

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY PHIL SCOTT,

Defendant-Appellant.

UNPUBLISHED
February 15, 2007

No. 265456
Oakland Circuit Court
LC No. 2005-201651-FC

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, stemming from the armed robbery of a Family Dollar store in Madison Heights. We affirm.

Defendant claims that his trial counsel was constitutionally ineffective for not raising an insanity or temporary insanity defense and for not seeking a psychological evaluation of defendant to determine whether such a defense was feasible. This claim is unpreserved because it was not raised below in a proper request for an evidentiary hearing or in a motion for new trial. See MCR 7.211(C)(1); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, our review is limited to errors apparent on the record. See *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was objectively unreasonable and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). There is a strong presumption that counsel's performance was sound trial strategy. *Id.*

Legal insanity, an affirmative defense under MCL 768.21a(1), requires proof that as a result of mental illness or mental retardation, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001). Further, a defendant may have a temporary insanity defense due to involuntary intoxication "when the chemical effects of drugs or alcohol render the defendant temporarily insane." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). The defendant bears the burden of proving the defense of insanity. MCL 768.21a(3).

Defendant identifies three broad categories of possible defenses he asserts were lost because defense counsel did not request an independent psychiatric evaluation pursuant to MCL 768.20a(3). These categories are (1) involuntary intoxication, (2) actual insanity, and (3) destruction of mental capacity. But, defendant's claim fails. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). There is nothing in the record to suggest that defendant was intoxicated (voluntarily or involuntarily) on the day of the armed robbery. And, defendant admits that he did not report any mental health problems to the probation department. Although he claims that his history of substance abuse suggests a likely mental health issue, he has provided no evidence of a psychological condition or organic brain injury at the time of the offense. Further, although defendant suggests that the violent nature of the crime indicates a possible mental health problem, he was a first-time offender who told the investigator that he made a mistake and he should not be judged solely on that mistake.

In sum, there simply is no record of any substance abuse by defendant or any indication of mental health problems, nor is there any indication that further development of the record would reveal such problems. Therefore, defendant's claim based on mere speculation fails to demonstrate that any of the identified defenses were applicable and could have made a difference at trial. See *id.*

Primarily relying on the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and further discussed in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), defendant next argues that he is entitled to resentencing because the trial court violated his due process rights when scoring offense variable (OV) 4 at 10 points by considering facts that were neither proved beyond a reasonable doubt at trial nor admitted by defendant. However, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan's legislative sentencing guidelines. Thus, defendant's argument is without merit.

Defendant next faults the trial court for failing to articulate its reasoning for imposing defendant's sentence. This unpreserved issue will be reviewed for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court is required to articulate its reasons for imposing a sentence on the record at the time of sentencing. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). If the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear, in context, that the trial court relied on the sentencing guidelines, the articulation requirement is satisfied. *Id.* at 313. Here, while the trial court did not expressly rely on the guidelines in imposing defendant's sentences, it is clear when read in context that the guidelines were the basis of the trial court's sentence. Further, the court lacked discretion concerning the felony-firearm conviction. MCL 750.227b(1), (2). As a result, no plain error occurred. Cf. *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992).

Defendant next claims that his sentences are disproportionate and amount to cruel and unusual punishment. Presumably, defendant is only referring to his armed robbery sentence because felony-firearm, first offense, requires a mandatory two-year prison term and defendant has not challenged the statute itself. Because defendant's armed robbery sentence is within the applicable guidelines range, it is presumed proportionate. See *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003).

While presumptively proportionate, defendant claims that a downward departure was appropriate given his alleged mental illness and history of substance abuse. A trial court may depart from the sentencing guidelines for substantial and compelling reasons. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). Only reasons that are objective and verifiable and “keenly” or “irresistibly” grab the court’s attention will justify a departure. *Id.* Here, defendant’s claim fails because record evidence suggests, to the contrary, that defendant did not suffer from mental illness or a history of substance abuse.

Next, defendant claims that his sentences should be reversed because they were based on inaccurate information, seemingly referring to the trial court’s failure to consider defendant’s rehabilitative potential through alcohol abuse and mental health treatment. It is again assumed that defendant is referring to only his armed robbery sentence. When a defendant is sentenced within the recommended minimum sentence range under the legislative guidelines, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant apparently faults the trial court for failing to obtain a current mental health report, as allowed under MCR 6.425(A)(6), if deemed necessary. But, no mental health concern was supported by the record evidence. Further, a PSIR need not contain exhaustive information. See MCR 6.425(A) (requiring the report be “succinct”). Therefore, no plain error occurred.

In a supplemental brief, defendant asserts error concerning the preliminary examination and the trial court’s decision to bind him over on both charges. The alleged bindover error is unpreserved and will be reviewed for plain error affecting substantial rights. See *Carines*, *supra* at 763.

Defendant argues that the district court failed to make findings of fact with respect to credibility issues or to acknowledge its discretion to assess credibility consistent with *People v Paille*, 383 Mich 621, 627; 178 NW2d 465 (1970). Specifically, he challenges testimony at the preliminary examination identifying him as an individual involved in the armed robbery in issue. But, regardless of that testimony, there was ample evidence to bind over defendant on the charges in light of the testimony that defendant was riding in a minivan shortly after the robbery that matched the description given by an eyewitness, that a certain amount of paper money and change was discovered in the minivan, and that two handguns were discovered in the minivan, with one matching the description given by some eyewitnesses. Moreover, there is nothing in the record to suggest that any of the witness testimony was incredible. Further, while the trial court did not express on the record that it did or should determine the credibility of the witnesses, there is nothing to indicate that it was unaware of this legal principle. Therefore, no plain error occurred.

Next, defendant claims that there was insufficient evidence to sustain his convictions. In reviewing a sufficiency challenge, the evidence is viewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility are left to the trier of fact to resolve, *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), and it is for the trier of fact to determine what inferences can be drawn from the evidence and to determine the weight to be given to those inferences, *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory

proof of the elements of the crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Here, an eyewitness identified defendant as the lighter-complected individual who entered the store, pointed a gun to her head, and took the money from the cash register. Shortly after the robbery, an officer stopped a minivan that matched the description of the vehicle involved in the robbery. Paper money and change was discovered in the vehicle that was similar in amount to that which was taken from the cash register, and two handguns were discovered, including one that matched a description given by eyewitnesses. This was sufficient evidence to support a conviction on both charges.

Defendant also argues that he was unlawfully arrested prior to the officers searching the minivan and that the search of the minivan was conducted solely to find incriminating evidence to support a finding of probable cause to arrest him. See *People v Dunbar*, 264 Mich App 240, 246; 690 NW2d 476 (2004) (internal citations omitted).

The officer involved in the investigatory stop testified that the minivan and its occupants matched the description he received from dispatch. After removing defendant from the vehicle, the officer patted him down and placed him in his patrol vehicle. An assisting officer contacted an officer at the Family Dollar who described what one of the suspects was wearing. The assisting officer determined that defendant matched the description of that suspect and concluded that there was probable cause to arrest. Given the fact that initial detention was brief and in light of the potential for harm, see *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988), there is no plain error concerning the scope of the detention because the officers were under a reasonable suspicion, prior to the arrest, that defendant may have been involved in the armed robbery. See *Dunbar*, *supra*.

Defendant apparently argues that the search of the minivan was illegal and used solely to establish probable cause to arrest him. A search conducted without a warrant is generally unreasonable under the Fourth Amendment,¹ unless the search falls within established exceptions to the warrant requirement, *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999), which include a search incident to arrest, *People v Eaton*, 241 Mich App 459, 461-462; 617 NW2d 363 (2000). Here, the arresting officer testified that probable cause to arrest was established after he determined that defendant matched a description of one of the robbery suspects. As a result, the police had the authority to search the minivan incident to a legal arrest. See *New York v Belton*, 453 US 454, 460, 462-463; 101 S Ct 2860; 69 L Ed 2d 768 (1981). Defendant does not challenge the scope of that search. No plain error occurred.

Defendant also challenges his in-court identification as one of the individuals involved in the robbery by an eyewitness to the crime. Defendant does not challenge the identification of him at both the preliminary examination and trial as unduly suggestive, but rather alleges that the witness was somewhat equivocal in identifying defendant as one of the individuals involved in

¹ US Const, Am IV. Accord Const 1963, art 1, § 11.

the robbery. This claim of error is one based on credibility, which was properly left for the jury to determine. See *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995).

Defendant next argues that OV 1, OV 2, and OV 4 were improperly scored. MCL 777.31, .32, .34. We disagree. OV 1 was scored 15 points. To support this score, the evidence must show that the defendant pointed a weapon at the victim, or placed the victim in reasonable apprehension of receiving an immediate battery as a result of being threatened with a weapon. MCL 777.31(1)(b). Here, a witness identified defendant as the individual who pointed a handgun at her head. Thus, no error occurred in the scoring of OV 1. Similarly, no error occurred in scoring OV 2 at 5 points. To support this score, the evidence must show that “[t]he offender possessed a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32. The evidence just cited satisfies this criteria. Finally, OV 4 was scored at 10 points. To support this score, the evidence must show that “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34. Here, one of the victims of the armed robbery informed the probation department that she suffered severe psychological harm due to the offense. While she has not sought counseling or therapy, this fact is not conclusive in determining whether professional treatment is necessary. MCL 777.34(2). Thus, OV 4 was properly scored.

Next, defendant argues that his constitutional right to effective assistance of counsel was violated when counsel failed to move to suppress the gun seized, an unidentified statement made, and a lineup identification. Because the premise underlying this argument—that defendant was illegally arrested—has been rejected, defendant’s claim of error is without merit. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (failure to make a futile objection does not constitute ineffective assistance of counsel). As a result, remand is unnecessary.

Finally, defendant argues that he was denied a fair trial by prosecutorial misconduct. Specifically, defendant asserts that the prosecutor called witnesses who testified untruthfully. “Michigan courts have . . . recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, and that a prosecutor has a duty to correct false evidence.” *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). However, defendant does not identify what testimony was perjurious. Rather, defendant’s argument that the prosecutor violated these duties appears to be premised solely on an unspoken and self-serving assertion that he is innocent and that those who identified him as a participant in the crime must be lying. This unsupported speculation cannot establish his claim of misconduct.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter