STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 291277 Kent Circuit Court
JERRY LEE WATKINS, Defendant-Appellant.	LC No. 08-007748-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 291297 Kent Circuit Court
DEVIN DARIVEED ARMOUR, Defendant-Appellant.	LC No. 08-007750-FC

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

In Docket No. 291277, defendant Jerry Lee Watkins appeals as of right following his convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 7-1/2 to 20 years' imprisonment for his armed robbery conviction, and to two years for his felony-firearm conviction, with credit for 264 days served. The sentences are to run consecutively. In Docket No. 291297, defendant Devin Dariveed Armour likewise appeals as of right following his convictions of armed robbery, MCL 750.529, and felony-firearm, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to 10 to 30 years' imprisonment for his armed robbery conviction, and to two years for his felony-firearm conviction. The sentences are to run consecutively. We affirm in both cases.

According to the record evidence, at approximately 12:30 p.m. on May 17, 2008, three men, later identified as Watkins, Armour, and Mauriece Coleman Pertiller, entered and robbed

the Fulton Street Outlet, a pawnshop in Grand Rapids, Michigan, owned by Kenneth (Ken) Hosteter and his son, Scott Hosteter. In the store at the time were Tony Spencer, a 14-year-old boy, two adult men, Ralph Hamblin and Rueben Jenkins Traviaso, and Ken, who worked behind the counter. Armour entered first, brandishing a gun. He held the patrons at gunpoint while Pertiller stole items from behind the counter and stole some of the victims' cellular telephones. Watkins stood by the entrance. After a few minutes, the perpetrators left the pawnshop, but not before Pertiller made away with additional video games and video game controllers. The three men escaped to a parked car driven by Shana Martinez-Galvan (Martinez), whom Watkins previously asked to wait on a nearby street corner. She was unaware of the robbery until the men returned wearing masks and hoods and carrying a weapon. At their command, she drove them from the scene. Several weeks later, the investigating officer, Detective Leslie Smith, of the Grand Rapids Police Department, executed a search warrant at 925 Dayton in Grand Rapids, an apartment rented by Pertiller and his girlfriend, in which he found numerous items later identified by Scott as stolen from the pawnshop. The three men were eventually arrested and their cases were consolidated and tried together.

In Docket No. 291277, Watkins first argues that the jury verdict was against the great weight of the evidence. "We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). An abuse of discretion exists if the trial court's decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *Unger*, 278 Mich App at 232. The trier of fact, not this Court, determines what inferences may be drawn from the evidence and concludes the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Our review of the record indicates that although Martinez may have been viewed as less than credible on certain points at trial, her testimony was not so impeached as to deprive her testimony of all probative value or render it unbelievable. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Assessing her credibility was entirely the province of the jury and we defer to its conclusion. Further, contrary to Watkins' argument, the fact that one of the eyewitnesses was unable to identify him as one of the three perpetrators does not equate to a conclusion that he should be excluded as a potential robber. We further find that Watkins' physical appearance and characteristics do not necessarily conflict with the eyewitnesses' recollection. Finally, even if Watkins did not reside at the home in which some of the stolen items were found, as he argues on appeal, Detective Smith nevertheless identified a piece of mail found at that address and belonging to Watkins, thus, establishing a nexus between Watkins and the home and its contents. In sum, we conclude that the several pieces of evidence referenced by Watkins on appeal do not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219.

Next, Watkins alleges that the trial court improperly sustained the prosecutor's hearsay objection during cross-examination of Detective Smith. We review a trial court's decision to

limit cross-examination for abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). A trial court's decision to admit evidence under a hearsay exception is also reviewed for abuse of discretion. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). While a criminal defendant has a fundamental right to cross-examine a state's witnesses to challenge their testimony, that right is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). A defendant must still comport with the rules of evidence and procedure to ensure fairness and reliability throughout the trial process. *Id.* at 278-279.

Here, Smith testified on direct-examination that Watkins said in an interview that he lived at 925 Dayton Southwest at the time of the robbery. On cross-examination, it appears that Watkins' counsel sought to clarify this statement by asking Smith if Watkins actually said that he lived at the address in the past, but not at the time of the robbery.[1] The trial court sustained the prosecutor's objection as self-serving hearsay by a party proponent. On appeal, Watkins argues the trial court should have allowed the statement under the MRE 106 completeness doctrine. However, the plain language of MRE 106 indicates that it applies only to "a writing or recorded statement or part thereof[.]" See also *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). Here, counsel wanted to cross-examine Smith about a previous statement made by Watkins during an interview. It was indeed hearsay, but it was neither recorded nor written. As such, it was not admissible under MRE 106. The trial court did not abuse its discretion.

In Docket No. 291297, Armour first argues there was insufficient evidence to convict him of either crime. On appeal for sufficiency of the evidence, we review all evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the prosecution proved all elements of the crimes beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The record indicates that all four victims inside the pawnshop noticed that the first robber who entered carried a handgun. Traviaso testified unequivocally that Armour was the first one to enter the store. The gun was identified as a rusty revolver with a nine to ten inch barrel. One witness saw bullets inside the cylinder chamber, and another witness believed the weapon to be a "Remington 357." Inside the store, the perpetrators used the weapon to aid in stealing three to five watches, six cellular telephones, eight to ten chains, two video game controllers, multiple video games, and $250 in cash. Martinez testified that Armour, Watkins and Pertiller talked about the robbery as she drove them from the scene. She later identified Armour during an in-person police line-up. In addition, Armour admitted to Smith that some of his personal belongings were at 925 Dayton. Thus, we conclude there was sufficient evidence to support the convictions of armed robbery and felony-firearm. MCL 750.529; MCL 750.227b.

Next, Armour challenges the introduction of two watches and a cellular telephone, which were found during a search of 925 Dayton and were later identified by Scott as being stolen from the pawnshop. Armour essentially argues that Scott's authentication of the items was insufficient. We review a trial court's decision to admit evidence for an abuse of discretion.

[1] We are not persuaded by defendant's self-serving and unsubstantiated affidavit that defense counsel sought to elicit other information on cross-examination.

People v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999). "The rule governing the admission of physical evidence requires that a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). Under MRE 901(b)(1), all that is required is "[t]estimony that a matter is what it is claimed to be." Here, Scott testified repeatedly that he recognized the items and that he was 100 percent certain they were stolen from his pawnshop. This was sufficient. *People v Howard*, 226 Mich App 528, 553-554; 575 NW2d 16 (1997).

Next, Armour challenges Traviaso's in-court eyewitness identification. Specifically, he argues that an identification based on "eyes alone" is per se an insufficient basis for identification. We disagree. Because defendant did not object to the identification, we review for plain error. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006). Plain error occurs at the trial court level if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In reviewing Armour's claim, we find it helpful to look at case law related to whether an independent basis existed for an in-court identification:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

Nothing in the record indicates that Traviaso knew or had seen Armour before the robbery. However, Traviaso stated that he stood side-by-side with Armour for the duration of the robbery and had an excellent opportunity to observe Armour's eyes. He intentionally made eye contact with Armour several times so that he would remember him later on. Although Armour wore a bandana over his nose and mouth and a hooded sweatshirt over his head, Traviaso stated that without a question he could recognize Armour by his eyes. Moreover, Traviaso also recognized Armour from the scratches or scars and tattoos on his neck below his bandana, as well as his body language, physical height, and size. The whole robbery occurred over a span of several minutes. The challenged identification occurred on January 22, 2009, approximately seven months after the May 17, 2008, robbery and we acknowledge that Armour pointed a gun at Traviaso and the other victims during the course of the robbery, and that at one point, Traviaso thought he would die. However, Traviaso stated unequivocally that he recognized Armour as the perpetrator with a gun. On this record, we conclude there were sufficient facts to support Traviaso's in-court identification. He was extremely confident throughout direct and cross-examination that Armour was the first person in the pawnshop and that he held a gun. Any differences or discrepancies in his description of Armour pertain to the weight of his identification, and not its admissibility. It was not plain error for the trial court to admit Traviaso's identification testimony.

Next, Armour challenges the trial court's denial of his motion for directed verdict at the close of trial. We review such challenges de novo. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). In reviewing a trial court's decision on a directed verdict, we view all the evidence up to the point the motion was made in the light most favorable to the prosecutor to determine whether a rational trier of fact could have concluded the essential elements of the crime were proved beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). We previously concluded that there was sufficient evidence to uphold each of Armour's convictions, and we likewise conclude that the trial court properly denied his motion.

Next, Armour argues that he is entitled to resentencing due to the misscoring of offense variables (OVs) 4, 9 and 14 at sentencing, and the fact that impermissible judicial fact finding took place. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Sentencing guidelines scoring decisions for which there is any supporting evidence will be upheld on appeal." *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

At the outset, we note that Armour's claim of impermissible judicial fact finding has been squarely rejected by our Supreme Court, *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), and we are bound by that decision, *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987).

Regarding OV 4, MCL 777.34(2) provides that ten points must be scored if a victim suffers "serious psychological injury [that] may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." Here, Traviaso testified that he believed he was going to die during the robbery. And, the victim impact statement of Ken Hosteter indicated that he was traumatized as a result of the robbery, and that he might require counseling in the future. This is sufficient to uphold the ten-point score.

Regarding OV 9, MCL 777.39(1)(c) provides that ten points must be scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death[.]" The record unquestionably indicates that four persons were inside the pawnshop when it was robbed. There is no question that the first person to enter the store, whom Traviaso identified as Armour, used a gun which he aimed at the victims to carry out the crime. The ten-point score was proper.

Regarding OV 14, MCL 777.44 provides that ten points should be scored if "[t]he offender was a leader in a multiple offender situation[.]" It further provides: "All of the following apply to scoring offense variable 14: (a) The entire criminal transaction should be considered when scoring this variable." Here, there is ample evidence that Armour entered the pawnshop first with a gun and held the victims at gunpoint. He then commanded Pertiller to remove the items from the display counter and take the victims' cellular telephones. Several witnesses said that Armour was the only perpetrator with a gun and the only one to speak during the entire robbery. Moreover, Hamblin testified that the perpetrator with the gun [identified by Traviaso as Armour] ordered the other two perpetrators to leave the store while he waited behind and warned the victims not to follow. In light of this evidence, the trial court did not abuse its discretion to conclude that Armour was the leader of this small band of robbers and score ten points for OV 14. Accordingly, Armour is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006).

Next, Armour argues ineffective assistance of trial counsel. Armour recites the applicable law setting forth the standard for ineffective assistance of counsel, but includes no discussion or application of the law to his case. Absent any reference to his counsel's specific conduct, the issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

We affirm the convictions of defendant Watkins in Docket No. 291277, and defendant Armour in Docket No. 291297.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray