

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION K. CUNNINGHAM,

Defendant-Appellant.

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UNPUBLISHED  
December 4, 2007

No. 272545  
Wayne Circuit Court  
LC No. 06-002631-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of three counts of assault with intent to commit armed robbery, MCL 750.89, armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 15 to 30 years' imprisonment for each assault with intent to commit armed robbery conviction, 15 to 30 years' imprisonment for the armed robbery conviction, five to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals his conviction and sentence, and we affirm.

I. Effective Assistance of Counsel

Defendant claims that his attorney was ineffective because he made frequent reference to a potential witness, Robin Scott, when he should have known he could not produce her as a witness at trial.

Defendant's claim that he was denied the effective assistance of counsel presents a question of constitutional law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to preserve this issue, we review errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).<sup>1</sup>

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<sup>1</sup> In order to prevail, defendant must establish that his attorney's assistance "fell below an  
(continued...)"

The record reflects that the witness, Robin Scott, indicated a willingness to testify that complainants told her that defendant was not involved in the crimes. However, defendant argues that his attorney should not have mentioned Scott's name during his opening statement because he had learned that Scott was fearful about testifying. Defendant also claims that his attorney should not have asked each of the complainants about whether they discussed the robbery with Scott. By doing so, defendant contends that his attorney raised the expectations of the jurors, which resulted in prejudice when Scott, ultimately, did not testify.

We disagree with defendant because his counsel's questioning about Scott was necessary to establish a foundation for Scott to testify as an impeachment witness. While some question arose about whether Scott would testify, it did not become clear that she would not appear until after defense counsel had already questioned the complainants about her. When defense counsel learned that Scott would not testify, he sought the trial court's assistance in securing her testimony. Defense counsel also persuaded the trial court to inform the jury that Scott could not be produced despite defense counsel and the trial court's efforts. Under the circumstances, defense counsel developed a reasonable trial strategy and, when he discovered that Scott would not appear, he took steps to alleviate any negative consequences. Clearly, counsel's performance did not fall below an objective standard of reasonableness.

Further, defendant cannot show that he was prejudiced by his counsel. Defendant argues that, instead of mentioning Scott's testimony, counsel should have pursued the alibi defense established by the testimony of LeKeisha York, defendant's girlfriend. However, had counsel done so, nothing suggests that the result of the trial would have been different. York's testimony could have been impeached because of her relationship with defendant and, regardless, the testimony did not establish that defendant was at home at the time of the robbery. A police officer testified that he arrived at the scene of the crime by 8:00 p.m. York testified that, at around 7:30 p.m., defendant was at their home just a few blocks away from where the robbery occurred. Obviously, defendant could have participated in the robbery and returned home by 7:30 p.m. and, therefore, York's testimony did not establish that defendant did not participate in the crime. Moreover, four eyewitnesses testified that defendant committed the crime. Therefore, defense counsel's strategic decision to not further stress the alibi defense did not prejudice defendant.

## II. Sentence

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(...continued)

objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L ED 2d 180 (1993).

Defendant claims that his sentence violates the Sixth Amendment of the United States Constitution because the trial court considered facts not found by the jury. In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge increased the defendant's *maximum* sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. However, our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the *minimum* sentence. *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006). Accordingly, defendant's argument is without merit.<sup>2</sup>

Affirmed.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Jane M. Beckering

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<sup>2</sup> For the same reason, we reject defendant's assertion that defense counsel was ineffective for failing to object to his sentence pursuant to *Blakely*. As discussed, defendant had no legitimate objection to the sentence, and his counsel had no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 602 NW2d 537 (2000).