STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN A. LOVE,

Defendant-Appellant.

UNPUBLISHED
April 21, 2000

No. 205432
Oakland Circuit Court
LC No. 97-151190 FC

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529; MSA 28.797. He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to thirty-five to sixty years' imprisonment and appeals as of right. We affirm.

The victim, Michael Angellotti, was playing pool at a bar when he encountered defendant and co-defendant George Bard. The victim left the bar with the two men after Bard invited the victim to smoke marijuana in a car in the parking lot. Bard sat in the driver's seat, the victim sat in the front passenger seat, and defendant sat in the back seat. Suddenly, the victim was held down by defendant, and a bottle was in the victim's face. The bottle was held by defendant, not Bard. The victim was cut when he pushed the bottle away with his hand, and he managed to open the door to exit the vehicle. The victim was then pushed to the ground and assaulted by both men. The victim's pants were torn in the struggle, and he was robbed of his wallet, "ATM" card, and $22.

Before trial commenced, the trial judge noted that he had "told your attorney that the court would go on the low end of the guidelines." Specifically, the trial court stated that the guidelines provided for a term of sixty to three hundred months' imprisonment for armed robbery. The trial court explained:

> Because you can't come back then and say if there is a conviction and your sentence is something else, and I don't know what the sentence is going to be because I haven't heard the facts totally, but if there is a conviction and you get substantially more within

> the guidelines which are three hundred plus the habitual fourth, you can't complain that Mr. Arnkoff [defense counsel] told you anything different.

Defendant acknowledged that defense counsel had advised him of the potential sentence, but requested a jury trial. A jury trial was held, and defendant was convicted of armed robbery.

Defendant first argues that the trial court violated the law allowing for plea sentencing agreements by initiating a plea agreement and ultimately punished defendant's exercise of his right to a jury trial because the sentence received was seven times the sentence originally proposed. We disagree. Whether the trial court violated plea sentencing agreement procedures presents a question of law. We review questions of law and the application of the law to the facts de novo. *People v Barrerra*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996), quoting *United States v Thomas*, 62 F3d 1332, 1336 (CA 11, 1995). Pursuant to *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), the trial court may not initiate, but at the request of a party, it may provide on the record the length of sentence which appears appropriate on the basis of the information then available. The trial court, however, is not bound by this preliminary evaluation when additional factual development may dictate that a different sentence be imposed. *Id*. In the present case, there is no indication on the record that the trial court initiated a plea sentencing agreement in violation of *Cobbs*. Rather, it appears that the trial court was ensuring that defendant had been apprised of all preliminary discussions and could not later allege ineffective assistance of counsel based on the failure to convey any plea and sentencing discussions. This was particularly important in light of the fact that Bard pleaded guilty to the charge of armed robbery pursuant to a *Cobbs* agreement wherein he would receive a sentence of thirty-six months' imprisonment. Accordingly, defendant's contention that the trial court initiated a plea sentencing agreement contrary to *Cobbs* is not supported by the record.

Additionally, there is no indication in the record that the sentence imposed was a punishment by the trial court for defendant's exercise of his right to a jury trial. At the time of the sentencing discussions, the trial court indicated that it had limited knowledge regarding the facts of the case and the guidelines did not include consideration of the sentence enhancement for habitual fourth. When sentencing did occur, the trial court learned of the predatory nature of the offense and the extensive prior criminal record of defendant, which included a plea to second-degree murder. Accordingly, we cannot conclude that the sentence imposed served as a punishment for defendant's exercise of his right to a jury trial. *Cobbs, supra*.

Defendant next argues that the thirty-five year minimum sentence violates the principle of proportionality. We disagree. Our review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality without reference to the guidelines. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). The proportionality of a sentence is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* In light of defendant's extensive criminal record, that spanned a thirty-year period and included ten felony convictions, coupled with the circumstances surrounding this conviction, we conclude that the sentence was proportionate to the offense and the offender.

Defendant, in propria persona, next argues that he was denied due process when the "warrant" contained falsehoods and, in the absence of the falsehoods, probable cause did not exist. An issue not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because defendant failed to raise this issue before the trial court, it is not preserved for appellate review. However, claims of unpreserved constitutional error are reviewed pursuant to the plain error rule. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under this rule, an error must have occurred, it must be clear or obvious, and the plain error affected substantial rights. *Id.* at 763. However, in the present case, we cannot conclude that an error occurred. Defendant has cited to authority regarding suppression of evidence based upon falsehoods involving search warrants. There is no evidence in the record that investigating officers obtained a search warrant based upon statements that they knew were false. In fact, there is no indication that any search warrant was executed. Accordingly, defendant's claim is without merit.[1]

Defendant, in propria persona, next argues that the magistrate erred in binding defendant over for trial where the elements of armed robbery were not satisfied. The failure to file a motion to quash the indictment and bindover precludes appellate review of this issue. *People v Hoffman*, 205 Mich App 1, 23; 518 NW2d 817 (1994). In any event, defendant asserts that the elements of armed robbery were not established because the victim did not see defendant take his personal property. However, circumstantial evidence and reasonable inferences therefrom are sufficient to support a bindover. *People v Grayer*, 235 Mich App 737, 744 n 3; 599 NW2d 527 (1999). In this case, there was sufficient circumstantial evidence of identification to support the bindover.

Defendant, in propria persona, next argues that he was denied the effective assistance of counsel when his attorney failed to object to a photographic lineup that occurred while he was in custody and failed to object to the break in the chain of evidence involving the victim's torn pants. We disagree. A defendant who claims ineffective assistance of counsel must establish that the performance of counsel fell below an objective standard of reasonableness under prevailing professional norms and a reasonable probability exists that, in the absence of counsel's errors, the outcome would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant failed to move for a *Ginther*[2] hearing below, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). Defendant contends that it was error to allow a photographic lineup to occur when he was in custody. However, there is no evidence contained in the record identifying the time frame of the photographic lineup and the time of defendant's arrest in Macomb County for an unrelated offense. Because there is no record evidence and, in any event, this "error" would not be outcome determinative, defendant's argument is without merit. Furthermore, we conclude that the police officers receipt of the victim's torn jeans five days after the robbery is also not outcome

determinative. In any event, defense counsel thoroughly cross-examined the victim regarding the condition of the jeans at trial.

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck

[1] It is difficult to discern the exact context of defendant's arguments addressing this issue because the arguments are not supported by the record. Defendant takes issue with the credibility of various statements made to the police in light of the testimony which occurred at trial. Yet, defendant contends that the *magistrate* accepted information contained in the police report which was contrary to the victim's testimony at the preliminary examination. There is no indication that the police report was admitted for consideration at the preliminary examination. Furthermore, any inconsistent testimony presented at trial was subject to a credibility assessment by the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). We will not resolve credibility assessments anew. *Id.*

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