# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 20, 2007 |
| v | No. 270542<br>Kalamazoo Circuit Court |
| JOSHUA LEWIS FORD,<br><br>Defendant-Appellant. | LC No. 05-001955-FC |

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 25 to 40 years' imprisonment for the armed robbery conviction, 15 to 40 years' imprisonment for the first-degree home invasion conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Testimony established that defendant, who wore a red "hoodie" sweatshirt, walked with Tyocal Webster and one other person to an apartment occupied by Andrea Rogers and Christopher Pollington. Defendant and Tyocal knocked on the door and defendant then forced his way in. Defendant brandished a gun and demanded money. Defendant saw some cash in a small box on top of a table. When defendant went for the cash, Pollington hit defendant on the back of the head. Defendant and Pollington struggled briefly before defendant fled with the money. Pollington stated that he saw defendant go to another apartment that was located across the parking lot. One of the occupants of the apartment testified that defendant, who was wearing a red "hoodie" and had some cash, stopped by the apartment and asked to borrow a jacket. After some discussion, defendant borrowed a jacket and wore it when he left. The police apprehended defendant the following day.

On appeal, defendant first argues that there was insufficient evidence to support his felony-firearm conviction. We disagree. This Court reviews sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

MCL 750.227b(1) provides in pertinent part that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years." This Court has ruled that "[t]he elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). MCL 750.222(d) defines "firearm" as "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air."

On appeal, defendant focuses on the fact that the police never located the gun used in the crime. Defendant reasons, therefore, that "[t]he evidence is not sufficient for guilt as a matter of law because the record does not support a finding that the defendant at any time possessed a firearm." However, both Rogers and Pollington testified that defendant forced his way into their apartment, pointed a gun at them and demanded money. Pollington did testify that he assumed that the gun was not loaded because, even after Pollington hit defendant, defendant never fired the gun. But Pollington also testified that it was a "real gun." Defendant's gun did not have to be loaded or even operable to support a conviction of felony-firearm. See *People v Peals*, 476 Mich 636, 656; 720 NW2d 196 (2006). Further, although Tyocal claimed that she did not see defendant with a gun, two police witnesses testified that she told them that defendant had a gun and that he threatened to shoot Pollington and Rogers. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that defendant possessed a firearm during the commission of a felony. *Avant, supra* at 505.

Next, defendant asserts that the trial court erred in excluding defendant's alibi defense. This Court reviews a trial court's decision to exclude a defendant's alibi evidence on the grounds that the defendant failed to give notice of alibi for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993).

This Court has previously explained that "alibi testimony" is "testimony offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime." *People v Watkins*, 54 Mich App 576, 580; 221 NW2d 437 (1974). In order to prevent the surprise introduction of an alibi defense, a defendant wishing to present an alibi defense must provide notice of the defense. *Travis, supra* at 675-676. The purpose of the notice is to safeguard against the wrongful use of an alibi defense and to give the prosecution time and information to investigate the merits of the defense. *People v Merritt*, 396 Mich 67, 77; 238 NW2d 31 (1976). The notice must be given at least 10 days before trial and must include "as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant" and "specific information as to the place at which the accused claims to have been at the time of the alleged offense." MCL 768.20(1).

A trial court should consider the following factors in exercising its discretion to exclude an alibi witness:

> "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." [*Travis, supra* at 682, quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

Defendant sought to introduce Edwards and Coates as alibi witnesses at trial. Their testimony would be offered "for the sole purpose of placing the defendant elsewhere than at the scene of the crime." *Watkins, supra* at 580. As such, defendant had to satisfy the requirements of MCL 768.20(1). Defendant's alibi notice was timely and contained the names of witnesses to be called. However, the notice did not provide "specific information as to the place at which the accused claims to have been at the time of the alleged offense." MCL 768.20(1).

The trial court excluded the alibi witnesses, apparently basing its decision on the fact that defendant failed to provide the required specificity, as well as defendant's lack of cooperation in locating the alibi witnesses. In this case, the alibi witnesses were not automatically excluded by operation of MCL 768.21, which provides that the court shall exclude alibi evidence if the written notice is not filed and served as required or does not name the witnesses to be called to establish the defense. Nevertheless, the trial court still had discretion to exclude the alibi witnesses. See *Travis, supra* at 679-680.

