

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS M. SMITH, a/k/a JOHNNY COOL
HUGHES,

Defendant-Appellant.

UNPUBLISHED

June 10, 1997

No. 189649

Recorder's Court

LC No. 95-1139 FC

Before: Saad, P.J., and Hood and McDonald, JJ.

MEMORANDUM.

Following a bench trial at which defendant was acquitted of first-degree murder but convicted of second-degree murder, defendant was sentenced to 21- to 40-years imprisonment, and now appeals by right. He first contends that the trial court erred in scoring 25 points under OV 4 for aggravated physical injury. Where the elderly victim was beaten and kicked and the medical examiner determined that this trauma ultimately was fatal, the trial court's scoring of this guideline variable does not present a cognizable issue for appellate review. *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997).

With respect to defendant's claim of ineffective assistance of trial counsel, there is no record support for a finding that defendant's statement to police after arrest was inadmissible. Absent proof of inadmissibility, defendant has failed to establish the prejudice prerequisite to appellate relief on a claim of ineffective assistance of counsel. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). In the alternative, the record reveals that the trial court did not rely on defendant's statement in finding him guilty. Indeed, defendant's participation in the fatal assault on the victim was uncontested; the only contested issue at trial was whether this homicide was related to a subsequent larceny from eyewitness Watson so as to elevate the crime to felony murder. Hence, even if the statement were inadmissible its admission was harmless error. *People v Jones*, 134 Mich App 371, 373; 350 NW2d 885 (1984). Therefore, on this alternative view defendant would again be unable to establish the prejudice prerequisite to appellate relief on a claim of ineffective assistance of counsel. *People v Pickens, supra*.

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Gary R. McDonald