

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAJUAN MICHAELCHIMA MURRAY,

Defendant-Appellant.

UNPUBLISHED

June 24, 2008

No. 270983

Oakland Circuit Court

LC No. 2005-203137-FC

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of armed robbery, MCL 750.529, and one count of fourth-degree fleeing or eluding a police officer, MCL 257.602a(2). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 50 to 75 years for the armed robbery convictions and 1 to 15 years for the fleeing or eluding conviction. We affirm.

I. Basic Facts

Defendant's convictions arise out of the armed robbery of a Cingular Wireless store in Oak Park. A man later identified as defendant entered the store covering his mouth and nose with a black rag, wearing surgical-type gloves, and carrying a gun. The storeowner complied with defendant's demands for cellular telephones, money from the cash register, and a laptop computer. Shortly after the robbery, the police arrived and attempted to pull over a vehicle that was leaving an alley behind the store. The driver of the vehicle refused, and the police pursued the vehicle, which was a rental car that defendant had previously rented and reported as stolen. During the pursuit, the vehicles reached speeds in excess of 80 miles an hour, and defendant ultimately eluded the police. One of the store employees identified defendant as the perpetrator at a photographic lineup the following day.

II. Peremptory Challenge

Defendant argues that he is entitled to a new trial because the prosecutor improperly exercised a peremptory challenge to excuse an African-American jury veniremember in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree.

Because defendant did not timely raise this issue before the venire was dismissed, it has not been properly preserved for appellate review, *People v Williams*, 174 Mich App 132, 137-138; 435 NW2d 469 (1989), and our review is limited to plain error affecting his substantial rights, *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only if the alleged error resulted in conviction despite defendant's actual innocence or if it "seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

A peremptory challenge may not be used to strike a veniremember based on race. *Batson*, *supra* at 89, 96-98; see also *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005). In *Batson*, *supra* at 96-98, the Court articulated a three-step process for determining whether a peremptory challenge violates the Equal Protection Clause on the basis of race. *People v Knight*, 473 Mich 324, 335-336; 701 NW2d 715 (2005); see also US Const, Am XIV, § 1. First, the defendant must make a prima facie showing of discrimination. *Knight*, *supra* at 336. Then, the burden shifts to the prosecutor to articulate a race-neutral explanation for the challenge. *Id.* at 337. Finally, the trial court must determine whether the prosecutor's explanation is a pretext and whether the defendant has proved purposeful discrimination. *Id.* at 337-338.

To establish a prima facie case of discrimination based on race, defendant must show:

(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight*, *supra* at 336.]

Although defendant waited until the following day to raise this issue, the trial court considered it and determined that defendant made a prima facie showing of discrimination. Defendant is African-American, and the peremptory challenge at issue was used to exclude an African-American veniremember. As the trial court noted, the prosecutor exercised two peremptory challenges early in voir dire and then withheld his remaining challenges for a significant period of time before striking the only African-American veniremember. Thus, defendant met his burden of establishing a prima facie case of discrimination based on race.

In response to defendant's prima facie showing of discrimination, the prosecutor provided several explanations for exercising his peremptory challenge to excuse the African-American veniremember. In determining whether the prosecutor's explanations are a pretext or demonstrate purposeful discrimination, the trial court must determine whether the prosecutor's explanations are credible. *Bell*, *supra* at 283. Credibility may be measured by the prosecutor's demeanor, how reasonable or improbable the explanations are, and "whether the proffered rationale has some basis in accepted trial strategy." *Id.*, quoting *Miller-El v. Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

First, the prosecutor indicated that he challenged the veniremember because he had no jury questionnaire from her. Defendant asserts that this was not a sufficient basis to strike the veniremember because the questionnaire asks only basic questions that are standard voir dire questions. The prosecutor stated that, without the questionnaire, he was unable to determine

whether the veniremember had a criminal history and often people who have not submitted a questionnaire fail to disclose their criminal histories. As the trial court noted, without a jury questionnaire the prosecutor would be unable to verify a veniremember's answers to questions regarding a criminal history. We agree with the trial court that this explanation was reasonable. Defendant has not established that the proffered reason was a mere pretext for discrimination.

The prosecutor's second reason was that the veniremember looked at him and answered the questions very quickly and he "did not get a good feeling when she answered the questions." Defendant argues that the fact that the prosecutor did not get a "good feeling" is too vague to satisfy the constitutional standard. However, the prosecutor did not make this statement regarding the veniremember in general; rather, he made this assertion with respect to the manner in which she answered questions. The trial court found that the veniremember's speed of answers was a reasonable explanation and properly declined to displace the prosecutor's judgment. This reason was race-neutral; defendant has failed to show that it was a mere pretext for discrimination.

Lastly, the prosecutor noted that the veniremember works for the United States Postal Service and there are stereotypes regarding people employed at the Postal Service, including that such persons "can sometimes be squirrely." The prosecutor further stated "[t]hat's not the first reason, but that was one of the things that passed through my mind when she did indicate what she did for a living." Defendant contends that striking the veniremember because she works for the United States Postal Service was irrational and unreasonable. The trial court found this to be a reasonable explanation and observed that attorneys often strike veniremembers because of their professions. The prosecutor's reliance on this particular stereotype, while perhaps odd, was a race-neutral reason that defendant has not shown was a pretext for discrimination. Nothing in the record indicates that any of the prosecutor's reasons were merely pretextual. Accordingly, defendant has not shown that the prosecutor's reasons were insufficient to overcome defendant's *Batson* challenge, and he has failed to show that the trial court committed plain error.

III. Ineffective Assistance of Counsel

Defendant contends that he was denied the effective assistance of counsel when his attorney failed to contemporaneously object to the prosecutor's peremptory challenge of the African-American veniremember. We disagree.

Although defendant moved this Court to remand for a *Ginther*¹ hearing, his motion was denied. Therefore, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner*, *supra* at 75-76.

As previously discussed, the prosecutor's peremptory challenge of an African-American veniremember did not violate defendant's rights under the Equal Protection Clause. Therefore, defendant was not prejudiced by counsel's failure to timely object and was not denied the effective assistance of counsel. *Toma*, *supra* at 302-303; *Moorner*, *supra* at 75-76.

IV. Sentencing

Defendant claims that offense variables (OVs) 13 and 17 of the sentencing guidelines were incorrectly scored because the evidence did not support the particular scores assessed under those variables. We disagree.

A sentencing court has discretion regarding the number of points to be assessed at sentencing, provided that record evidence supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold a scoring decision on appeal if there exists any evidence supporting the decision. *Id.* The construction of the statutory sentencing guidelines is a question of law that we review de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Defendant argues that the trial court erred by scoring 25 points for OV 13, MCL 777.43, which takes into account a continuing pattern of criminal behavior. MCL 777.43(1)(b) instructs the sentencing court to score 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Further, MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted. . . ."

Defendant contends that, because his convictions arose out of a single transaction, they cannot form the basis for scoring points under OV 13. Defendant's argument lacks merit. In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court stated that concurrent convictions may support a score of 25 points under OV 13. The instant convictions arose from the armed robbery of three victims. Moreover, in MCL 777.43(2), the Legislature specifically addressed situations in which certain convictions should not be counted because they arose out of a single incident.² "The omission of a provision from one part of a statute that is

² MCL 777.43(2) provides, in pertinent part:

(e) Do not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced.

included in another part of a statute must be construed as intentional.” *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). The Legislature did not include the instant circumstances as an exception to the general rule that “all crimes within a 5-year period, including the sentencing offense, shall be counted” MCL 777.43(2)(a). Thus, this Court lacks the authority to exempt the instant circumstances from the application of the general rule.

Defendant also argues that the trial court erroneously scored ten points under OV 17 because his armed robbery conviction did not involve the operation of a vehicle. Pursuant to MCR 6.429(C) and MCL 769.34(10), a party may not raise on appeal an issue challenging the scoring of the sentencing guidelines unless he has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. See also *People v Kimble*, 470 Mich 305, 314 n 7; 684 NW2d 669 (2004). Defendant did not object to the scoring of OV 17 at sentencing or in a motion for resentencing. He raised this issue only indirectly in an untimely motion to remand with this Court challenging the effective assistance of counsel for counsel’s failure to object to the scoring of OV 17. As such, defendant has failed to preserve this issue for our review, and it will be reviewed for plain error affecting defendant’s substantial rights. *Kimble*, *supra* at 311-312; *Carines*, *supra* at 762-763.

Ten points are appropriate for OV 17 if “[t]he offender showed a wanton or reckless disregard for the life or property of another person[.]” MCL 777.47(1)(a), and “the offense or attempted offense involves the operation of a vehicle[.]” MCL 777.22(1). The offense of armed robbery includes flight or attempted flight after the commission of a larceny. MCL 750.530(2); *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). The offense at issue is the armed robbery of the Cingular Wireless store, and defendant fled in a vehicle, reaching speeds in excess of 80 miles an hour and running a red traffic light. Therefore, the scored offense involved the operation of a vehicle. Because defendant fled from the store at such a high speed and he failed to stop for a traffic light, he showed a wanton or reckless disregard for the life or property of another. The trial court therefore properly assessed ten points for OV 17.

Moreover, even if defendant’s total OV points were reduced by ten points, his OV level would not change, and his minimum sentence would be within the appropriate guidelines range. MCL 777.16y; MCL 777.62. We must affirm a sentence if the minimum sentence is within the appropriate guidelines range; defendant would not be entitled to resentencing. MCL 769.34(10); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Further, counsel was not ineffective for failing to challenge the scoring of OV 17 because any challenge would have been futile. *People v Wilson*, 252 Mich App 390, 396-397; 652 NW2d 488 (2002).

Defendant argues that resentencing is required because the sentencing court relied on facts that were not proven beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

(...continued)

(f) Do not count more than 1 crime involving the same controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances.

Michigan's sentencing system is an indeterminate one, and our Supreme Court has repeatedly held that *Blakely* does not apply to this system. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). Therefore, defendant's argument lacks merit. Further, counsel was not ineffective for failing to raise this issue at sentencing. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly