STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2009
v	No. 284828 Oakland Circuit Court
RAEMON RAPHAEL SMITH, a/k/a CLAYTON HANK, Defendant-Appellant.	LC No. 2007-213189-FC

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of 114 months to 30 years' imprisonment for armed robbery, and 114 months to 30 years' imprisonment for first-degree home invasion. Defendant appeals as of right. We affirm.

Defendant first argues that insufficient evidence was presented to support his convictions. We disagree. We review de novo claims of insufficient evidence, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing the evidence "in a light most favorable to the prosecution" to "determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The prosecutor does not need to negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant challenges only one element of his first-degree home invasion conviction: whether he entered Pastor Ananias Davis's house "without permission." MCL 750.110a(1)(c) defines "without permission" as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." Defendant asserts that he was present in the home pursuant to permission granted by Pastor Davis's grandson, who lived there. However, Pastor Davis testified that he did not know defendant[1], that defendant did not have his permission to be in his home, and that his grandson

[1] Or defendant's codefendant, Gerry Swain, who was tried jointly with defendant but with a separate jury. Swain's appeal is also before this Court in Docket No. 283368.

did not have permission to admit others to his home without his approval. A victim's testimony alone may be sufficient evidence to support the elements of a crime, *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990), and the prosecutor was not required to negate defendant's theory. There was sufficient evidence for the trier of fact to find it proven beyond a reasonable doubt that defendant entered Pastor Davis's home "without permission."

Defendant argues that the evidence was insufficient to convict him for armed robbery, asserting that he was only shown to be present during the armed robbery and that he did not assist or even possess a weapon. However, defendant was convicted of aiding and abetting. Mere presence – even with knowledge of the offense – is insufficient to convict a person of aiding and abetting; he "must either have possessed the required intent or have participated while knowing that the principal had the requisite intent." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). An aider and abettor's state of mind may be inferred from the facts and circumstances including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). Here, defendant entered the house with his codefendant, blocked a doorway and appeared to be "backing up" his codefendant and preventing the victims from escaping, and remained with his codefendant while fleeing until stopped by the police. The facts and circumstances surrounding the robbery support the inference that defendant either possessed the intent to permanently deprive Pastor Davis of the money or that he participated in robbery while knowing that the Swain had that intent. *Wilson*, *supra* at 614. The evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that defendant aided and abetted Swain during the armed robbery. *Carines*, *supra* at 757-758.

Defendant next argues that the jury was deadlocked and that the trial court coerced the jury's verdict through supplemental instructions. We disagree. "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). We afford great deference to the trial court's decision whether to declare a jury deadlocked. *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002). The trial court may require the jury to continue deliberations, but it may not threaten to require the jury to deliberate for an unreasonable time, nor may it induce a juror to give up his or her opinion solely for the sake of achieving unanimity. *People v Hardin*, 421 Mich 296, 312; 365 NW2d 101 (1984). In other words, the trial court may not pressure, threaten, embarrass, or otherwise coerce a decision. *Id*. at 315; *People v Sullivan*, 392 Mich 324, 334; 220 NW2d 441 (1974).

Here, the jury indicated that it was deadlocked shortly after it had started deliberating. The trial court reasonably surmised that the jury might be able to reach a verdict after open-minded deliberations. Significantly, the trial court emphasized the importance of deliberating by working together to reach consensus, rather than agreeing just to agree. The trial court's additional instructions differed slightly from the verbatim text of CJI2d 3.12, which is ordinarily to be given to deadlocked juries. *People v Pollick*, 448 Mich 376, 382 n 12; 531 NW2d 159 (1995). However, the instruction given contained no pressure, threats, embarrassing assertions, or other wording that would constitute coercion, and the trial court did not require, or threaten to require, the jury to deliberate for an unreasonable length of time or at unreasonable intervals.

Hardin, supra at 315. We find that the trial court's supplemental instructions to the jury were not coercive.

Defendant next argues that the trial court abused its discretion by denying a request for substitute defense counsel. We disagree. The record shows that defense counsel met with defendant, sent defendant copies of his filings, and explained to defendant how he would pursue defendant's defense. Nothing in the record suggests that there was a legitimate difference of opinion between defendant and defense counsel over any "fundamental trial tactic" in the case. See *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Defendant's disagreements arose from matters of professional judgment and trial strategy, such as the manner in which witnesses were questioned. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Defense counsel's decision not to request a bond reduction under a 180-day rule also falls within the categories of professional judgment and trial strategy. Finally, defendant made his request for substitute counsel during the second day of trial, despite, as the trial court noted, prior opportunities to make such a request and further despite no showing that the judicial process would not be unreasonably disrupted. The trial court did not abuse its discretion.

Defendant next argues that his Sixth Amendment right of confrontation was violated because the trial court limited his cross-examination of Pastor Davis. We disagree. In fact, the trial court permitted defendant considerable latitude to inquire into collateral matters bearing on Pastor Davis's credibility and possible bias. Defense counsel inquired directly into the possible involvement of Davis's grandson in the robbery, including the facts that Davis retained an attorney for his grandson and loaned his grandson money with which to pay the attorney. The trial court precluded examination into matters that were, at best, only marginally relevant, like the amount of the loan. Pastor Davis was directly asked if he wanted his grandson to avoid being charged for his alleged involvement in the robbery, and he replied, "Well if he's found guilty I'll let the folks decide here." Neither the Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). The limitations that the trial court placed on defendant's cross-examination were reasonable. See *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

Defendant next argues that the trial court committed several errors during sentencing. We disagree. Because defendant's minimum sentence was within the guidelines, we must affirm defendant's sentence unless the trial court erred in scoring the sentencing guidelines or the sentence was based on inaccurate information. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003); MCL 769.34(10).

Defendant argues that the trial court inappropriately scored Offence Variable (OV) 10, MCL 777.40, "exploitation of a vulnerable victim," at ten points. Ten points should be scored if the "offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). The record showed that age was a factor: defendant planned to rob 90-year-old Pastor Davis and his elderly guests. Pastor Davis was vulnerable because there was a 68-year age difference between him and defendant, and he was in his home when the robbery occurred. Under the circumstances, the trial court reasonably found on the evidence of record that defendant singled out the victim due to his vulnerability based on his agedness. "Scoring decisions for which there

is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We find OV 10 properly scored.

Defendant argues that the trial court abused its discretion by failing to depart from the sentencing guidelines and impose a sentence below the guidelines range. We disagree. Departure from the sentencing guidelines is permissive, but "only in exceptional cases" where the trial court identifies "objective and verifiable," "substantial and compelling," reasons for doing so. See *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003). The trial court considered the victims' request for leniency and imposed a shorter sentence than it would have without the request. There were no substantial and compelling reasons to justify a departure from the guidelines range. Moreover, the trial court expressly relied on the sentencing guidelines in imposing the sentence and was not required to articulate any additional reasons for the sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

Finally, defendant argues that the trial court erroneously increased his minimum sentence because he exercised his right to a trial. We disagree. A trial court may not consider factors that violate a defendant's constitutional rights when passing sentence. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). Thus, A sentencing court cannot base its sentence on a defendant's exercise of his constitutional right to a jury trial. *People v Earegood*, 383 Mich 82, 85; 173 NW2d 205 (1970). However, it is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than he would have received had he pled guilty. *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985).

While it is *possible* to interpret the trial court's remarks as an indication that it reserved the minimum sentence only for defendants who choose to plead guilty rather than exercise their right to a trial, it does not appear from the entire context that this is what the trial court actually meant or actually did. The trial court's comment was made after considering defendant's past criminal history and the context of the instant offense. The trial court explained at greater length that it had considered a number of pleas for leniency from the victims and from defendant's family and acceded to those pleas – just not all the way to the minimum sentence under the guidelines. It appears that the trial court simply intended the minimum sentence to be reserved for defendants who indicate in some way that they have "taken responsibility" for their actions. The trial court's quick and vague comment, when viewed in context, does not show that it considered "taking responsibility" to be synonymous with "pleading guilty." The trial court's remark was unfortunate, but the record does not show that defendant was punished in any way for exercising his right to a trial. We therefore sustain the sentence. *People v Sickles*, 162 Mich App 344, 365-366; 412 NW2d 734 (1987).

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood