STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 11, 2008
v	No. 275478 Oakland Circuit Court
JERRON JASON DAVIS, Defendant-Appellant.	LC No. 2006-210240-FC

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

PER CURIAM.

Defendant was convicted by a jury of carjacking, MCL 750.529a, armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), carrying a concealed weapon ("CCW"), MCL 750.227, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 375 months to 50 years for the carjacking and armed robbery convictions, 13 to 20 years for the home invasion conviction, and two to five years for the CCW conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right, and we affirm.

Defendant's convictions arise from an incident in which the complainant was assaulted and robbed at her home. The complainant was in her garage when a man wearing a ski mask approached her with a hammer. The man pushed her into the house, but then brought her back into the garage where a second man, armed with a wooden stick or bat, assisted the first man in binding the complainant's arms and feet with duct tape. A fabric hood was then placed over the complainant's head. The men asked the complainant where she kept her money, but she denied having any money other than what was in her purse. The complainant heard the men enter her home, after which she was able to remove the tape and hood, but the men returned to the garage before she could escape. A third man, who was also wearing a ski mask, then entered the garage. The first two men again placed the hood over the complainant's head, tied her feet with a rope, and placed her in a furnace room behind the garage. From the furnace room, the complainant heard the men discussing whether they should take one of her vehicles. They took a Porsche sport utility vehicle, which was parked in the driveway.

Defendant was arrested a short time later while driving the Porsche. A gun was recovered from underneath the driver's seat and some of the complainant's jewelry was discovered in defendant's coat pocket. After he was arrested, defendant gave a written statement in which he admitted participating in a plan with others to rob the complainant's house, but

denied knowing that the house was going to be occupied. Defendant also admitted that he was armed with a loaded handgun during the offense.

I. Issues Raised by Appellate Counsel

Defendant first argues that the evidence was insufficient to support his convictions for carjacking and armed robbery. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction does not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id*. at 514-515.

Defendant argues that the evidence was insufficient to establish the offense of carjacking, because the evidence showed that the complainant's vehicle was taken while she was tied up inside the furnace room of her house and, therefore, was not taken from her "presence." Defendant's argument is misplaced. Although the carjacking statute, MCL 750.529a, formerly required that a vehicle be taken from a person's presence, the statute was amended by 2004 PA 128, effective July 1, 2004, to remove the "presence" requirement. This offense was committed on February 17, 2006, and, therefore, the amended statute applies. As amended, MCL 750.529a(1) now provides, in pertinent part:

> A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking[.]

The cases cited by defendant, *People v Davenport*, 230 Mich App 577, 578-579; 583 NW2d 919 (1998), *People v Green*, 228 Mich App 684, 694-696; 580 NW2d 444 (1998), and *People v Raper*, 222 Mich App 475, 481-483; 563 NW2d 709 (1997), all involve the former version of MCL 750.529a and, therefore, are not applicable.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that, in the course of committing a larceny of a motor vehicle, force or violence was used against the complainant, who was in lawful possession of the vehicle. Thus, the evidence was sufficient to support defendant's carjacking conviction.

Defendant next argues that the evidence did not support his armed robbery conviction because, although there was sufficient evidence that his accomplices committed an armed robbery, he did not assist them in committing that crime and an armed robbery was beyond the scope of his intended plan to only burglarize an unoccupied house. We disagree.

At trial, the prosecutor argued that defendant could be guilty of armed robbery under an aiding and abetting theory. To prove aiding and abetting, the prosecution must prove that

> "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citations omitted).]

The third element is at issue here. In discussing this element, our Supreme Court explained in *Robinson* that the aiding and abetting statute, MCL 767.39, incorporated the common-law theories for aiding and abetting, and that a defendant may be criminally liable as an accomplice if either "(1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an 'incidental consequence[] which might reasonably be expected to result from the intended wrong.'" *Id.* at 9. (Citation and footnotes omitted.) Therefore, under an aiding and abetting theory, all offenders may be convicted not only of the offense intended, but also of the natural and probable consequences of that offense. *Id*.

Applying *Robinson* to this case leads to the conclusion that there was sufficient evidence to support defendant's armed robbery conviction. Defendant agreed to assist his accomplices in committing a home invasion of the complainant's home for the purpose of stealing her property. Defendant was also armed with a gun. The risk that the house might be occupied and that it might be necessary to use force or violence against an occupant of the home was a natural and reasonably expected consequence of the intended wrong. Indeed, defendant admitted that he armed himself with a gun because he thought he might need it. Accordingly, the evidence was sufficient to support defendant's armed robbery conviction.[1]

Next, defendant argues that the trial court erred in scoring offense variables (OV) 7 and 8 of the sentencing guidelines. A trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* An Issue involving the interpretation or application of the sentencing guidelines is reviewed de novo as a question of law. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

The trial court determined that 50 points should be scored for OV 7, because the victim was treated with excessive brutality. MCL 777.37(1)(a). Additionally, it scored 15 points for OV 8, because the victim was asported to another place or situation of greater danger. MCL 777.38(1)(a). Defendant does not dispute that there was evidence to factually support the trial court's determinations that the victim was treated with excessive brutality and asported to another place or situation of greater danger. Instead, he argues that it was improper to score

[1] Defendant also challenges two of his felony-firearm convictions by arguing that, absent sufficient evidence to support his carjacking and armed robbery convictions, his felony-firearm convictions associated with those two offenses must also vacated. Having found that there was sufficient evidence to support the carjacking and armed robbery convictions, we reject this claim of error.

these offense variables because he did not personally participate in the conduct that led to the scoring decisions. Defendant observes that unlike MCL 777.31 (OV 1), MCL 777.32 (OV 2), and MCL 777.33 (OV 3), the instructions for OV 7 and OV 8 do not contain a provision specifying that all offenders be assessed the same number of points in multiple-offender cases.

We apply the rules for statutory construction when interpreting and applying the legislative sentencing guidelines. *Morson, supra* at 255. This Court's primary goal is to give effect to the intent of the Legislature as expressed in the language of the statute. *Id.* Where the language is unambiguous, we give the words their plain meaning and apply the statute as written. *Id.*

MCL 777.37(1)(a) directs a court to score 50 points for OV 7 if "[a] victim was treated with . . . excessive brutality . . . during the offense." MCL 777.38(1)(a) directs a court to score 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." The focus of these statutes is the harm experienced by a victim. Neither statute provides that a court is limited to considering only conduct committed by a particular offender when scoring these offense variables in multiple-offender cases. Thus, the plain language of both statutes require that points be scored solely by examining the victim's situation or circumstances, without regard to which offender may have personally committed the acts that led to the victim's harm or situation. In order to accept defendant's argument that the scoring of OV 7 and OV 8 must be based on an assessment of each offender's individual conduct, it would be necessary to read into MCL 777.37 and MCL 777.38 language that is not present, which is improper. For these reasons, we reject defendant's claim that the trial court erred in its scoring of OV 7 and OV 8.

II. Issues Raised in Defendant's Standard 4 Brief

Defendant argues that trial counsel was ineffective in his cross-examination of the prosecution's footprint impression expert, and improperly conceded defendant's guilt to some of the lesser charges. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first argues that defense counsel failed to effectively cross-examine the prosecution's footwear impression expert. Decisions regarding the questioning of witnesses 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 Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The record does not support defendant's claim that defense counsel's cross-examination established that the footprint impression found in the complainant's house could only have been left by defendant's shoe. Although the prosecution's expert testified that the footprint impression was consistent with defendant's shoes, the witness conceded that he could

not conclusively determine that defendant's shoe left the footprint. Defense counsel also questioned the witness whether the imprint could have been made by a size 7-1/2 or 8-1/2 shoe, rather than defendant's size eight shoe. The witness did not believe that the impression could have been made by another size shoe, but conceded that he did not have either of the other size shoes available to perform a comparison. Defense counsel also clarified through his cross-examination that the witness did not base his opinion on the actual wear of the shoe tread and, therefore, could not conclusively determine that defendant left the footprint that was found inside the home. Furthermore, defense counsel previously elicited through another witness that the brand of shoe defendant was wearing was a very common brand. In his closing argument, defense counsel did not concede that the footprint inside the house was made by defendant's shoe, but rather argued that there was not a positive match of the footprint, and that the type of shoe worn by defendant was a popular brand. On this record, there is no basis to conclude that defense counsel was deficient in his cross-examination of the prosecution's footprint expert.

Defendant also argues that defense counsel was ineffective because he conceded guilt to some of the lesser offenses and conceded that defendant entered the complainant's home. We disagree.

In his opening statement, counsel explained to the jury that defendant did not have "clean hands," and that he was responsible for some of the charges in this case, but not all. In his closing argument, defense counsel asked the jury to carefully apply the facts to the law and explained that "[i]t is our position that when you do so, you will find him guilty, but you will find him guilty of home invasion, you'll find him guilty of car theft, UDAA, and carrying a concealed weapon in a motor vehicle." Counsel then focused his closing argument on why defendant was not guilty of the more serious charges of armed robbery and carjacking, and the felony-firearm charges associated with those offenses.

An attorney is not necessarily ineffective for conceding guilt to a lesser offense. See *People v Fabian,* 77 Mich App 52, 55; 257 NW2d 673 (1977). "An attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Schultz,* 85 Mich App 527, 532; 271 NW2d 305 (1978). Conceding what is obvious based upon the evidence is a permissible trial strategy. *People v Wise,* 134 Mich App 82, 98; 351 NW2d 255 (1984).

In this case, defendant was in possession of the complainant's vehicle when he was arrested, and he subsequently gave a police statement in which he admitted his involvement in the offense as part of a plan to break into the complainant's home to commit a burglary, but denied knowing that the home would be occupied. He also admitted that he was armed with a gun when he committed the offense. In light of this evidence, defense counsel's strategy of conceding guilt to the lesser charges and contesting the more serious carjacking and armed robbery charges was not, to say the least, unreasonable.[2]

[2] Furthermore, nothing in the record indicates that defendant disagreed with defense counsel's strategy. Although defendant did not consent to this strategy on the record, a defendant's on-the-record consent is required only when counsel's argument is the functional equivalent of a guilty
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Defendant next argues that the trial court erred by failing to conduct an evidentiary hearing to determine if a juror was exposed to extraneous information. We disagree.

The record discloses that, during a recess, a juror walked into the courtroom while the prosecutor was discussing the weapon involved in this offense with two police officers. The gun was inside a box, but the box was open. The juror then quickly left the courtroom. Defense counsel informed the court that the gun was going to be admitted as evidence and asked the court to remind the jurors not to enter the courtroom during breaks, which the trial court did. There was no request for an evidentiary hearing to determine if the juror overhead anything.

Defendant now argues that the trial court should have conducted an evidentiary hearing to determine (1) what the juror overheard, (2) if that information was prejudicial, and (3) if the information was discussed with other jurors. Because defense counsel did not request an evidentiary hearing and instead only asked that the prosecutor make a record of her conversation with the police officer and that the trial court remind the jury not to enter the courtroom during breaks, which was done, we conclude that appellate relief is not warranted. "A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *Green, supra* at 691. "To do so would allow a defendant to harbor error as an appellate parachute." *Id.*[3]

Finally, we find no merit to defendant's argument that the evidence was insufficient to support his felony-firearm convictions. MCL 750.227b(1) prohibits an individual from possessing a firearm during the commission of a felony. *People v Burgenmeyer,* 461 Mich 431, 436; 606 NW2d 645 (2000); *People v Avant,* 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant gave a police statement in which he admitted purchasing a firearm a few days before the offense and then carrying it in his pocket during the offense. A loaded firearm was found underneath the driver's seat of the complainant's Porsche that defendant was driving when he was arrested. Viewed in a light most favorable to the prosecution, this evidence was sufficient to establish defendant's possession of a firearm during the commission of the felony offenses.

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plea to the highest possible charges. See *Wise, supra* at 97; *People v Fisher,* 119 Mich App 445, 447; 326 NW2d 537 (1982); *Schultz, supra* at 532-533.

In any event, contrary to what defendant argues, the court in *United States v Hall,* 85 F3d 367, 369 (CA 8, 1996), did not hold that a trial court is required to conduct an evidentiary hearing whenever an issue regarding improper juror contact is raised. We also disagree with the proposition that defense counsel could not waive an evidentiary hearing on defendant's behalf, as only fundamental rights must be personally waived by a defendant. Other rights generally may be waived by defense counsel with the defendant being bound by any such decisions. *New York v Hill,* 528 US 110, 114-115; 120 S Ct 659, 664; 145 L Ed 2d 560 (2000). Defendant has not shown that this issue involves a fundamental right, especially considering that there is no suggestion in the record that defendant's right to fair and impartial trial was jeopardized. See *People v Budzyn,* 456 Mich 77, 88; 566 NW2d 229 (1997).

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood