STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2005
v	No. 257196 Ingham Circuit Court
CALEB MER-ASHA LEWIS, Defendant-Appellant.	LC No. 04-000074-FC

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, two counts of assault with intent to rob while armed, MCL 750.89, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 225 to 600 months for the two armed robbery convictions and the two assault with intent to rob while armed convictions. The court also imposed a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in allowing the prosecution to question Detective John Draganchuk about a statement made by Troy Jackson admitting to being one of the robbers and stating that defendant was his accomplice. Defendant argues that his Sixth Amendment right to confront and cross-examine the witness was violated. Defendant did not object on this ground below, so it is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We agree that the trial court erred in allowing the testimony, but we also conclude that it was harmless in light of the overwhelming other evidence.

The Sixth Amendment prohibits testimonial statements from a witness who did not testify at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Statements elicited under police interrogations, as was the statement here, are testimonial. *Id*. at 52. Troy did not testify at trial and was not subject to cross-examination. Therefore, the trial court plainly erred in admitting his testimonial statements into evidence through Draganchuk. However, plain error generally does not warrant reversal unless it prejudiced defendant. *Carines*, *supra* at 763. Admission of a testimonial statement from a

witness in violation of the Confrontation Clause is not the kind of structural error that automatically requires reversal. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Instead, we examine the entire record "to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *Id*. at 348. We find that it is.

There were numerous eyewitnesses to the robbery. One victim identified defendant as the man who struck her in the face. Defendant's girlfriend at the time of the robbery testified that defendant and Troy met her together on the day of the robbery, and she drove them to Target. There was testimony that defendant was the same individual in two security camera videotapes: the recording of the robbery and a recording made at Target approximately half an hour later, where defendant used one of the credit cards that had been taken from the robbery victims. Defendant admitted that the Target recording showed him removing from his waistband a gun that matched the gun in the robbery recording and the gun later recovered by police from defendant's girlfriend's house. Moreover, defendant testified that Troy essentially admitted to the robbery when he told defendant that the credit cards had been stolen. As a result, any supposed harm that his accomplice's admissions had on defendant was negated by defendant's testimony. Thus, after a careful review of the record, the error was harmless beyond a reasonable doubt, and defendant is not entitled to relief based on this issue.

Defendant next argues that the trial court improperly scored Offense Variable ("OV") 7, aggravated physical abuse, resulting in an alleged improper upward departure from the minimum sentencing guidelines range. We disagree.

Scoring decisions should be upheld if there is any evidence to support the decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). In calculating OV 7 of the sentencing guidelines, a court must assess fifty points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). A sentencing court may consider all record evidence before it, including the contents of a presentence investigation report or testimony taken at a preliminary examination or trial. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993).

A victim testified that defendant punched her in the face, causing a concussion, and that she thought she was going to die. Another victim testified that the taller gunman, who could reasonably be determined to have been defendant, pushed him below the ribcage with his gun, and he feared that it would go off. The taller gunman threatened to "shoot me somebody" upon discovering the back door open and the alarm going off. These facts support a determination that defendant engaged in conduct during the offense that was designed to substantially increase the fear and anxiety of his victims. Therefore, we uphold the trial court's scoring of OV 7. *Hornsby, supra* at 468.

Defendant finally argues he is entitled to resentencing. He admits that he has not previously raised this issue but argues that the plain error rule applies. We find that defendant would not be entitled to relief even if this issue was preserved. Defendant claims that the trial court violated his due process rights at sentencing by considering facts that were neither proved beyond a reasonable doubt at trial nor admitted by defendant when scoring the offense variables. He asserts that if the trial court scored the offense variables consistently with the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the

applicable sentencing guidelines range would have been shorter. However, *Blakely* struck down Washington's determinate sentencing guidelines; it does not apply to Michigan's indeterminate sentencing guidelines. *People v Claypool*, 470 Mich. 715, 730 n 14; 684 NW2d 278 (2004); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). Therefore, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis