STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2007
v	No. 270212 Oakland Circuit Court
MICHAEL JERMAIEL CRIMES, Defendant-Appellant.	LC No. 2005-204052-FC

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). He was sentenced to concurrent prison terms of 16 to 40 years for the armed robbery conviction and 7 to 20 years for the home invasion conviction. He appeals as of right. We affirm.

I. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to call several witnesses at trial. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question, i.e., that there is a reasonable probability that the error made a difference in the outcome of the trial. *Id.* at 312-314; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Where counsel's conduct involves a choice of strategies, it is not deficient. *Id.* Every effort must be made to eliminate the distorting effects of hindsight. *Id.*; see also *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show

that counsel's alleged error may have made a difference in the outcome of trial by, for example, depriving defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

A. Alibi Witnesses

Defendant argues that trial counsel was ineffective for not calling defendant's stepbrother and stepmother to provide an alibi for defendant at the time of the offenses.

At trial, defense counsel stated on the record that he had discussed this issue with defendant and that defendant "ha[d] elected" not to call his stepmother and stepbrother to testify. Defendant did not voice disagreement with counsel's statement. Additionally, at the hearing on defendant's motion for a new trial, defendant's appellate attorney stated that he had only been able to locate defendant's stepbrother, who "was not helpful." Counsel then conceded that "I really can't make in good faith at this point the argument [that] those alibi witnesses would've been useful." In light of the record in this regard, we conclude that this issue has been waived. See *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001). Even if the issue was not waived, however, defendant has not submitted affidavits from either witness to show that they could have provided favorable testimony, so there is no basis for concluding that defense counsel's failure to call them as witnesses deprived defendant of a substantial defense. See *Daniel*, *supra* at 58.

B. Impeachment Witnesses Weiner and Boling

Defendant argues that defense counsel was ineffective for failing to call attorney Arnold Weiner and defendant's cellmate, Claude Boling, to impeach the testimony of defendant's other cellmate, Jermaine Jackson. Jackson testified at trial that defendant admitted committing the charged crimes. Defendant argues that Weiner's testimony would have shown that Jackson had access to independent information concerning the charged crimes, and that Boling would have testified that defendant and Jackson never had any private conversations about defendant's case.

Trial counsel explained that Jackson knew details about the crimes that were not contained in either the police reports or the preliminary examination transcript. Indeed, at trial, police officers testified that until Jackson came forward, no one knew the identity of the second robber. It was Jackson who identified this person. Additionally, it was Jackson who first disclosed the possible involvement of Devon Dawson (a/k/a "D-Dog") and Antonio Jordan (a/k/a "Tone"). Jackson also supplied an alleged "hit list" written by defendant that listed Dawson's and Jordan's telephone numbers, which were not contained in the police reports or preliminary examination transcript. In light of this evidence, Weiner's testimony would have done little to impeach Jackson's credibility.

Further, although defendant claims that Boling would have testified that defendant and Jackson never had a private conversation, trial counsel reasonably should have expected that the jury would have difficulty believing that Boling could possibly account for defendant's and Jackson's presence at all times. Moreover, trial counsel averred that defendant admitted speaking to Jackson, and as already discussed, Jackson was able to provide information about the offense that was not previously reported or known to the police. Under the circumstances, there

is no basis for concluding that Boling could have provided a substantial defense. Defendant has not overcome the presumption of effective assistance of counsel in this regard.

C. Impeachment Witness Jensen

Defendant also argues that trial counsel was ineffective for failing to call Kathy Jensen to impeach the victim's testimony that there were two perpetrators.

Defendant claims that Jensen would have testified that she observed one man enter and exit the victim's apartment rather than two. Defense counsel decided not to call Jensen because, based on Jensen's statement to the police, he determined that her testimony would not have been helpful.

Jensen's police statement indicates that she saw one man walk from the parking lot to the victim's building. However, Jensen could not see the door of the victim's second floor apartment. Thus, Jensen's proposed testimony would not have tended to impeach the victim's testimony that there were two robbers. Further, according to the victim, defendant and the second robber left the apartment at separate times. Additionally, defendant fit the description of the man that Jensen saw, so Jensen's testimony may have actually bolstered the identification of defendant as the perpetrator. We will not substitute our judgment for that of trial counsel regarding the strategic decision whether to call Jensen to testify. *Davis*, *supra* at 368.

II. Scoring of the Sentencing Guidelines

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 sentencing factor need be proved only by a preponderance of the evidence. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). We review the scoring to determine whether the sentencing court properly exercised its discretion and whether the record evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A. OV 8

MCL 777.38(1)(a) directs a score of 15 points for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." In the present case, defendant and his accomplice forced their way into the victim's apartment. After confronting the victim, they directed her to a back bedroom at gunpoint, and defendant told his accomplice to tie the victim up and beat her. The evidence that the victim was asported from the living room of an apartment to a more secluded location in a back bedroom, where she was exposed to greater danger, supported the trial court's score of 15 points for OV 8. See *People v Piotrowski*, 211 Mich App 527, 529-530; 536 NW2d 293 (1995).

B. OV 14

MCL 777.44(1)(a) instructs the trial court to score ten points for OV 14 if the defendant was a leader in a multiple offender situation. The entire criminal transaction should be considered. MCL 777.44(2)(a). The evidence here indicated that defendant was an acquaintance of the victim's boyfriend and had been in the victim's apartment on prior occasions. Defendant believed that the victim's boyfriend was a drug dealer who had considerable cash in the apartment. According to Jackson, defendant told his accomplice to turn the victim around while defendant covered his face so the victim would not recognize him. There was also evidence that, during the incident, defendant told his accomplice to tie the victim up and beat her. When a search of the apartment proved fruitless, the accomplice left, but defendant stayed behind and continued searching. We agree with the trial court that the evidence supported an inference that defendant was the leader, thereby justifying ten points for OV 14.

C. OV 1 and OV 2

In a supplemental brief filed in propria persona, defendant argues that because only his accomplice possessed a firearm, the trial court erred in scoring 15 points for OV 1 (firearm pointed at or toward a victim), and five points for OV 2 (offender possessed or used a pistol). Defendant did not object to the scoring of these offense variables below, so we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because this was a multiple offender case, conduct attributable to the other offenders was properly considered in the scoring of defendant's offense variables. See MCL 777.31(2)(b); MCL 777.32(2); see also *People v Morson*, 471 Mich 248, 259; 685 NW2d 203 (2004). Because defendant does not dispute the finding that his accomplice possessed a firearm and pointed the firearm at or toward the victim, the trial court did not plainly err in its scoring of OV 1 and OV 2.

III. *Blakely* Issue

Defendant lastly argues that Michigan's sentencing scheme is unconstitutional because it allows a court to impose a sentence on the basis of facts not found by the jury or admitted by the defendant, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court held that it is a violation of the Sixth Amendment for a sentencing court to increase a defendant's *maximum* sentence based on facts not found by a jury. 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 fixed by statute, and the sentencing guidelines affect only the *minimum* sentence. *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). Thus, there is no merit to defendant's argument in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood