

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICIA J. POWELL,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 178829

Oakland Circuit Court

LC No. 94-132166

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit robbery while armed, MCL 750.89; MSA 28.284. Subsequently, she pleaded guilty to being an habitual offender, third offense, MCL 769.11(1)(b); MSA 28.1083(1)(b). The judge sentenced her to four to thirty years' imprisonment. She now appeals from her convictions and sentence as of right. We affirm, but correct the judgment of sentence.

I

Defendant first argues that the admission of an unavailable witness's preliminary examination testimony violated her right to confront and cross-examine the witness and to a fair trial, because she did not personally waive either right. We disagree.

In this case, it was not a question of defendant waiving her right to confrontation. The admission of the witness's preliminary examination testimony did not violate defendant's rights under the Confrontation Clause. It has long been held that the admission of prior court testimony of an unavailable witness does not violate the Confrontation Clause, because the testimony is given under circumstances that closely approximate those that surround the typical trial. *California v Green*, 399 US 149, 165; 90 S Ct 1930, 1938-1939; 26 L Ed 2d 489, 501 (1970). At trial the parties stipulated that the witness was not available. At the preliminary examination, the witness had been under oath. Defendant had been represented by counsel who had every opportunity to and did cross-examine the witness, and the

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

proceedings were conducted before a judicial tribunal that made a record of them. *Id.* Therefore, the introduction of the witness's testimony at trial did not deny defendant her right of confrontation. *People v Frazier*, 16 Mich App 38, 41; 167 NW2d 481 (1969).

II

Next, defendant argues that the court did not properly inform her of the rights she was forfeiting by pleading guilty to the habitual offender charge. Due to defendant's failure to move to withdraw her habitual offender plea in the trial court, the issue is not properly before this Court. *People v Nowicki*, 213 Mich App 383, 385; 539 NW2d 590 (1995); *People v Gaines*, 198 Mich App 130, 131; 497 NW2d 210 (1993). We will not review it.

III

Defendant next argues that the Oakland County prosecutor's policy of filing an habitual offender information against every recidivist results in a failure to exercise discretion on a case-by-case basis and denies defendants in Oakland County due process and equal protection. This Court previously rejected the same argument in *People v Newcomb*, 190 Mich App 424, 431-432; 476 NW2d 749 (1991) and *People v Sunday*, 183 Mich App 504, 506; 445 NW2d 321 (1990). We too find the argument to have no merit.

IV

Defendant also asserts that her four to thirty year sentence represents cruel and unusual punishment and is not proportional. However, because defendant fails to present any argument regarding this allegation of error, the issue is not preserved. *People v Jones (On Rehearing)*, 201 Mich App 449, 457; 506 NW2d 542 (1993). We will not review it.

Although we affirm defendant's convictions and sentence, we find it necessary to correct the judgment of sentence. The judgment of sentence states that defendant was convicted, by plea, of armed robbery. A judgment of sentence is the final record of a defendant's conviction. *People v Williams (After Second Remand)*, 208 Mich App 60, 64; 526 NW2d 614 (1994). However, the trial court found defendant guilty of assault with intent to commit robbery while armed, and found that insufficient evidence had been presented to find defendant guilty of armed robbery. Defendant did not plead guilty to either armed robbery or assault with intent to commit robbery while armed. Therefore, we amend the judgment of sentence to reflect defendant's conviction for assault with intent to commit robbery while armed. MCR 7.216(A)(7).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan