STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2004
v	No. 241172 Kalamazoo Circuit Court
EVELYN RICHARDSON, Defendant-Appellant.	LC No. 01-001664-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals by right her convictions for armed robbery, MCL 750.227, and carrying a concealed weapon, MCL 750.529, after a bench trial before Kalamazoo Circuit Judge William Schma. We find no basis to conclude that Judge Schma abused his discretion by denying defendant's motion for new trial predicated on defendant's claim of ineffective assistance of counsel; nor did the trial court abuse its discretion by declining to conduct a more extensive hearing on this issue. Defendant also argues Judge Schma abused his discretion by sentencing her to 51 months to 30 years in prison for her armed robbery conviction. But defendant asserts no claim that the sentence guidelines were inaccurately scored. Because defendant's sentence was within the recommended minimum guidelines range, MCL 769.34(10) precludes this Court from granting relief. So, we affirm defendant's convictions and sentences.

Defendant first argues that the trial court abused its discretion denying her motion for new trial because she was denied effective assistance of counsel at trial. Defendant also argues that the trial court abused its discretion by not entertaining further proofs on the issue at a *Ginther*[1] hearing. We find no abuse of discretion by the trial court.

A trial court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). We review the trial court's decision denying a motion for a new trial for an

[1] *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973) held that when a defendant "asserts that his assigned lawyer is not adequate or diligent . . . the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion."

abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court abuses its discretion when its decision is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *People v Yost*, 468 Mich 122, 127; 659 NW2d 604 (2003), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Here, defendant claimed that trial counsel's performance was deficient because counsel neglected to raise intoxication as a defense. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, which in turn denied defendant a fair trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* at 139. We review the trial court's factual findings for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

At trial, Angela Gettys testified that defendant was a regular customer of the gas station convenience store where she worked. According to Gettys, defendant walked in, went to the back of the store, grabbed a bottle of water from the cooler and came up to the front of the store. Gettys was standing behind her register when defendant came to the counter and set the bottle of water down. Gettys testified she reached for the bottle of water to ring it up, and "the next thing I knew a knife was in my face." Defendant had a large kitchen knife and demanded that Gettys give her all of the twenties from the drawer of the cash register. Although scared, Gettys, who had no $20 bills, told defendant to "get the hell out of the store." Defendant then stuck the knife in the cash register, attempting to open it. Defendant, unable to get the register open, grabbed a container filled with about five or six dollars in change for charitable donations from the counter. After Gettys again told defendant to "get the hell out of the store," defendant left with the change container and the bottle of water. Gettys locked the store and called "911."

Portage police officer Matthew Barkley testified that he responded to Gettys' 911 call. Barkley found the butcher knife used to commit the crime next to a driveway of the gas station. He then went to defendant's apartment, and after getting permission to search and defendant's telling where, he found the stolen water bottle hidden behind the couch and the donation container on the floor next to defendant's bed.

Officer Melia Demeester transported defendant from her apartment to the police station. Demeester spoke with defendant who waived her *Miranda*[2] rights. Defendant confessed to

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Demeester. Defendant also told Demeester that she had a drinking problem, and that she drank to numb the pain because she had just lost a child to child protective services. Demeester acknowledged that defendant was crying when she found her apartment and that defendant initially denied involvement in the crime. Demeester also testified she smelled alcohol on defendant when defendant was in the police car, and that defendant had informed her that she had attempted suicide two days before.

Defendant testified at trial that shortly before the crime, she had lost a child [to protective services]. Defendant also testified that she had just been released from a hospital for depression. Defendant further testified that on the day of the incident, she was taking Antabuse, three kinds of antidepressants, and was drinking alcohol, even though the alcohol mixed with the other drugs made her sick. She acknowledged committing the crime, but claimed that her memory was "scattered."

Based upon this evidence, the trial court convicted defendant of armed robbery, MCL 750.227, and carrying a concealed weapon, MCL 750.529. "'The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 569, 540 NW2d 728 (1995). Further, armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). As a specific intent crime, intoxication may serve as a defense to the charge, but only "if the degree of intoxication is so great as to render the accused incapable of entertaining the intent." *Id*., citing *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984).

In *Savoie* our Supreme Court overruled *People v Crittle*, 390 Mich 367; 212 NW2d 196 (1973), which had disproved the "capacity standard" for an intoxication defense. *Savoie, supra* at 130, 134. Rather, the *Savoie* Court adopted the intoxication standard stated in *Roberts v People*, 19 Mich 401 (1870) by Justice Christiancy:

> In determining the question whether the assault was committed with the intent charged, it was therefore material to inquire whether the defendant's mental faculties were so far overcome by the effect of intoxication, as to render him *incapable of entertaining the intent*. And for this purpose, it was the right and duty of the jury -- as upon the question of intent of which this forms a part -- to take into consideration the nature and circumstances of the assault, the actions, conduct and demeanor of the defendant, and his declaration before, at the time, and after the assault; and especially to consider the nature of the intent, and what degree of *mental capacity* was necessary to enable him to entertain the simple intent to kill, under the circumstances of this case -- or, which is the same thing, how far the mental faculties must be obscured by intoxication to render him *incapable of entertaining that particular intent*. [*Savoie, supra* at 133, quoting *Roberts, supra* at 418 (Emphasis supplied by the *Savoie* Court).]

In the present case, the trial court was fully cognizant of the elements of armed robbery. Indeed, before trial Judge Schma had rejected defendant's effort to plead guilty pursuant to a

plea bargain. In her plea colloquy, defendant indicated she had been drinking, was on medication, had just been released from the hospital, and claimed she didn't know if she acted intentionally. Because defendant would not acknowledge the specific intent necessary for the offense, Judge Schma refused to accept the plea. The bench trial followed defendant's waiver of jury trial.

In making its findings of fact, the trial court analyzed each element of the crimes charged and paid particularly attention to whether the evidence proved defendant possessed the specific intent necessary for the crimes. The trial court noted a number of actions that convinced it that defendant acted deliberately and that she possessed the necessary specific intent. Judge Schma noted that defendant: (1) carried a very large knife all the way to the gas station; (2) demanded "twenties," i.e., defendant knew what she wanted; (3) acted knowingly and deliberately in attempting to pry open the cash register with the knife, and grabbed the jar of money before she left the store; (4) when interviewed by police, approximately 20 minutes after the crime, defendant was aware enough of her circumstances to deny any involvement with the crime, hid the stolen water and money but then switch her story as she informed police of the location of the stolen items; and (5) she was aware enough to inform the police officer of her alcohol problem. The trial court specifically found that defendant's professed memory loss was "selective," and that the evidence showed beyond a reasonable doubt that defendant acted knowingly at the time of the offense.

Defendant's appellate counsel timely moved for a new trial or a *Ginther* hearing.[3] Defendant argued she had been denied a substantial defense when trial counsel failed to present additional evidence of intoxication or effectively argue that defense. Defendant pointed to two items of evidence not admitted at trial. The first was a competency report by Dr. Joe Galdi, a forensic psychiatrist, who wrote:

> [Defendant's] actions at the time of the alleged offense reveal a high likelihood that they were directly influenced by an alcohol influenced mental state. Review of the evidence pertaining to her mental state at the time of the alleged offense, in fact—whether it was deleteriously affected by alcohol withdrawal or alcohol intoxication, i.e., craving or disinhibition of control—suggests that the alleged offense was primarily influenced by previous alcohol ingestion.

Second, appellate counsel noted that defendant's medical records indicated she had a .242 blood-alcohol level when she voluntarily admitted herself to a hospital two days before the offense.

The trial court rejected defendant's motion for new trial and her request for a *Ginther* hearing. Regarding defendant's claim to have been denied a substantial defense by trial counsel, Judge Schma reasoned:

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[3] See n 1, *supra*.

> [O]n the issue of intoxication, the reason that I conclude that the presentation of this defense - - even if pursued - - would not have resulted - - that there's not a substantial likelihood that it would have resulted in a different outcome; and, therefore, there's no showing of prejudice such as to warrant a new trial or a *Ginther* hearing. I conclude that based on the analysis of the defendant's behavior that the Court provided in its finding [sic] of fact and conclusions of law when it delivered its opinion. The question of alcohol was - - raised, and the Court addressed her state of mind in its findings.

The trial court also found that trial counsel did not err by not calling Dr. Galdi because his report made no finding as to defendant's specific intent or state of mind at the time of the offense. Rather, the report indicated that defendant's actions might have been influenced by alcohol, either intoxication or desire for money to obtain alcohol, but that did not rise to the level of establishing an intoxication defense. The trial court concluded:

> There's [no] showing of prejudice and that there's no showing that there would have been a different result had this [additional evidence] been presented . . . .

To establish her claim of ineffective assistance of counsel defendant must show both deficient performance by counsel and that she was prejudiced. *Riley, supra* at 130. The latter requires defendant to demonstrate a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different.[4] *Toma, supra* at 302-303. An otherwise valid conviction may not be reversed on a claim of ineffective assistance if the defendant cannot establish the alleged errors resulted in prejudice. *People v Pickens*, 446 Mich 298, 314, 327; 521 NW2d 797 (1994). In applying the two-pronged test for ineffective assistance, the Supreme Court instructs lower courts that,

> there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result. [*Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

[4] Although the trial court in rendering its ruling from the bench referred at one point to a "substantial likelihood" of a different outcome, we conclude in the context of the entire record that the trial court was aware of the issues in the case and correctly applied the proper legal standard. See *People v Rushlow*, 179 Mich App 172, 177; 445 NW2d 222 (1989).

We find no clear error in the trial court's factual finding that even had defense counsel presented the additional evidence proffered at her motion for new trial or argued the defense of intoxication, it would not have affected the outcome of the trial. *LeBlanc, supra* at 579. It follows that the trial court did not err by concluding defendant could not establish her claim of ineffective assistance counsel because she could not establish that but for counsel's alleged error a reasonable probability existed that the out come would have been different. *Toma, supra* at 302-303; *Pickens, supra* at 314, 327. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for new trial. MCR 6.431(B); *Yost, supra* at 127. The trial court also did not abuse its discretion by declining to conduct further hearings because resolution of disputed facts was unnecessary for the court to rule on defendant's motion. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). Claims of ineffective assistance need not require a burdensome hearing in every case. *Strickland, supra* at 697.

Next, defendant argues that the trial court abused its discretion by failing to sentence below the appropriate sentencing guidelines range when sentencing defendant for her armed robbery conviction. We disagree.

Defendant's sentencing guidelines range was 51 months to 85 months. The trial court sentenced defendant to a minimum of 51 months, which is within and at the low end of the appropriate sentence guidelines recommended range. Defendant does not allege that the trial court used inaccurate information in imposing sentence, nor does she claim that guidelines scoring errors occurred. The mandate of MCL 769.34(10) is clear and unambiguous: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."

This Court has consistently held that absent an error in the scoring of the guidelines we must affirm a sentence that is within the guidelines minimum recommended range. *People v McLaughlin*, 258 Mich App 635, 669-670; ___ NW2d ___ (2003); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Although the Legislature has accorded trial courts the discretion to depart from the appropriate sentence guidelines recommended range upon finding a substantial and compelling reason to do so, MCL 769.34(3), the statutory scheme makes clear that this Court's ability to review sentences that are within the appropriate guidelines range and based on accurate information has been severely restricted. *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003). Only where the trial court in fact departs from the guidelines based on a finding of a substantial and compelling reason to do so may this Court review the trial court's fact finding in that regard and the exercise of the trial court's discretion. *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003). Here, because the sentence imposed on defendant is within the recommended guidelines range, and defendant does not challenge the accuracy of the scoring or the information relied upon by the trial court, this Court is obligated to affirm the sentence.

We affirm defendant's convictions and sentences.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot