STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 280429 Wayne Circuit Court
HAKEEM TERRELL SINGLETON, Defendant-Appellant.	LC No. 07-004113-01

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

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of 20 to 40 years for armed robbery and ten to 20 years for home invasion, to be served consecutively to a two-year term for felony-firearm. Defendant, acting through appointed counsel and *in propria persona*, appeals as of right. We affirm.

Defendant first argues that the victims' identification of him at the scene was unduly suggestive since he was the only occupant of the police car not in uniform, and he was handcuffed. He claims that he should have received a corporeal lineup. We disagree.

In *People v Winters*, 225 Mich App 718, 721-722, 728; 571 NW2d 764 (1997), this Court held that prompt, on-the-scene identifications are reasonable, "indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime, and subject to arrest, or merely an unfortunate victim of circumstance." In *People v Libbett*, 251 Mich App 353, 412; 650 NW2d 407 (2002), citing *Winters*, *supra* at 728, this Court stated that, "one of the main benefits of prompt on-the-scene identifications is to obtain reliability in the apprehension of suspects, which insures both that the police have the actual perpetrator and that any improvidently detained individual can be immediately released." A defendant can challenge an identification based on constitutional grounds if it was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [it] amounts to a denial of due process." *Winters*, *supra* at 725, citing *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). In analyzing this question, the Court must look at whether there was undue suggestion "in light of all of the circumstances surrounding the identification." Relevant factors include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the

accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993) (addressing whether a photographic lineup was unduly suggestive).

Here, both victims testified that they saw defendant's face during the robbery when he pulled up his ski mask. There was evidence that the room was illuminated by daylight. There was no evidence to suggest that the victims were inattentive during this observation. Although some details of the victims' *subsequent* descriptions of their assailants were challenged during cross-examination, the cited discrepancies were not a compelling indicator of mistaken identifications. Both victims decisively identified defendant when he was returned to their residence. In fact, one witness screamed "That's him" as he was being pulled out of the backseat of the police car. Defendant claims the second victim would not contradict the first victim's identification after she ran toward defendant and started kicking him, but there was no evidence of such influence. Finally, the on-the-scene identifications were made approximately ten minutes after defendant fled the crime scene, and before the apprehending officer had been given information about what had transpired. Based on the totality of these circumstances, there is no indication that the victims' identification of defendant was unduly influenced by seeing him emerge from the police car in handcuffs.

Defendant next takes issue with the trial court's departure from the sentencing guidelines with regard to his armed robbery conviction. The guidelines called for a minimum sentence of between 81 to 135 months, but the trial court imposed a minimum sentence of 240 months. MCL 769.34(3) provides that a court may depart from the guidelines for "a substantial and compelling reason" stated on the record, but

> shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

In *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008), quoting *People v Babcoc*k, 469 Mich 247, 257-258; 666 NW2d 231 (2003) (footnotes omitted), our Supreme Court stated, "that the reasons relied on [for a departure] must be objective and verifiable," "of considerable worth in determining the length of the sentence," and "should keenly or irresistibly grab the court's attention." A trial court's finding that a particular factor exists is reviewed for clear error. Whether it is objective and verifiable is a question of law subject to de novo review. The determination that such factors constitute a substantial and compelling reason is reviewed for an abuse of discretion. *People v Uphaus*, 278 Mich App 174, 178-179; 748 NW2d 899 (2008).

Here, at the sentencing hearing, both victims described the impact the crime had on their lives. The 13-year-old child victim testified that (1) his life had been turned upside down, (2) he and his mother had not been able to live in their home since the crime was committed, (3) he was very afraid when defendant put a gun to his head, (4) he thought he "would never be able to see another day," (5) he had been living in fear since, and (6) did not understand why defendant broke into their house since they did not know him. His mother, the other victim, testified that (1) their lives had been "overturned" since this happened, (2) they had not been able to live in

their home, had been living with relatives, and their lives had been unstable since they became defendant's victims, (3) she felt helpless when defendant had a gun pointed to her child's head, (4) her son had not been able to be alone since this happened and any noise he heard caused him to jump and run, (5) they did not know if someone was after them so they were always looking over their shoulder and did not know what was going to happen to them so they lived in fear, (6) she and her son had been harassed since the incident by someone calling her on her stolen cell phone and her window was broken the day after this happened, and (7) they had been "living in torment and fear everyday, every single day since this has happened."

Thereafter, the trial court sentenced defendant to 20 to 40 years for the armed robbery conviction. The court indicated on the record that it was sentencing defendant above the guidelines because (1) of the highly assaultive nature of the crime, (2) of the extreme fear and trepidation that he put in the hearts and minds of the victims, (3) the crime occurred in their home, totally destroying the victims' sense of security, and (4) of the longstanding psychological impact that the crime had and would continue to have on both of the victims.

Defendant argues on appeal that these articulated factors were almost all considered in the guidelines. He claims that the OV 1 score of 15 (firearm pointed at a victim), the OV 2 score of 5 (use of a pistol), the OV 4 score of 10 (serious psychological injury), the OV 9 score of 10 (two victims), and the OV 16 score of 1 (property damage) took into account most of the factors relied upon by the trial court to render the sentence departure. We disagree.

The record evidence includes that defendant and his cohort forced their way into the victims' apartment, wearing masks and carrying guns. A gun was pointed at the child victim's head and he was forced into the bedroom while his mother was "roughed up." Ultimately the mother was also forced into the bedroom and they threatened to shoot the child in the head if she did not give them money. These circumstances were not addressed in the scoring of the offense variables. That OV 1 was scored for a firearm being pointed at a victim does not take into consideration, for example, that defendant and his cohort forced their way into the victims' home, wearing masks and brandishing guns, roughed up one victim, and put a gun to the head of a child and threatened his life for money, i.e., "the highly assaultive nature of the crime," that destroyed their sense of security in their own home.

Similarly, that OV 4 was scored to indicate that the victims suffered "serious psychological injury" does not take into consideration, for example, the impact this crime had and will continue to have on the mind of a 13-year-old boy who had a gun pointed to his head and did not think he would live to see another day, whose home life was destroyed, whose life was disrupted for no reason by strangers, and who had lived in fear since that time, i.e., "the longstanding psychological impact that the crime had and would continue to have on both of the victims" and "the extreme fear and trepidation that [defendant] put in the hearts and minds of the victims." And, finally, it also does not take into consideration the impact this crime had and will continue to have on a single mother (1) who was forced to watch a gun being pointed at her child's head, helpless, (2) who was forced to flee her home and depend on relatives, (3) whose son was so traumatized that he could not be left alone and who jumps and runs at any noise, and (4) who has been further harassed to the point of fearing future crimes being perpetrated against them and was "living in torment and fear everyday, every single day since that has happened," i.e., "the longstanding psychological impact that the crime had and would continue to have on both of the victims" and "the extreme fear and trepidation that [defendant] put in the hearts and

minds of the victims." In conclusion, the trial court's departure from the guidelines did not constitute an abuse of discretion. See *Uphaus, supra*.

Defendant next argues that he was deprived of the effective assistance of counsel because his attorney did not challenge the failure to give *Miranda*[1] warnings when taken into custody. However, *Miranda* warnings are only implicated when a defendant is questioned, *People v Daoud*, 462 Mich 621, 622; 614 NW2d 152 (2000), not necessarily when a defendant is taken into custody. There was no indication that defendant was subjected to questioning until after he was given the warnings. Accordingly, the failure to raise this issue did not constitute ineffective assistance. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (counsel is not required to advocate a meritless position).

Defendant also asserts that his counsel should not have advised him to waive a jury trial, and references the failure to hold an evidentiary hearing on an evidence question. We find no basis for concluding that an evidentiary hearing was needed or compromised by the waiver trial. Notably, the evidentiary issue was decided in defendant's favor. Defendant has failed to establish that his attorney provided ineffective assistance. See *Mack, supra*.

Defendant further suggests that his counsel should have requested a hearing pursuant to *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), where the Court held that pretrial confrontations had to be scrutinized to determine whether the presence of counsel was necessary. Defendant challenged the confrontation on the basis of undue suggestion, not an entitlement to counsel, but the trial court treated its inquiry as a *Wade* hearing. Defendant also asserts that counsel should have requested a hearing on the chain of custody, but does not develop this argument to identify the challenged evidence. Defendant may not leave it to this Court to search for the factual basis for argument. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Defendant next argues that there was insufficient evidence to convict him of felony-firearm. He claims it was not established that the victims could distinguish a real gun from a toy or replica. This is apparently based on one victim's testimony that he could recognize a semiautomatic pistol from having seen one on television. Regardless, his testimony that the robbers were holding guns, whatever the type, was not challenged. The evidence on this point was sufficient.

Defendant next argues that the police did not have probable cause to stop him and transport him to the crime scene. In *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993), our Supreme Court stated that a proper investigative stop required "a particular [reasonable and articulable] suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity." Here, two men were seen running from the house after police pounded on the door in response to a call suggesting a domestic disturbance. Defendant was then seen running nearby, and ran from police when they saw him. Given the totality of these circumstances, see *Nelson, supra*, the officers had a reasonable suspicion that defendant

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

had been involved in some criminal activity. As previously stated, the subsequent on-the-scene identification was also proper. See *Winters*, *supra* at 728.

Finally, defendant suggests that the trial court resentenced him to a longer term when the original sentence of 20 years to life was corrected to 20 to 40 years. That claim is unsupported by the record.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter