

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESLEY NEAL, JR.,

Defendant-Appellant.

UNPUBLISHED

October 23, 2007

No. 272244

Wayne Circuit Court

LC No. 06-001860-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carjacking, MCL 750.529a, assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 35 to 50 years for the carjacking, assault, and robbery convictions, and three to five years for the felon in possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Shanna McElroy testified that she and defendant planned to commit a crime that involved her going out as a prostitute and keeping her “date” occupied until defendant arrived, at which point they would rob the “date.” McElroy stated that defendant was in possession of a gun at the time.

McElroy proceeded to a street corner where she was picked up by Bruce Clark. Following a traffic stop for speeding, McElroy directed Clark to a darkened street corner; defendant followed them in his car. When Clark parked his car, defendant pulled up nearby, got out of his car, and went to the passenger side of Clark’s car while McElroy unlocked her door. Defendant opened McElroy’s door, stuck his gun inside the vehicle, and demanded money. After Clark handed over the money in his pocket, defendant shot him. Clark grabbed the gun and a fight ensued. Defendant retained control of the gun and, at McElroy’s urging, he shot Clark several more times. Defendant removed Clark’s coat and took his wallet. Defendant and McElroy then left the scene separately, one in Clark’s car.

A few days after the shooting, police officers found defendant and McElroy in the company of Aaron Miles. According to the police, Miles was seen throwing away a .22 caliber

gun. The gun was recovered and was determined to be the gun used to shoot Clark. McElroy testified that it was the gun defendant had in his possession on the night Clark was shot and that defendant was the one who disposed of it. Clark and McElroy were adamant that defendant and not Miles was McElroy's accomplice in the commission of the offenses.

During a break in the trial, defendant sent McElroy a message through a jail trustee. The message was for McElroy to "keep your mouth shut and don't say nothing because he's going to win the case" or to "be quiet, don't say nothing" because "[t]he case is doing okay."

Defendant first contends that the trial court violated his right to attend, and have counsel present during, a critical stage of the proceedings when the judge left the bench to take a look at Miles. Because defendant did not raise an appropriate objection below, he must demonstrate plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a right to attend his trial. MCL 768.3. He is entitled to attend, and have the assistance of counsel during, all critical stages of the criminal proceedings. *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993); *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984), reh den 422 Mich 1201 (1986). Critical stages of the proceedings are stages where counsel's absence may harm the defendant's right to a fair trial, *People v Burhans*, 166 Mich App 758, 764; 421 NW2d 285 (1988), and include the trial stage. *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004).

There can be no doubt that a jury view of a crime scene is a critical part of the trial which a defendant is entitled to attend. *Mallory, supra* at 247-248; *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987). Likewise, in the case of a bench trial, the defendant and his attorney are entitled to an opportunity to attend the judge's view of a crime scene. *United States v Walls*, 443 F2d 1220, 1222-1223 (CA 6, 1971). That is because the view of the scene is or has the effect of evidence. *Id.* at 1223; *Mallory, supra* at 248 n 13. Further, the defendant's presence affords him the opportunity to make observations of the area and any possible changes that may aid in his defense and to guard against misconduct by the jurors. *Mallory, supra* at 247-248. While it is not clear that the viewing of a person is the equivalent of the viewing of a scene, it is clear that a court cannot, without the parties' consent, seek out extrinsic evidence and use the information thus obtained to determine a fact in issue. *Valentine v Malone*, 269 Mich 619, 630; 257 NW 900 (1934). Although the viewing here took place during the trial, it does not appear to have been done for evidentiary purposes. Indeed, the presentation of proofs had already closed and the judge stated that he acted only out of curiosity. Further, there is nothing to suggest that the trial court relied on the view of Miles to determine a fact in issue. Accordingly, we conclude that defendant has failed to establish a plain error.

Defendant next contends that the trial court erred in scoring offense variable (OV) 14 of the sentencing guidelines at ten points rather than zero points.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court reviews the scoring to determine whether the sentencing court properly exercised its

discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

OV 14 is to be scored at ten points if the defendant “was a leader in a multiple offender situation.” MCL 777.44(1)(a). The evidence at trial showed that defendant and McElroy planned the crime together, but that defendant was the person with the gun who persuaded Clark to part with his cash and then shot him. Such evidence was sufficient to support the trial court’s scoring of OV 14. In any event, a reduction of ten points in defendant’s total OV score would not result in a change in the recommended range under the guidelines and thus any error does not require resentencing. *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006); *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Affirmed.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Karen M. Fort Hood