STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 280427 Wayne Circuit Court
ZACHERY SCOTT GILLAY, Defendant-Appellant.	LC No. 07-007463-01

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of armed robbery, MCL 750.529, for which he was sentenced to 3 to 15 years in prison. We affirm.

I. Basic Facts

The complainant testified that when he arrived home on the evening of March 1, 2007, defendant, codefendant Evan Whited, Kim Johnson, David Rocheleau, and Justin Brown were all present at the home. Candles were burning because there was a power outage. The complainant lived in the house of his friend, Johnson. Johnson's younger nephew brought Brown to the house, and codefendant Whited brought defendant. Rocheleau testified that he had been at the house only 15 minutes before defendant twice asked him for some playing cards. Codefendant Whited and Rocheleau eventually left the house to obtain the cards. The complainant testified that he was in the living room with Brown and defendant when defendant came up behind him, grabbed his hair, placed a gun against his head, and demanded his money. Brown observed defendant pull a handgun from his waistband before asking the complainant for his money. Both the complainant and Brown testified that the complainant turned over his wallet, but when defendant discovered that it did not contain any money, he hit the complainant in the face with the gun, and again directed him to turn over his money.[1] The complainant testified that he gave defendant approximately $400 from his pocket, while Brown testified that the complainant gave defendant what appeared to be $200. Both the complainant and Brown testified that Brown then refused defendant's request to use his cell phone, and defendant left. When codefendant Whited

[1] The complainant testified that although he thought defendant had only hit him in the face with the gun, he later learned that he had been shot and that a BB was lodged in his face.

and Rocheleau returned shortly after the incident, the complainant and Brown told them what had occurred. Rocheleau testified that the complainant was in shock and scared, and was holding his face as if in pain. Rocheleau further testified that Brown was outside, looked scared, and said to "get [him] out of there."

The complainant reported the robbery the following day, identifying defendant as the perpetrator. An officer testified that defendant initially denied being at the house on that day but, after being told that he had been identified as the perpetrator, admitted he was there. Defendant stated that he, Johnson, and codefendant Whited had discussed obtaining the complainant's money by purchasing over-the-counter pills and selling them to the complainant as Xanex. However, Johnson had then left the house and, once she left, they could not proceed with the plan. Defendant stated that, at some point, he, the complainant, and Brown were in the house alone, and that the complainant had a BB gun in his possession.[2] Defendant further stated that he struggled with the complainant for the BB gun and took $116 or $117 from the complainant's pocket during the struggle. Defendant stated that he then took the BB gun from the complainant, ran out of the house, and threw the gun near the house. After the police searched the area and did not find the gun, defendant admitted that he had disposed of the gun at a different location.

II. Late Endorsement of a Witness

Defendant argues that he was denied a fair trial when the trial court improperly allowed the late endorsement of codefendant Whited as a witness.[3] We disagree.

On the second day of trial, the prosecutor moved to amend her witness list to add codefendant Whited:

> *The prosecutor*: [T]his happened yesterday . . . The codefendant Whited pleaded guilty to a misdemeanor and approached our office and said he wanted to testify in the trial. He is not on the witness list. We haven't offered him anything but he says he wants to testify though. He believes that this might help him in his sentencing for the misdemeanor.
>
> We have not promised him anything, he is not on the witness list. However, he's obviously a res gestate witness in this matter and we would move to amend our witness list to allow him to testify.
>
> *Defense counsel*: And I object because I've not had a chance to interview that witness. It's too late. We're in the middle of the trial now.

[2] The complainant denied having a BB gun.

[3] Codefendant Whited was initially bound over on a charge of unarmed robbery. He subsequently pled guilty to a reduced charge of receiving stolen property.

The court: Well, you haven't had the opportunity to question him but the thing is the same would be true if he was remaining a codefendant and that wouldn't be any different.

The motion to amend the witness list of the prosecution is granted.

The prosecutor: Do you want to take some time for defense counsel to interview him?

The court: Certainly he can do that now if the witness wishes to speak with him.

The prosecutor: Sure. He is out in the hallway.

* * *

The prosecutor: Tell you what. . . . I believe Mr. Whited is out in the hallway and just bring him into the witness room.

The court: You go get the witness. You can use my chambers.

Shortly thereafter, the jurors were recalled, and codefendant Whited testified. He indicated that he had brought defendant to Johnson's house. He explained that he had seen the complainant with a "little wad" of money early in the day. Thereafter, Johnson approached him and defendant about robbing the complainant by selling him over-the-counter "blue pills" and passing them off as the prescription medication Xanex. Johnson told them that she had tricked the complainant before in a similar manner. Codefendant Whited explained that the three then agreed to proceed with that plan. He and Rocheleau later left to obtain playing cards, leaving only the complainant, Brown, and defendant in the house. Whited testified that when he returned, the complainant was "in shock," scared, and "had a little blood" on him. Whited stated that, a couple of days later, defendant told him that he had taken the complainant's money and had used a BB gun. Defense counsel did not ask codefendant Whited any questions.

MCL 767.40a(4) permits the prosecutor to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). To establish that the trial court abused its discretion in permitting a late endorsement, a defendant must demonstrate that the court's ruling resulted in prejudice. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991).

Even without deciding whether good cause was shown for the late endorsement, reversal is not required because defendant has failed to demonstrate prejudice. *Id.* Defendant argues that he was "severely prejudiced" by codefendant Whited's testimony. However, the core of Whited's allegedly detrimental testimony had already been presented through defendant's own statement to the police. Indeed, defendant admitted to participating in the discussion with Johnson and codefendant Whited about taking the complainant's money through trickery, and also admitted to taking money from the complainant. Moreover, codefendant Whited did not

claim to have witnessed the critical acts that actually comprised the robbery. It was undisputed that only defendant, the complainant, and Brown were present during the actual robbery, and the complainant's and Brown's testimony was consistent on this issue. Given their testimony, coupled with defendant's own admission that he took the complainant's money, there is no reasonable probability that the verdict would have been different had codefendant Whited not testified. *Id*.

Defendant also claims that the only "appropriate remedy" for the late endorsement was for the trial court to "sua sponte" adjourn trial to allow defense counsel "meaningful time to prepare to meet the testimony." The trial court provided defense counsel with an opportunity to interview codefendant Whited before he testified. Defense counsel did not indicate that he needed more time. More significantly, defendant has not offered any support for his claim that the trial court was required to sua sponte order an adjournment of trial. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We reject this claim of error.

III. Sentence

A. Victim's Impact Statement

Defendant also argues that he is entitled to resentencing because the trial court allowed the prosecutor to speak on the complainant's behalf at sentencing without requiring adequate proof that the complainant was physically or emotionally unable to appear. We disagree. "A sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence . . . ." *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994). A trial court abuses its discretion when it chooses a decision falling outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379.

At sentencing, the prosecutor indicated that she had telephoned the complainant on the day before sentencing and, because he was physically or emotionally unable to appear, he asked her to give his statement to the court. The prosecutor relayed on behalf of the complainant that the complainant still had a BB lodged in his face; that Botsford Hospital medical personnel had advised him that a specialist must remove the BB to avoid nerve damage; that the complainant has no medical insurance so the BB has not been removed; that the complainant is disabled because of being hit by a train at age 16; that at the time of the incident, his arm was in a sling so he could not fight back; that he went to Lincoln Behavioral Center for anxiety attacks after the incident; that he requested that defendant receive jail time; and that he had not received the return of any of the stolen money. Defense counsel objected to the prosecutor's remarks, noting that the complainant had failed to make himself available and that the trial court was unable to assess the complainant's credibility or the credibility of the information provided. The prosecutor argued that the trial court had received the opportunity to observe the complainant during trial, that the complainant could not come to court, and that, under MCL 780.752 and MCL 780.765, she could speak for the complainant because he was unable to appear. The prosecutor noted that there was no right to cross-examine a victim's impact statement. The trial court accepted the complainant's statement, as presented by the prosecutor.

MCL 780.765 provides:

> The victim has the right to appear and make an oral impact statement at the sentencing of the defendant. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney.

The prosecutor stated on the record that she had spoken with the complainant, that he had advised her that he could not make the oral impact statement in person, and that he had asked her to relay his statement to the court. The trial court had discretion to permit the prosecutor to speak on the complainant's behalf at sentencing, MCL 780.765, and to consider the complainant's statement as relayed by the prosecutor. Furthermore, as noted by the prosecutor, the sentencing judge had presided over defendant's trial and was therefore familiar with the complainant and the facts of the case. Defendant has not provided any support for his assertion that more evidence of the complainant's unavailability was required before the prosecutor could speak on his behalf. See *Kelly*, 231 Mich App at 640-641. We perceive no error with respect to this issue.

B. Scoring of Offense Variables

"A sentencing 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). A sentencing factor need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

1. OV 3

Defendant argues that the trial court should have scored only five points for offense variable (OV) 3 because there was no evidence that medical treatment was required. MCL 777.33(1)(d) provides that ten points may be scored for OV 3 if "[b]odily injury requiring medical treatment occurred to [the] victim." "[R]equiring medical treatment" means "the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). At trial, there was evidence that the complainant had swelling, redness, blood, and a cut on his face after defendant shot him with a BB gun. The complainant testified that he had subsequently gone to the hospital where an x-ray revealed that a projectile from the BB gun was still lodged in his face. In scoring OV 3, the trial court noted that the projectile was lodged in the complainant's face, "which means that he would need medical treatment for the very injury defendant inflicted upon him." The evidence was sufficient to support a score of ten points for OV 3.

2. OV 4

MCL 777.34(1)(a) provides that ten points may be scored for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." There was evidence presented at sentencing that the complainant sought counseling at the Lincoln Behavioral Center because of anxiety as a result of this incident. This evidence was sufficient to support the trial court's score of ten points for OV 4.

3. OV 10

The primary purpose of OV 10 is to assess points for the exploitation of vulnerable victims. *People v Cannon*, 481 Mich 152, 157; 749 NW2d 257 (2008). Five points may be assessed if "[t]he offender exploited a victim by his or her difference in size or strength, or both[.]" MCL 777.40(1)(c). The prosecutor argued that the complainant was a disabled person, and also had his arm in a sling at the time of the robbery and could not fight back. In scoring five points for OV 10, the court found that "the difference in size or the strength capability was from a diminished capacity of [the complainant] at that time." Defendant argues that there was no evidence that he exploited the complainant's disability, particularly where a BB gun was used to effectuate the robbery.

We tend to agree with the trial court that defendant exploited the difference between his own strength and that of the complainant by seeking to commit the robbery when the complainant's arm was visibly injured and in a sling. However, even if the trial court erred in scoring this variable, any error was plainly harmless. Even with a score of zero points for OV 10, defendant would remain in the same OV level II (20 to 39 points), and defendant's guidelines range would not change. Because the alleged scoring error does not affect the appropriate guidelines range, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood