

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN JAMES AGELINK,

Defendant-Appellant.

UNPUBLISHED

September 14, 2010

No. 292198

Oakland Circuit Court

LC No. 2008-223830-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant Kevin Agelink appeals as of right his conviction for unarmed robbery.¹ The trial court sentenced Agelink as a fourth-offense habitual offender² to 5 to 20 years' imprisonment for the unarmed robbery conviction, to be served consecutively to his parole violation. We affirm.

I. BASIC FACTS

On October 30, 2008, Julie Ford, an associate cashier at Rite Aid, was working at the store located on the corner of Elizabeth Lake Road and M-59 in Waterford. At about 10:00 p.m., as she stood near the cashier counter at the front of the store, she saw Agelink enter the store wearing jeans and a jacket. She watched Agelink go to the liquor aisle and grab a liquor bottle that had a security cap on it. Agelink then approached the cashier counter with a bottle of wine. Ford noticed that Agelink "had gained quite a bit of weight, by the lower midsection" since he had entered the store. Ford suspected that Agelink was hiding "quite a bit of something." She asked him whether he had anything in his jacket, but Agelink responded that he did not. Agelink tried to purchase the wine, but he did not have enough money—he was 50 cents short.

Agelink returned to the liquor aisle to find something cheaper. Ford told the store manager, Scott Polonis, of her suspicion that Agelink was stealing. Polonis followed Agelink to the liquor aisle to see if he could assist him in finding something cheaper. He saw that Agelink's

¹ MCL 750.530.

² MCL 769.13.

jacket had “obviously expanded out quite a bit” and appeared to be full of liquor. He asked Agelink whether he needed help, and Agelink indicated he was looking for a cheaper bottle of wine; although, there was nothing cheaper. Polonis told Agelink, “You look kind of strange, sir,” and encouraged him to unzip his jacket. Agelink asked whether Polonis was accusing him of something. Polonis responded that he was not but that he would give Agelink the change he was short to pay for the wine if he would open his jacket. Agelink only unzipped his jacket about two inches.

Agelink and Polonis then went toward the front of the store. Polonis stood by the front door, thinking he would stop Agelink when Agelink set off the alarm sensors. Agelink “kind of just stalled around[.]” Polonis again asked Agelink to unzip his jacket. Agelink refused, but when he came within range of the sensors near the door, they went off.

The alarm made a loud beeping noise and lights flashed. The doors, which were electronic sliding doors, were closed because the store closed at 10:00 p.m. and Ford had turned them off. Therefore, Agelink could not get out. Polonis stated that “now we’ve got a situation,” and Agelink “tried to charge” Polonis. Polonis pushed Agelink back and up against the side of the vestibule at the entrance. Agelink and Polonis “got into a tussle,” and Polonis held Agelink’s arms up, causing bottles of liquor to fall out of Agelink’s jacket. Ford called 9-1-1. Ford observed four or five bottles of Grey Goose vodka on the floor.

Agelink struggled to lower his arms. Polonis thought Agelink would give up since the liquor had fallen out, so he loosened his grip. Instead, Polonis saw that when Agelink lowered his arms, “there was a knife in his hand.” Polonis had no doubt that Agelink had a knife. It was a small, silver pocketknife. Ford also noticed something in Agelink’s hands; it was small, silver, and appeared to be on a key ring. But she was about ten feet away and did not have a clear view. Polonis stopped and backed off, not wanting to be stabbed or struck. Agelink held the knife in his right hand and tried to open the door with his left hand. Agelink held the knife out so that Polonis would not go after him. The door was jammed at first. Polonis then tried to open the door because he wanted Agelink to leave. The door eventually opened, and Agelink ran away. Polonis then started lock the doors. But as Polonis was trying to lock the doors, Agelink returned, charging toward Polonis with the knife and threatening “I’m gonna get you.” However, as he got close, Agelink “went low,” reached down, and grabbed a bottle of liquor. After Agelink was gone, Polonis recovered four bottles of vodka from the floor; Agelink had taken the fifth bottle. Each bottle costs \$35.

Agelink testified at trial and admitted that he tried to steal the five bottles of liquor. He also admitted that he struggled with Polonis as he tried to leave the store. Agelink denied threatening Polonis with a knife; however, he did admit that, in an effort to open the doors, he pulled out his “handy tool. Like a boy scout tool that’s got phillips, [sic] flathead, fingernail clippers[,] and a little knife.” Agelink also admitted that he came back and grabbed one of the bottles before he ran away.

The parties stipulated that Agelink escaped on the night of the incident and no weapon was recovered. Agelink was charged with armed robbery, and the jury was instructed on both armed and unarmed robbery. The jury convicted Agelink of unarmed robbery. Agelink now appeals.

II. SCORING OF OFFENSE VARIABLE 1

A. STANDARD OF REVIEW

Agelink argues that the trial court violated his due process rights by scoring offense variable (OV) 1³—use of a weapon—at 15 points because the jury only convicted him of unarmed robbery. Because Agelink raised this issue at sentencing, it is preserved on appeal.⁴ We review the sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion in sentencing the defendant and whether the evidence adequately supported a particular score.⁵ Where there is any record evidence to support the score, we will uphold it.⁶

B. ANALYSIS

MCL 777.31(1)(c) provides for a score of 15 points where “the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon.” Agelink argues that there was conflicting testimony at trial regarding whether he used a pocketknife to threaten the store manager during the robbery and that the jury’s verdict indicates that it believed Agelink did not use a pocketknife in such a manner.

However, “the scoring of the guidelines need not be consistent with the jury verdict[.]”⁷ Moreover, the manager testified that he saw that Agelink had a knife in his right hand as the two struggled near the entrance of the store; the manager was afraid that Agelink would stab him; and after Agelink escaped through the front doors and briefly returned, Agelink said that he was “gonna get you” and still had the knife in his hand. Agelink’s presentence investigation report (PSIR) contains a similar story. “[A] ‘sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report . . . or testimony taken at a . . . trial.’”⁸ Accordingly, we conclude that adequate record evidence supported the trial court’s scoring decision.

III. REFERENCE TO KNIFE IN PSIR

Agelink argues that the references to his use of the knife should be stricken from the PSIR because they are inconsistent with the jury’s verdict. However, at sentencing, defense counsel stated, “we reviewed the pre-sentence investigation report, we find it factually accurate;

³ MCL 777.31.

⁴ MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004).

⁵ *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citations omitted).

⁶ *Id.*

⁷ *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), *aff’d in part, vac’d in part on other grounds* 469 Mich 415 (2003); *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993).

⁸ *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008), quoting *Ratkov*, 201 Mich App at 125.

no additions, deletions or corrections” other than his objection to the scoring of OV 1. Agelink has thus waived this claim of error on appeal. ““A defendant may not waive objection to an issue before the trial court and then raise it as an error’ on appeal.”⁹

IV. FACT FINDING FOR OFFENSE VARIABLES 1, 2, AND 13

Agelink argues that the trial court engaged in impermissible fact-finding in scoring OV 1, OV 2, and OV 13, which violated his Sixth Amendment rights. However, the constitutional limitation on judicial fact-finding does not affect Michigan’s statutory indeterminate sentencing scheme, where the statute sets maximum punishment.¹⁰ Additionally, the Michigan Supreme Court has determined that “[a] sentencing court does not violate *Blakely*^[11] by engaging in judicial fact-finding to score the OVs to calculate a defendant’s recommended minimum sentence range[.]”¹² “Upon conviction, a defendant is legally entitled only to the statutory maximum sentence for the crime involved.”¹³ Thus, in the present case, the trial court did not violate Agelink’s right to a jury trial by engaging in judicial fact-finding to score his OVs.

V. HABITUAL OFFENDER ENHANCEMENT

A. STANDARD OF REVIEW

Agelink argues that he is entitled to be resentenced without the habitual offender enhancement because he never received actual notice of the prosecution’s intent to seek an enhanced sentence. Agelink raised this issue in a motion to remand, which this Court denied.¹⁴ Whether a defendant’s due process rights were violated is a question of law reviewed de novo.¹⁵

B. LEGAL STANDARDS

Pursuant to MCL 769.13(1), the prosecutor may seek to enhance a defendant’s sentence under the habitual offender statutes “by filing a written notice of his or her intent to do so within 21 days after the defendant’s arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.” In addition, the notice of intent “shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). . . . The prosecuting attorney shall file a written proof of service with the clerk of the court.”¹⁶ The

⁹ *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), quoting *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

¹⁰ *People v Drohan*, 475 Mich 140, 160-161; 715 NW2d 778 (2006).

¹¹ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹² *People v McCuller*, 479 Mich 672, 686, 689-690; 739 NW2d 563 (2007).

¹³ *Id.* at 689.

¹⁴ *People v Agelink*, unpublished order of the Court of Appeals, entered January 15, 2010 (Docket No. 292198).

¹⁵ *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

¹⁶ MCL 769.13(2).

failure to file the proof of service of the notice of intent to seek an enhanced sentence may merely constitute harmless error.¹⁷

C. APPLYING THE STANDARDS

Agelink concedes that the prosecutor filed a timely notice of intent to seek an enhanced sentence.¹⁸ The record reflects that a notice of intent to seek enhancement of Agelink's sentence as a fourth offense habitual offender was filed with the trial court on November 20, 2008, and listed three prior felony convictions for first-degree retail fraud. The waiver of arraignment, dated November 20, 2008, and filed on November 21, 2008, indicates that Agelink and his attorney acknowledged that they received a copy of the information and supplemental information, read the information, understood the charges against him, and waived arraignment. Defense counsel signed the waiver, but Agelink did not. However, the record does not contain a proof of service for the notice of intent.¹⁹

The prosecution contends that Agelink waived any claim of error regarding the lack of proof of service of the notice of intent to seek enhancement because Agelink pleaded guilty to the habitual offender charge. We agree. After pleading guilty, a defendant waives many potential defenses, including the right to contest the prosecution's violation of the timing requirements in providing notice of intent to seek an enhanced sentence, which is merely a procedural rule that protects "the defendant's right to prompt and fair notice[.]"²⁰ A guilty plea does not waive issues that implicate the government's authority to try the defendant or jurisdictional defenses.²¹ Here, Agelink and defense counsel raised no objection, and in fact cooperated, when, at the beginning of the hearing, the prosecutor stated that "we still need to take the habitual plea." Agelink was sworn in, and the prosecutor elicited from him that he had three prior first-degree retail fraud convictions. Defense counsel responded, "[d]efense satisfied," when asked if he was satisfied with the record made for the habitual offender plea. By pleading guilty to the habitual offender charge, without indicating that there was any problem with notice or the proof of service, and where the evidence otherwise supports that Agelink was aware of the enhancement, Agelink waived any challenge to this issue on appeal.

We affirm.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen Fort Hood

¹⁷ *Walker*, 234 Mich App at 314-315.

¹⁸ MCL 769.13(1).

¹⁹ MCL 769.13(2).

²⁰ *People v Lannom*, 441 Mich 490, 493-495; 490 NW2d 396 (1992); see *People v Bulger*, 462 Mich 495, 517 n 7; 614 NW2d 103 (2000), overruled in part on other grounds *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005).

²¹ *Lannom*, 441 Mich at 493.