be proven for the purpose of sentencing even though it was not established for the purpose of conviction. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Thus, a sentencing court may consider criminal activity for which the defendant was acquitted. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

When scoring OV 2 for a robbery conviction, one hundred points are to be assessed when "death results from the commission of a crime and homicide is not the conviction offense." In the instant case, Michael Hodgson testified that he was in a gang with defendant, Gutierrez, and Kenneth Matsey. Gutierrez testified that he played pool with King, Matsey, and defendant on the night the murder was committed. According to Gutierrez, defendant suggested that the three men rob King of his money and then kill him. Later, the four men drove to Clark Park. Matsey got out of the car and demanded that King give him his money. Matsey hit King in the head with a hammer. As Matsey tried to pull King out of the car, defendant began going through King's pockets. Defendant ran off just as Matsey was about to strike King a second time. When Matsey hit King, the hammer stuck inside his skull. Later, Matsey told Gutierrez that he would kill defendant if Matsey did not get any money from King. King's body was found the next morning. Several days after the incident, defendant told Gutierrez that he got rid of King's wallet.

Based on the testimony of Gutierrez and Hodgson, we conclude that sufficient evidence existed for the trial court to conclude that King's death resulted from the commission of the robbery for purposes of scoring OV 2. We find defendant's reliance on *People v LeMarbe (After Remand)*, 201 Mich App 45, 48-49; 505 NW2d 879 (1993), and *People v Payton*, 186 Mich App 387, 388; 464 NW2d 907 (1990), to be inapposite as both decisions involved OV 3 which contains specific instructions not applicable to OV 2.

We also reject defendant's contention that his sentence is disproportionate. Defendant's 180 to 600 month sentence was within the guidelines range and is presumed to be proportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). In order to overcome the presumption of proportionality, the defendant must present unusual circumstances to the court. *Id.*; *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). A defendant's lack of criminal history and minimum culpability are not mitigating factors that would overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Accordingly, we conclude the sentence is proportionate to the offense and the offender.

Next, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to object when Gutierrez testified that he had known defendant since "before he got locked up." Although defendant filed a motion for a new trial and a *Ginther*[1] hearing, this issue was not raised below. Therefore, this Court's review is limited to errors apparent on the record. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

As noted, there is no indication in the record that Gutierrez was referring to a prior unnamed conviction. It is likely that defense counsel did not object to Gutierrez' testimony because, like this Court, he believed that the witness was referring to when defendant was jailed in the instant case, not for any unnamed prior conviction. It is also possible that defense counsel did not object because he did not want to call attention to the allegedly improper remark. Accordingly, defendant has failed to establish that his trial counsel was ineffective on this basis.

Defendant also contends that his trial counsel was ineffective in failing to object to "other prosecutorial misconduct." This issue is not preserved for appeal because it was not set forth in defendant's statement of the questions presented. *Hartsuff, supra; Yarbrough, supra.* Moreover, defendant does not identify the precise instances of conduct to which he is referring, nor does he make any meaningful argument with regard to this allegation. Therefore, this issue has been abandoned. See *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

Next, defendant contends that his counsel was ineffective in failing to advise him of the possibility of moving for a continuance so that he could obtain civilian clothes. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Stanaway, supra*. To establish prejudice, defendant must show that there was a reasonable probability of a different outcome. *Id.* at 687-688. In the instant case, defendant must prove that he would not have waived his right to a jury trial had his attorney informed him of the possibility of a continuance or adjournment for purposes of obtaining civilian clothes. This requires a showing that the waiver decision was, in fact, the result of defendant's inability to obtain the proper attire. As noted, the trial court found that defendant was not coerced into waiving his right to a jury trial because he was dressed in jail garb. Accordingly, defendant has failed to establish that he would not have waived his right to a jury trial had his attorney informed him of the possibility of a continuance for purposes of obtaining civilian clothes.

In denying defendant's motion for a new trial, the trial court found that the waiver was voluntary and that defendant was lying with regard to the circumstances surrounding the waiver decision. As noted, a trial court may evaluate the credibility of a witness in deciding a motion for new trial. *Mechura, supra*. Because defendant has failed to establish that his decision to waive a jury trial was influenced by the fact that he was dressed in jail garb, his ineffective assistance of counsel claim is without merit.

Finally, defendant argues that his trial counsel was ineffective in failing to explain to him the nature of the right to a jury trial. Defendant alleges that his attorney failed to inform him that the verdict of the jury must be unanimous and that he had the right to participate in jury selection. At the evidentiary hearing, defendant testified that his decision to waive a jury trial was based primarily on the fact that prison officials had lost his clothes. Thus, it does not appear that counsel's alleged failure to inform defendant of the basic elements of a jury trial substantially contributed to the waiver decision. Moreover, defendant has cited no authority establishing that an attorney's failure to advise a client of the nature of a jury trial constitutes ineffective assistance. As noted, knowledge of the basic attributes of a jury trial is not constitutionally required to effectuate a proper waiver. *Sammons, supra.*

We affirm.

/s/ Richard A. Bandstra
/s/ Michael E. Dodge

I concur in the result only.

/s/ Janet T. Neff

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).