STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREI LAMAR WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 11, 2002

No. 224727
Saginaw Circuit Court
LC No. 99-017068-FC

Before: Markey, P.J., and Cavanagh and R.P. Griffin*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to a term of thirty-nine to sixty years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals by right. We affirm.

Defendant challenges both the weight and sufficiency of the evidence against him. We decline to address defendant's great weight argument because defendant did not preserve this issue in an appropriate motion for a new trial. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987). Although the sufficiency issue may be addressed on appeal, *id.*, we find the evidence sufficient. Although many witnesses gave conflicting testimony and some recanted prior identifications of another person as the shooter, four witnesses at trial identified defendant as the shooter. Three of those witnesses were not impeached by prior inconsistent identifications. Defendant's fingerprint was found on a bullet box containing bullets consistent with those used in the shooting. Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as the shooter beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Defendant next argues the prosecutor exercised peremptory challenges with a discriminatory intent to exclude African-Americans from the jury, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree. One African-American remained on the jury, and the prosecutor provided race-neutral explanations for excluding two other jurors. The trial court did not abuse its discretion in concluding that the

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

prosecutor exercised peremptory challenges in a non-discriminatory manner. *Id.* at 97-98; *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

We also reject defendant's challenge to the search of his jail cell, which led to the seizure of impeachment evidence that was used at trial. A prisoner has no legitimate expectation of privacy in a jail cell. *Hudson v Palmer*, 468 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984). This rule applies to pre-trial detainees. *People v Phillips*, 219 Mich App 159, 162; 555 NW2d 742 (1996). Although it is factually similar, we disagree that *United States v Cohen*, 796 F2d 20 (CA 2, 1986), applies to invalidate the search. The Supreme Court in *Hudson* cited prison security as a basis for its conclusion that a prisoner has no legitimate expectation of privacy in his cell and, therefore, that a Fourth Amendment analysis does not apply. *Cohen* used prison security as a test of the *reasonableness* of a search – in other words, the court in *Cohen* assumed that some level of Fourth Amendment analysis should be applied. We do not read *Hudson* as permitting such an analysis. Indeed, the Court in *Hudson* refused to even consider whether a prison guard searched the cell and seized materials to harass the prisoner, stating that it would not inquire into the officer's motives because there was no Fourth Amendment protection. *Hudson*, *supra* at 529-530.[1] Accordingly, because defendant has no Fourth Amendment protection to the contents of his jail cell, the seizure of those items did not violate defendant's Fourth Amendment rights.

Defendant also argues that the search of his jail cell constituted prosecutorial misconduct denying him a fair trial. Because we have found the search to be legal, we cannot characterize it as "misconduct."

Defendant next argues that he was denied a fair trial by references to both gang activity and the use of a car in exchange for drugs. Defendant did not timely object to the gang references at trial. In fact, he actively cross-examined witnesses about the prosecutor's allegations that he was a member of a gang and that the dispute that gave rise to the killing had gang roots. To the extent that defendant affirmatively developed the challenged testimony, he has waived any error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Further, to the extent that the issue is merely considered unpreserved for failure to object, appellate relief is not warranted because defendant has not demonstrated that the challenged testimony constituted plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Finally, the court did not abuse its discretion when it denied defendant's subsequent motion for a mistrial in connection with this issue. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Next, defendant challenges the scoring of the legislative sentencing guidelines and the proportionality of his sentence. The instructions to offense variable 3 state that the court should assign the highest number of points. Obviously, a death is a personal injury, but 100 points

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[1] Although defendant also refers to the Sixth Amendment in his statement of the issue, he does not cite that amendment, or cases decided under it, in the text of his brief. Any claim of error under the Sixth Amendment is therefore abandoned. See *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; __ NW2d __ (2002) (an appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue).

could not be assessed because of MCL 777.33(2)(b), which instructs that the court should not assess 100 points in homicide cases. As a result, the next highest level, 25 points, was the appropriate score for offense variable 3.[2]

Finally, we reject defendant's challenge to the proportionality of his sentence. Defendant was sentenced within the recommended range of the sentencing guidelines, and he has not established a scoring error or shown that his sentence was based on inaccurate information. Accordingly, the sentence must be upheld. MCL 769.34(10), *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin

[2] We note that MCL 777.33 was amended in 2000. We offer no opinion on its effect.