After reviewing the *Travis* factors, we conclude that the trial court did not abuse its discretion in excluding the alibi witnesses. *Id.* at 682. First, there is no prejudice resulting to either side by excluding the alibi witnesses' testimony. A review of the offer of proof testimony demonstrates that the testimony of Edwards and Coates was, at best, dubious.[1] Second, there was no apparent reason for the failure to disclose the alibi witnesses earlier or the failure to disclose the substance of their testimony. Defendant filed his alibi notice more than four months after his arrest. There was no explanation as to why Edwards or Coates could not be located sooner. Defense counsel indicated that "in 17 years [she has never] had such difficulty trying to find people." When defense counsel finally obtained Coates' telephone number, she requested, and received, an adjournment. Defense counsel learned of Edwards only after talking to Coates. Third, there was overwhelming evidence that supported defendant's guilt. Pollington and Rogers positively identified defendant as the individual who forced his way into their apartment, pointed a gun at them and demanded money. Further, Henry and Danntoinett Webster corroborated the victims' identification testimony.

Finally, another significant factor in this case is the lack of cooperation on the part of defendant and his witnesses in providing the necessary information to defendant's own trial counsel. The trial court explained:

> And it goes right to the heart of why an alibi notice is required. So that the truth can be uncovered by . . . the prosecutor who has all of these resources to send those resources out and to uncover what is going on. And this really under cuts that, it is right at the heart of what alibi defenses are all about and the [truth]

[1] Defendant's alibi was that he was at Edwards' residence when the offenses were committed. At the offer of proof, Edwards testified that defendant and Coates spent approximately six hours at her residence during the day in question. In contrast, Coates indicated that they spent 30 to 60 minutes at Edwards' residence. Further, the prosecution impeached Coates with her statement to the police on the day following the incident. She told the police that defendant dropped her off for classes at 10:45 a.m. on the day in question, and she attended classes from 11:00 a.m. until 7:00 p.m. She did not know defendant's whereabouts during those times.

seeking process. It would be grossly unfair and contrary to the purpose of the statute to allow—to allow it to go forward.

Based on consideration of these factors, we conclude that the trial court's decision to exclude the alibi witnesses fell within the range of reasonable and principled outcomes. See *Travis, supra* at 678-680, 682. Therefore, there was no error warranting relief.

Defendant next contends that the trial court violated the United States and Michigan constitutions by sentencing defendant to 25 to 40 years for his armed robbery conviction and to 15 to 40 years for his first-degree home invasion conviction. Specifically, defendant contends that the trial court should have stated with specificity how the sentences were calculated and proportionate to the offense and offender, should have considered defendant's strong family support, should have departed downward based on defendant's mental health and substance abuse issues and should have conducted an assessment of defendant under MCR 6.425(A)(5). Defendant also argues that the trial court relied on inaccurate and incomplete information when sentencing him, that his sentences were not proportionate and amounted to cruel and unusual punishment and that his sentences violate the rule stated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We find these claims to be without merit.

This Court reviews unpreserved allegations of sentencing errors for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

At sentencing, the trial court clearly relied on the sentencing guidelines and the sentencing recommendation of the department of corrections. This reliance satisfied the trial court's articulation requirement. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

Defendant also specifically mentioned his seizure problem and his strong family support. Nevertheless, the trial court stated that it was particularly concerned with defendant's criminal history and his inability to benefit from community supervision in the past. For that reason it determined that it would sentence defendant within the sentencing guidelines. Hence, notwithstanding defendant's family and health history, the trial court clearly determined that the offense and offender warranted a sentence within the recommended range. This Court must affirm a sentence within the recommended minimum sentence range unless the trial court erred in scoring the guidelines or relied on inaccurate information. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Further, although defendant alleges that the trial court relied on inaccurate information in deriving his sentence, defendant failed to identify any inaccuracy except to note that the presentence investigation report might more accurately reflect defendant's rehabilitative potential if it included an assessment under MCR 6.425(A)(5). Therefore, we conclude that defendant abandoned any claim that the trial court relied on inaccurate or incomplete information. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Further, because defendant's sentences are within the applicable guidelines range, they are presumed proportionate. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000).

Finally, because Michigan's sentencing scheme does not increase the applicable statutory maximum sentence, it does not violate the rule stated in *Blakely*. See *People v McCuller*, 479 Mich 672, 689-690; ___ NW2d ___ (2007).

There were no plain sentencing errors warranting relief.

On appeal, defendant also submitted what appears to be a standard 4 brief. However, the brief was entirely deficient. Significantly, defendant failed to include a statement of the questions involved. See MCR 7.212(C)(5). The standard 4 brief also does not include (1) a table of contents, MCR 7.212(C)(2), (2) an index of authorities, MCR 7.212(C)(3), (3) a jurisdictional statement, MCR 7.212(C)(4), (4) "a clear concise, and chronological narrative," MCR 7.212(C)(6), (5) "arguments . . . prefaced by the principal point[s] stated in capital letters or boldface type," MCR 7.212(C)(7), (6) the applicable standard of review, *Id.*, (7) and a request for relief "in a distinct concluding section," MCR 7.212(C)(8). Because of these deficiencies, this Court is not obligated to review the additional claims. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, we have reviewed the content of defendant's brief and find the claims of error to be without merit.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter