

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD GAVIN,

Defendant-Appellant.

---

UNPUBLISHED

September 11, 2008

No. 278268

Macomb Circuit Court

LC No. 2006-004308-FC

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

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, and was sentenced to 9 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

The victim, a loss prevention officer, attempted to stop defendant from leaving the store with a bag containing bottles of cologne that defendant had not purchased. After the victim confronted defendant, he struck her with the cologne bottles and some of the bottles shattered. As a result of the altercation, the victim suffered cuts and bruises.

First, defendant argues that there was insufficient evidence to convict him of armed robbery. We disagree. The elements of a crime may be established by drawing reasonable inferences from circumstantial evidence. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). It is for the trier of fact to determine what particular inferences can fairly be drawn from the evidence presented. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Furthermore, this Court should not interfere with the trier of fact's determination of the weight of the evidence or the credibility of the witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

To establish armed robbery, the prosecutor must show the following elements: (1) the defendant used force or violence, assaulted, or put one in fear during the course of committing a larceny, and (2) the defendant either possessed a dangerous weapon, an article fashioned in a manner to lead a person to reasonably believe it is a dangerous weapon, or represented that he was in possession of a dangerous weapon. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). The only element that defendant disputes is the second element, requiring the use of a "dangerous weapon."

It is within the fact finder's discretion to determine whether an object constitutes a "dangerous weapon." *People v Norris*, 236 Mich App 411, 414-415; 600 NW2d 658 (1999). To determine whether an object is a dangerous weapon, a fact finder must take notice of the object itself and the manner in which that object is used. *Id.* A dangerous weapon may be a weapon designed to be dangerous, such as a loaded gun, or it may be an object capable of causing death or serious injury when used as a weapon, such as a screwdriver that is used as a knife. *Id.*

Clearly, a bag full of cologne bottles is not an object that is specifically designed to be dangerous, such as a loaded gun. However, a generally safe glass object may become capable of causing serious harm when it is used to strike a person on the head. In the present case, the victim knew she was being hit by the bag of bottles, she could hear glass breaking, she felt liquid running down her face, and she testified that she was afraid of the injuries she would sustain. Under the circumstances, there was sufficient evidence for the trier of fact to conclude that the bottles of cologne used to strike the victim constituted a dangerous weapon for purposes of committing an armed robbery. MCL 750.529; *Hardiman*, *supra*.

Defendant next argues that he was denied his constitutional rights because the trial court failed to instruct the jury regarding how to consider evidence, how to deliberate, how to reach a verdict, and what the elements of the crime charged are. We disagree. This Court views jury instructions given by a trial judge as a whole when determining whether the instructions were erroneous. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). A jury must be instructed on all elements of the crimes charged, material issues, defenses, and any theories supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Although the instructions may be imperfect, they are sufficient if they fairly present the issues and adequately protect the defendant's rights. *Id.*

Review of the record reveals that the trial judge appropriately instructed the jury. The trial judge emphasized the jurors' duty to be fair and impartial, to apply the law as given to them, to only consider what the judge indicates is evidence, and to be aware of the prosecutor's burden of proof. The judge explained what is and is not considered evidence, explained that the jurors must consider the credibility of witnesses, and illustrated the difference between direct and circumstantial evidence. The judge read and explained twice the elements of the crime of armed robbery and the lesser offense of assault with a dangerous weapon. The jury was also given more detailed instructions regarding the term "dangerous weapon." Finally, the judge reiterated the manner in which the jury must deliberate.

The instructions given were accurate and adequate. Moreover, at the completion of the instructions, defendant expressly stated that he was satisfied with them. Therefore, any claimed error was waived because a defendant may not claim error on appeal regarding an action to which he acquiesced. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). We find no basis to conclude that defendant's constitutional rights were violated by the instructions as given.

Defendant next argues that he was denied his constitutional rights when the trial court sentenced him to 108 to 180 months' imprisonment. We disagree. MCL 769.34(10) provides that if a minimum sentence is within the proper sentence guidelines range, this Court shall affirm that sentence unless there was an error in scoring the guidelines or inaccurate information was relied on when determining the sentence. Defendant's sentencing guidelines range was

determined to be 108 to 180 months. Therefore, defendant's minimum sentence is in fact within the proper guidelines range.

Defendant asserts that because he has familial support, accepted responsibility for his actions, and was remorseful he was entitled to a reduced sentence. Defendant cites only federal sentencing guidelines to support this argument. However, defendant was not sentenced under the federal guidelines. Defendant asserts that his drug use provided an additional reason for a downward departure from the sentencing guidelines, relying on *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). In *Babcock*, our Supreme Court explained that the trial court is required to choose a sentence within the appropriate guidelines range, unless there are "substantial and compelling" reasons to depart. *Id.* at 255-256. Substantial and compelling reasons for departing from the sentencing guidelines only exist in "exceptional cases." *Id.* at 257-258. The trial judge was aware of defendant's background and current situation and properly sentenced him within the guidelines. We cannot conclude that the judge was required to depart from the guidelines for the reasons defendant sets forth.

Defendant also asserts that the trial court should have conducted an assessment, pursuant to MCR 6.425(A)(5), to determine his potential for rehabilitation through intensive drug and psychiatric treatment. Defendant argues that, without such an assessment, the court did not have accurate and complete information about him when it sentenced him. The relevant presentence report contains defendant's medical history and substance abuse history in compliance with the requirements of MCR 6.425(A)(5). The report also indicates that defendant does not claim to have any mental health issues. A presentence report is presumed to be accurate and, therefore the trial judge may rely on that report unless the defendant challenges its accuracy. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). At no point in time did defendant challenge the contents or the accuracy of the report. Therefore, we cannot conclude that defendant was sentenced based on inaccurate information.

In addition, defendant asserts that the trial court failed to explain the proportionality of the sentence imposed and how it arrived at the 180 month maximum. The trial court must articulate its reasons for imposing a particular sentence, but that requirement is satisfied if the court expressly relies on the sentencing guidelines, or the context of the remarks make it clear that the court is relying on the guidelines. *People v Conley*, 270 Mich App 301, 312-313; 715 NW2d 377 (2006). Here, the trial judge expressly stated that she was basing defendant's sentence on the guidelines. A minimum sentence falling within the guidelines is presumed to be proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Furthermore, MCL 750.529 provides that the maximum sentence that may be imposed for armed robbery is life or any term of years. The trial judge specifically stated that she arrived at the sentence by considering "the discipline and the punishment of the wrongdoer, the protection of society, the potential for rehabilitation of the defendant, [and] the deterring of others from committing like offenses." Therefore, we conclude that the sentence is proportional to the offense and the judge sufficiently articulated how she arrived at it.<sup>1</sup>

---

<sup>1</sup> Defendant's argument regarding the application of *Blakely v Washington*, 542 US 296, 300; 124 S Ct 2531; 159 L Ed 2d 403 (2004) was rejected in *People v McCuller*, 479 Mich 672, 684; (continued...)

Next, defendant asserts that the court did not consider how the sentence imposed would rehabilitate defendant, and that the sentence constitutes cruel or unusual punishment. Again, the trial judge expressly stated that the potential for rehabilitation was one of the factors she considered when sentencing defendant. In addition, we have already noted that a minimum sentence falling within the guidelines is presumed to be proportional, *Powell, supra* at 323, and this Court has held that a proportional sentence does not constitute cruel and unusual punishment, *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

Finally, defendant argues that the court misinterpreted MCL 769.11b and denied him his constitutional rights when it refused to grant him jail credit for the time he was incarcerated between his arrest and sentencing because he was a parolee. We disagree.

MCL 769.11b provides that when a person serves jail time prior to sentencing because they are denied or unable to furnish bond for that offense, they must receive jail credit towards their sentence. Defendant was on parole for a prior offense when he was arrested for the armed robbery at issue. Defendant argues that the trial court interpreted MCL 769.11b incorrectly when it denied him jail credit because the statute does not exclude parolees. When a parolee is arrested on a new offense, the parolee will be incarcerated on a “parole detainer” until convicted of the new offense. *People v Seiders*, 262 Mich App 702, 707; 686 NW2d 821 (2004). Any jail credit for that period of time shall only apply to the sentence from the old offense, and the jail credit must not be applied to the sentence imposed for the new offense. *Id.* at 705; MCL 791.238(2).

In *Seiders*, this Court reasoned that when a parolee is arrested for a new offense, he is incarcerated because he committed an offense while on parole and not because of any lack of bond on the new offense. *Seiders, supra* at 707. Therefore, “[c]redit is not available to a parole detainee for time spent in jail attendant to a new offense because bond is neither set nor denied when a defendant is held in jail on a parole detainer.” *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006); *Seiders, supra* at 707.

Defendant argues that because it is uncertain whether he will ever be required to serve additional time for an old offense, the period of incarceration at issue here may end up being credited nowhere. However, defendant does not provide any authority suggesting that simply because he may not be required to serve any more time on his old sentence, the jail credit should be applied towards his new sentence. In fact, such a ruling would be contrary to current binding law. Therefore, we conclude that the trial court did not misinterpret the applicable statute.

Defendant also cites *North Carolina v Pearce*, 395 US 711, 718-719; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled on other grounds, *Alabama v Smith*, 490 US 794; 109 S Ct 2201; 104 L Ed 2d 865 (1989), for the proposition that the double jeopardy protection “absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense.” However, *Pearce* is notably distinguishable from the present case. In *Pearce*, a defendant served part of his sentence, his conviction was then reversed, and he was later tried and convicted again for that same offense. *Id.* at 713. The Supreme Court held that the defendant must receive credit for the portion of his sentence he had already served. *Id.*

---

(...continued)

739 NW2d 563 (2007) and *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

In the present case, defendant was on parole for an old offense and was incarcerated between his arrest and sentencing on a new offense because he committed that new offense while on parole. Therefore, the present case does not constitute multiple punishments for the same offense.

Defendant also argues that the denial of jail credit is a violation of his equal protection and due process rights. Defendant asserts that he should be awarded jail credit in order to protect his “inherent liberty interests” and refers to the time he was incarcerated as “dead time” because it may not be credited anywhere. This Court has held that parolees “owe a debt to society,” and the government has a legitimate interest in treating them differently. *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994). In *Stewart*, this Court rejected a defendant’s claim that a denial of jail credit towards his new sentence resulted in “dead time.” *Id.* Therefore, defendant’s due process and equal protection rights were not violated when the court denied him jail credit.<sup>2</sup>

Affirmed.

/s/ Stephen L. Borrello  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood

---

<sup>2</sup> Defendant filed a supplemental brief challenging the trial court’s decision on remand to order defendant to pay attorney fees. Although defendant submitted an affidavit indicating that he suffered from numerous health problems, the trial court rejected this argument. Defendant contends that it was a denial of due process to render such a decision without factual findings and without a hearing. We disagree. The sentencing court need not conduct a formal evidentiary hearing when determining a defendant’s present and future ability to pay attorney fees. *People v DeJesus*, 477 Mich 996, 997; 725 NW2d 669 (2007). Moreover, the trial court had the benefit of presiding over the trial at issue. Although defendant asserted that he had numerous health problems, he nonetheless had the ability to travel to a retail store and attack the loss prevention officer with cologne bottles. Under the circumstances, defendant’s challenge to the trial court’s order of attorney fees is without merit.