

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DURREL CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 281859

Wayne Circuit Court

LC No. 07-005598-FC

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, and armed robbery, MCL 750.529. Following a bench trial, he was acquitted of the assault charge, but convicted of armed robbery, MCL 750.529. He was sentenced to a prison term of 17-1/2 to 40 years. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At trial, evidence was presented that defendant called the complainant and arranged a meeting at his home, purportedly for the complainant to help defendant's friend with an insurance matter. The complainant saw the men arrive in defendant's vehicle. After the complainant let them in his home, defendant's companion hit the complainant and knocked him down. Defendant restrained the complainant while the other man wrapped his face, hands, and feet with duct tape. Defendant repeatedly hit the complainant in the head and demanded to know where his rings and guns were. The complainant heard sounds indicating that the other man was in the bedroom, and then felt two people going through his pockets. He could tell that defendant was holding him because defendant continued to talk. As defendant held the complainant from behind, the complainant felt his throat being cut twice. He believed that defendant cut him, but admitted that he was not sure. The men left, taking with them money from the complainant's two wallets. The complainant's injuries included a fractured cheek and he required surgery on his trachea.

The trial court found that defendant knew "who he was running with," why they went to the complainant's home, and "that they were going to have to beat him to take his stuff." The court did not resolve which perpetrator cut the complainant. The court stated that it could not find beyond a reasonable doubt that defendant intended to kill the complainant, commenting that "[i]f it was [defendant] who held the knife and intended to kill the victim, he would have finished

the job right then and there.” However, the court stated that there was no question that defendant committed an armed robbery.

On appeal, defendant maintains that he sought to leave before the other man produced the knife and cut the complainant’s throat and, therefore, argues that there was insufficient evidence to support the armed robbery conviction.

In evaluating a challenge to the sufficiency of the evidence in a bench trial, “this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. Findings of fact by the trial court may not be set aside unless they are clearly erroneous.” *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

To establish armed robbery, the prosecution must prove “(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.” *People v Chambers*, 277 Mich App 1, 7-8; 742 NW2d 610 (2007). “[I]n the course of committing a larceny’ includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.” MCL 750.530(2).¹

In this case, the prosecutor also relied on a theory of aiding and abetting, which includes the following elements:

(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. [*Robinson, supra*, p 6 (internal quotations omitted).]

The evidence showed that defendant and his companion both used force and violence against the complainant to commit a larceny. The complainant was cut with a knife, which allowed the trier of fact to infer that “in the course of committing the larceny,” one of the men possessed a knife. Defendant performed acts, including restraining and striking the complainant, that assisted in the commission of the crime. Even if defendant did not use the knife, his willingness to restrain the complainant as his throat was cut suggests, at a minimum, that defendant knew that his companion intended to commit armed robbery. The evidence does not support defendant’s argument that he sought to leave before the other man produced the knife.

¹ The armed robbery statute, MCL 750.529, incorporates this language from MCL 750.530(2).

The complainant testified that he did not recall hearing one of the men say, “Let’s get out of here.”

Defendant also argues that the evidence was insufficient to show that the weapon was used during the course of the larceny. However, possession, not use, of a weapon during the course of a larceny is sufficient to establish armed robbery. MCL 750.529.

Next, defendant argues that the trial court rendered an inconsistent verdict by finding him not guilty of assaulting the complainant with a weapon, but finding him guilty of armed robbery. In reviewing a verdict reached in a bench trial, we review the trial court's factual findings for clear error and its conclusions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

Defendant is correct that a trial court sitting as the finder of fact may not enter an inconsistent verdict. *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003). However, the trial court’s findings indicate that the court acquitted defendant of assault with intent to commit murder because the court was not persuaded that the mens rea, i.e., an intent to kill, was proven beyond a reasonable doubt. There is no inconsistency between defendant’s acquittal of that offense and his conviction for armed robbery.

Next, defendant challenges the scoring of offense variables 1, 2, 3, 7, and 10, and prior record variable 5, of the sentencing guidelines. This Court reviews de novo issues involving the interpretation of the statutory sentencing guidelines and the legal questions presented by their application. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

OV 1 was properly scored at 25 points because “the victim was cut . . . with a knife . . .” MCL 777.31(a). OV 3 was properly scored at 25 points because “[l]ife threatening . . . injury occurred to a victim.” MCL 777.33(1)(c). Contrary to defendant’s argument, the scoring of these variables does not require differentiation between defendant’s conduct and that of his accomplice.

Defendant challenges the scoring of OV 7, which was scored at 50 points for aggravated physical abuse. Fifty points may be scored for OV 7 where “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(a). The evidence that the complainant’s throat was slit while he was bound supports the scoring of this variable.

With respect to OV 10, defendant argues that the evidence did not indicate that he exploited any vulnerability of the victim. Defendant received 15 points under MCL 777.40(1)(a), on the basis that “predatory conduct was involved.” In *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008), the Court explained that 15 points is properly scored if, before the offense, the offender engaged in conduct that was directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and that was for the primary purpose of victimization. The record indicates that the complainant was 78 years old at the time of the offense. “Agedness” is a factor to be considered in determining vulnerability, but “the mere existence of one of these [specified] factors does not automatically render the victim vulnerable.” *Id.* at pp 158-159. In this case, however, even if this variable should not have been scored, resentencing is not required.

Defendant received 130 total offense variable points, placing him in OV level VI, which applies to OV scores of 100 or more points. MCL 777.62. Thus, a 15-point reduction would not affect the appropriate guidelines range.

For the same reason, we need not resolve defendant's claim that OV 2 was improperly scored at five points for possession of a knife by his accomplice where the multiple offender provision was not applicable, MCL 777.32(2), or defendant's claim that PRV 5 should have been scored at only five points, rather than ten points, MCL 777.55. Even if both OV 2 and OV 10 should have been scored at zero points, defendant's total OV score would still exceed 100 points, and he would remain in OV level VI. Similarly, a reduction of defendant's total PRV score from 15 to 10 points would not change his placement in PRV level C. Because these changes would not affect the appropriate guidelines range of 135 to 225 months, defendant is not entitled to resentencing. See *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006).

Finally, defendant argues that defense counsel was ineffective for failing to object to the alleged scoring errors.

To establish ineffective assistance of counsel, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *Id.* at pp 302-303 (citation omitted).

Because we have concluded that defendant's scoring challenges either lack merit or do not affect the appropriate guidelines range, any objection by counsel would not have changed the result of the proceeding. Therefore, defendant has not established that he was denied the effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Patrick M. Meter