

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONAN THOMLISON,

Defendant-Appellant.

UNPUBLISHED

October 16, 2001

No. 223288

Ingham Circuit Court

LC No. 99-074353-FC

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aiding and abetting an unarmed robbery, MCL 750.530, and felonious assault, MCL 750.82(1). The trial court sentenced defendant to concurrent terms of five to fifteen years' imprisonment for the unarmed robbery conviction and two to four years' imprisonment for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in not sua sponte instructing the jury on CJI2d 7.5 – defendant's claim of right theory. Defendant failed to preserve this issue for appeal because he did not specifically request this instruction. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Therefore, we review this issue for plain error affecting defendant's substantial rights and will not reverse unless defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

The evidence did not support defendant's claim of right theory because none of the testimony established that defendant believed that the pager, or other various items of property, taken from the victim was his specific property, or that defendant was asserting a legal right when taking it back – as does a creditor when a debtor defaults on a loan under a mistaken belief. *People v McCann*, 42 Mich App 47, 48-49; 201 NW2d 345 (1972). Further, a claim of right defense cannot be based on an illegal debt. *People v Karasek*, 63 Mich App 706, 713-714; 234 NW2d 761 (1975). Defendant's knowledge that the alleged debt stemmed from an illegal drug transaction negates the existence of good faith on the part of his codefendant, who initiated the assault on the victim and took her pager, watch, and wallet. *Id.* at 713. Furthermore, defendant

claimed that he was owed money, not any specific item of personal property. Accordingly, the trial court did not err by not sua sponte giving CJI2d 7.5.

In the alternative, defendant argues that he was denied effective assistance of counsel because his attorney failed to request CJI2d 7.5. We disagree. Whether a defendant was denied effective assistance of counsel is a constitutional question, which this Court reviews de novo. *People v Pickens*, 446 Mich 298, 359; 521 NW2d 797 (1994) (Levin, J. concurring in part, dissenting in part); *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000). Our review is limited to the existing record because defendant failed to move for a new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a claim for ineffective assistance of counsel, a defendant must show two things: first, that his attorney's performance was deficient under an objective standard of reasonableness, and second, that there is a reasonable probability that, but for the deficiency, the jury would not have found the defendant guilty. *Id.* at 424. An attorney is presumed to provide effective assistance of counsel; therefore, a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). Here, the evidence did not support a claim of right instruction. Counsel was not required to raise a futile argument. *Snider, supra* at 425. Therefore, defendant's attorney's performance was not deficient.

Defendant next argues that he is entitled to be resentenced because the trial court erroneously scored OV 13 and OV 17 when determining his guidelines' range. We agree that the court erred; however, the error was harmless because it did not change the recommended guidelines' range.¹ "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). A defendant is entitled to have his sentence guidelines range correctly calculated so that the court may impose an appropriate sentence in light of that range. *People v Hannan (After Remand)*, 200 Mich App 123, 127; 504 NW2d 189 (1993). However, if an error occurs that does not affect the overall offense variable score that would change the applicable guidelines' range, then the error is harmless beyond a reasonable doubt. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Here, even if the trial court scored OV 13 and OV 17 as zero, the guidelines' range would have been exactly the same – offense severity level IV. Therefore, regardless of any scoring error, defendant would still have been sentenced to the minimum terms of five years for his unarmed robbery conviction and two years for his felonious assault conviction. Defendant additionally asserts that the trial court acted under a misconception of the law regarding its discretion in deviating from the sentencing guidelines. This argument is without merit because the trial court expressly recognized that it could deviate from the recommended guidelines' range but chose not to because there were no facts to support a departure.

¹ Defendant's sentence is controlled by the judicial guidelines in place before the effective date of the legislative guidelines because the charged offense occurred on December 16, 1998. See MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Defendant next contends that the trial court should have stricken certain information from his presentence investigation report (PSIR), namely a citation to the Holmes Youthful Trainee Act (YTA), because the court indicated that it did not consider it in imposing defendant's sentence. When a sentencing court states that it will disregard information in the PSIR challenged as inaccurate, a defendant is entitled to have the information stricken from the report before the report is sent to the Department of Corrections. MCL 771.14(6); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). In this case, defendant did not challenge the accuracy of the prior juvenile conviction and never requested the court to strike the information from defendant's PSIR. Therefore, defendant has waived this argument for appeal. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996), citing *People v Rodriquez*, 192 Mich App 1, 5; 480 NW2d 287 (1991).

Finally, defendant argues that his sentences of five to fifteen years' imprisonment for his unarmed robbery conviction and two to four years' imprisonment for his felonious assault conviction are disproportionate. We disagree. This Court reviews sentencing issues for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999).

The policy of this state favors individualized sentencing for every defendant. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). The trial court's discretion in imposing a sentence is broad, and the court is permitted to tailor each sentence to the circumstances of the case. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). In determining an appropriate sentence for a defendant, the trial court is permitted to consider many factors. It is permissible, for example, for a court to consider the severity of the crime committed, and the nature of the crime and surrounding circumstances of the criminal behavior. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). "[T]he 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter." *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997); *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Sentences that fall within the guidelines' range are presumed proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In this case, the sentencing guidelines' calculation resulted in a suggested minimum sentence of three to six years for defendant's unarmed robbery conviction and for his felonious assault conviction. Defendant was sentenced to five to fifteen years' imprisonment for his unarmed robbery charge and two to four years' imprisonment for his felonious assault charge. The statutory maximum sentence for unarmed robbery is fifteen years, MCL 750.530, while the statutory maximum sentence for felonious assault is four years, MCL. 750.82(1). Therefore, defendant's sentence is presumptively proportionate because his sentences are within the guidelines' range and the statutorily mandated maximum ranges. We find no factual support for defendant's claim that the sentences are disproportionate.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald