STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2010
v	No. 293872 Saginaw Circuit Court
JOSEPH JORDAN INGRAM, Defendant-Appellant.	LC No. 07-030131-FJ

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Defendant pleaded guilty to three counts of armed robbery, MCL 750.529, one count of assault with intent to commit robbery while armed, MCL 750.89, one count of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two years in prison for the felony-firearm conviction, to be served preceding and consecutive to defendant's concurrent sentences of 225 to 360 months in prison for each of the other convictions. Defendant appeals by delayed leave granted. We affirm.

I

Defendant (DOB December 6, 1991) was arrested on August 7, 2007, on four counts of armed robbery. He was 15 years old at the time. The prosecution moved the family division of the circuit court ("family court") to waive jurisdiction over defendant to the circuit court for trial as an adult. The family court then conducted a two-phase waiver hearing as required under MCL 712A.4 and MCR 3.950(D).

At the phase one proceedings, three witnesses—all of whom were victims—testified about the events giving rise to defendant's arrest. According to their testimonies, the four victims of the incident—Jessica Theile, Randy O'Bryan, Kevin Palacio, and Carol Lamphere—were friends. At approximately 3:00 a.m. on August 7, 2007, they were driving in a car in Saginaw, Michigan. When the car stopped at a stop sign, two young males approached. One was later identified as defendant. Both men were holding guns. Defendant approached the driver's side of the car and pointed his gun at the head of the driver, O'Bryan. The other man approached the passenger side of the car and pointed his gun at the head of the front passenger, Theile. They instructed O'Bryan to drive around the corner and stop in a vacant parking lot. When the car stopped, defendant took the keys out of the ignition and demanded money and

everything else the victims had in their possession. The men took purses belonging to Theile and Lamphere, as well as other items from the car. When Lamphere attempted to call 911, one of the men threatened to blow her head off. The men instructed the victims to exit the car, which they did. The men then left the area. Based on this testimony, the family court determined that there was probable cause to believe defendant committed the armed robberies.

At the phase two proceedings, the family court determined that the best interests of defendant and the public would be served by granting a waiver of jurisdiction. An order to that effect was subsequently issued.

Defendant was arraigned in the circuit court in January 2008, and the information was amended to include charges for three counts of armed robbery, one count of assault with intent to rob while armed, one count of conspiracy to commit armed robbery, and one count of felony-firearm. In August 2008, defendant pleaded guilty to all charges. He made a brief statement of fact to the trial court, and the court accepted the plea. Defendant was sentenced as described.

Defendant filed a delayed application for leave to appeal, which this Court granted. See *People v Ingram*, unpublished order of the Court of Appeals, entered October 15, 2009 (Docket No. 293872).

II

Defendant first argues that the family court abused its discretion in waiving jurisdiction over him. We disagree.

Generally, the family court has exclusive jurisdiction over proceedings concerning any child less than 17 years old who is accused of violating a law or a municipal ordinance. MCL 712A.2(a)(1); *People v Conat*, 238 Mich App 134, 139; 605 NW2d 49 (1999). The family court may waive its jurisdiction over a child who is at least 14 years old, on motion of the prosecution, if the alleged offense is a felony. MCL 712A.4(1); *People v Thenghkam*, 240 Mich App 29, 37; 610 NW2d 571 (2003), overruled in part on other grounds in *People v Petty*, 469 Mich 108; 665 NW2d 443 (2003).

As indicated, the waiver hearing is conducted in two phases. MCL 712A.4(3) and (4); MCR 3.950(D); *People v Williams*, 245 Mich App 427, 432; 628 NW2d 80 (2001). Phase one requires a determination of probable cause. MCL 712A.4(3); MCR 3.950(D)(1), *People v Hana*, 443 Mich 202, 221-222; 504 NW2d 166 (1993). The phase one hearing takes the place of a preliminary examination. MCL 712A.4(3) and (10); MCR 3.950(D)(1)(c)(ii).

Phase two requires a determination of the best interests of the juvenile and the public. MCL 712A.4(4); MCR 3.950(D)(2); *Hana*, 443 Mich at 222-223; *Williams*, 245 Mich App at 432. In deciding whether these interests merit waiver of jurisdiction, the family court must consider:

> (a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
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> (c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
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> (d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (e) The adequacy of the punishment or programming in the juvenile justice system.
>
> (f) The dispositional options available for the juvenile. [MCL 712A.4(4). See also MCR 3.950(D)(2)(d).]

The court must give greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria. MCL 712A.4(4); *People v Whitfield (After Remand)*, 228 Mich App 659, 662 n 1; 579 NW2d 465 (1998). The prosecution has the burden of establishing by a preponderance of the evidence that waiver would serve the best interests of the juvenile and the public. MCR 3.950(D)(2)(c).

This Court must affirm an order waiving jurisdiction whenever the family court's findings, based on substantial evidence and a thorough investigation, show that the juvenile is not amenable to treatment or is likely to be dangerous if released at age 19 or 21 or is likely to disrupt the rehabilitation of others. *People v Dunbar*, 423 Mich 380, 387; 377 NW2d 262 (1985); *Whitfield*, 228 Mich App at 662. There must also be on the record, to which the court must refer, findings regarding the relative suitability of programs and facilities available in the juvenile and adult correctional systems. *Dunbar*, 423 Mich at 388. The family court's findings of fact are reviewed under the clearly erroneous standard. MCR 3.902(A); MCR 2.613(C). The ultimate decision whether to waive jurisdiction is reviewed for an abuse of discretion. *In re Fultz*, 211 Mich App 299, 306; 535 NW2d 590 (1995), rev'd on other grounds 453 Mich 937 (1996).

In this case, at the phase two proceedings, the family court, without any objection, took notice of defendant's juvenile file and a two-page report prepared by his probation officer. The parties also stipulated to a description of the programming and services that would be available to defendant in the adult system. Following arguments by counsel, the court stated its findings with regard to all six of the statutory factors to be considered for waiver. With regard to the seriousness of the alleged offenses, the court noted that it had found probable cause to believe defendant "was one of two individuals, both armed with weapons, who, in the early morning

hours, put guns to the head of people in a vehicle and robbed them." The court further noted that the remaining effect on the victims was apparent during the phase one proceedings, particularly on Theile, who was "wavering and shaking" during her testimony. With regard to defendant's culpability, the court stated: "I can't find any mitigating factors in what I heard. We're talking about four counts of Armed Robbery . . . with no mitigation. . . . There's no indication that anyone [out of the two alleged perpetrators] involved in that offense was less culpable." The court next addressed defendant's prior record of delinquency and programming history:

> This young man was 15 at the time this report was written. He became 16 earlier this month. His first contacts with this court go back to 2005 on a charge of—having been reduced here and found true—Attempted Resisting & Obstructing a Police Officer. The complaint forms and records in the file indicate that what that involved was this young man as a passenger in a stolen car which he and another had, apparently, taken earlier in the day. Suspect fled on foot after the vehicle pursuit ended. That was the first contact. That progressed to a charge of Attempted Home Invasion-Second Degree and Malicious Destruction of Property Under $200. That progressed to Conspiracy to Commit Unarmed Robbery and Robbery-Unarmed. Through all of these charges, this young man and his family have both, since 2005, received substantial services in an effort to modify and rehabilitate [defendant]. As the report reflects and as the file reflects, there have been efforts by the Department of Human services to work with the entire family for a period of six months, going back to 2005, when there were efforts at initiating parenting and counseling services for the parents involved as well as for the children. This young man who, when he was in . . . May of '06, suspended for five days from Webber Middle due to shouting sexual comments across the classroom and insubordination, given the opportunity to attend New Alternatives school program. He was given the opportunity to have in-home counseling, which literally would have been in the home, had the counselor received opportunity to do that, with counseling for both substance abuse treatment and anger management, as well as family counseling. He was given the opportunity to participate in the Family Youth Initiative Level 3 program . . . . This young man has failed as recently as July to appear for a placement violation hearing having to do with two curfew violations. There have been previous concerns about his being in school, being under any type of parental control, taking seriously any effort to modify his behavior. Tethering couldn't be used because of the parent denying that he could be a flight risk and failing to cooperate in what was necessary to put a phone in the home so that the tether could be implemented. The bottom line is this young man has been offered a range of juvenile systems as has his family to change this situation, and his willingness to participate meaningfully in any of the services that were offered to him has been non-existent. . . . Certainly, his prior record of delinquency shows a pattern of escalation despite intervention . . . .

Finally, with regard to the adequacy of the punishment or programming available in the juvenile system and the dispositional options available for defendant, the court noted that the only remaining option for defendant in the juvenile system was "secure custody for an extended period of time." The court did not believe that option would be effective considering the time

defendant had already spent in the juvenile detention unit without success. [Defendant's juvenile history indicates that he was ordered to spend at least 90 days in detention in 2006.] The court further noted that the adult system had more available options for defendant, which would hopefully prove more effective, including community-based counseling, substance abuse services, and incarceration, should that be deemed necessary, all extending over a longer period of time than what was available in the juvenile system. In conclusion, the court stated:

> [W]hen I consider not only [defendant's] welfare but that of the public and the need for the public protection, I am satisfied that the People have carried their burden by far more than the necessary preponderance of the evidence on every one of the factors that I must consider.
>
> Accordingly, this Court will enter an Order that transfers [defendant] to the court of general criminal jurisdiction to be tried as an adult.

On appeal, defendant challenges the family court's decision to waive jurisdiction over him, arguing that the court focused too heavily on the seriousness of the alleged offenses and defendant's prior record and failed to consider other relevant factors. We disagree. MCL 712A.4(4) specifically instructs that the court must give greater weight to the seriousness of the alleged offenses and the juvenile's prior record of delinquency than to the other statutory criteria. In his brief on appeal, defendant acknowledges that armed robbery is a serious offense and does not identify any mitigating factors. Defendant also acknowledges his lengthy and progressively escalating prior record. Nonetheless, defendant claims that placing him in juvenile detention would have been more effective than adult incarceration. He claims the court should have considered that he had not undergone extended periods of detention in the past, whether he was amenable to treatment, his potential for treatment, whether he would pose a danger to the community upon release, whether he would disrupt other juveniles in the program before release, "other dispositional options," and his age "and/or psychological make-up." Contrary to defendant's claims, however, it is clear from the record that the court carefully considered the options available to defendant in the juvenile and adult systems. Given defendant's previous failure to cooperate with treatment programs and the limited amount of time he would have had in the juvenile system considering his age, the court concluded that placing defendant in the adult system would likely be more effective. It is also clear from the record that the court was concerned with the danger defendant posed to the public considering his escalating pattern of criminal behavior and the alleged armed robberies at issue, which involved defendant holding a gun to a victim's head, taking the victims' possessions, and possibly threatening to kill one of the victims. The court considered all of the statutory criteria, placed detailed findings with regard to each criterion on the record, and concluded that the prosecution had established the necessity of waiver by a preponderance of the evidence. Accordingly, we hold that the family court did not abuse its discretion in waiving jurisdiction over defendant.

III

Defendant next argues that resentencing is required because the trial court erroneously scored offense variables (OVs) 8 and 13. Again, we disagree.

Defendant did not object to the scoring of any OVs at sentencing. We review unpreserved scoring challenges for plain error affecting the defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). "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 scoring decision "for which there is any evidence in support will be upheld." *Id.*

According to defendant, the trial court erred in scoring 15 points for OV 8. MCL 777.38(1)(a) provides that 15 points are to be scored for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Defendant claims that the OV should have been scored at zero points because "[n]o victim was asported or held captive." See MCL 777.38(1)(b). Although "asportation" is not defined in the statute, it does not require force. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). But the requisite movement must not be incidental to the commission of the underlying offense. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Here, the trial court did not specifically state the basis for the 15-point score. At the phase one proceedings, the victims who testified indicated that on the night of the robbery, they were driving in a car in Saginaw. When the car stopped at a stop sign, defendant and another young male approached. With guns pointed at the victims' heads, they instructed the driver to drive around the corner and stop in a vacant parking lot. They then proceeded with the robbery. We find that by being forced to drive around a corner and into a vacant lot, the victims were "asported to another place of greater danger or to a situation of greater danger." MCL 777.38(1)(a). The robbery took place at approximately 3:00 a.m. At that time of night, driving from a street, where the victims were momentarily stopped at a stop sign, to a vacant lot around the corner, would have made the robbery less conspicuous to other drivers or passersby and, therefore, more dangerous. In addition, one of the victims testified that before defendant and the other young man left the area, they instructed all of the victims to exit the car. Forcing the victims to exit the car took them out of the relative safety of the car and out into the open, where they were even more vulnerable to attack. This arguably also constituted asportation to a situation of greater danger. Given the facts of record, the trial court properly scored OV 8 at 15 points.

Defendant further argues that the trial court erred in scoring OV 13 at 25 points. MCL 777.43(1)(c) provides that 25 points are to be scored for OV 13 where the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Defendant claims, without citation to authority, that OV 13 should have been scored at zero points because there was "[n]o pattern of felonious criminal activity" before the sentencing offenses. See MCL 777.43(1)(g). But MCL 777.43 provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, *including the sentencing offense*, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a) (emphasis added). Contrary to defendant's argument on appeal, the plain language of MCL 777.43(2)(a) indicates that a sentencing court must include contemporaneous crimes. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). Here, defendant pleaded guilty to three counts of armed robbery and one count of assault with intent to commit robbery while armed, both of which are crimes against a person. See MCL 777.16d and MCL 777.16y. Additionally, the plain language of MCL 777.43 does not limit the scoring of points to adult criminal proceedings. Defendant's presentence investigation report shows juvenile adjudications

in 2006 for attempted second-degree home invasion, MCL 750.92 and MCL 750.110a(3), and unarmed robbery, MCL 750.530, both of which are felonies if committed by an adult and are crimes against a person. MCL 777.16f and 777.16y. Thus, the trial court properly scored OV 13 at 25 points.

IV

Finally, defendant argues that his trial counsel rendered ineffective assistance of counsel. Defendant's claim fails.

A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant failed to move for a new trial or a *Ginther* hearing, our review is limited to mistakes apparent on the record. See *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance claim is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *Id*.

Attached to defendant's brief on appeal is a document listing his complaints with his trial counsel's performance. The document is signed by defendant and dated May 20, 2009. In sum, defendant asserts that counsel: 1) informed defendant that the trial court would not allow him to withdraw from the case; 2) the day of trial, stated that he was not ready and fully equipped; 3) stated that if defendant desired to free his codefendant and insure separate sentencing dates, defendant should plead guilty; 4) spent only one to two minutes with defendant before defendant entered his plea; 5) informed defendant that there was nothing he could do about the witnesses' varying testimonies; 6) the day of trial, gave defendant only one to two minutes to review the PSIR; 7) instructed defendant to hurry when defendant was signing the plea agreement; 8) attempted to postpone the trial because of a vacation; 9) discussed the case with defendant only two to three times; 10) communicated with defendant's parents only through his assistant; and 11) failed to give transcripts to defendant when requested, instead giving them only to his codefendant.

Other than his unsworn statement, which is summarized above, defendant provides this Court with no evidence that his trial counsel was actually ineffective. If, in fact, the assertions in defendant's statement are accurate, at least some of counsel's performance arguably fell below an objective standard of reasonableness. But defendant has not explained how such performance affected the outcome of the case. Defendant does not assert that he would have changed his plea or challenged his sentence had counsel communicated more effectively with him or otherwise

improved his performance. Therefore, there is no basis on which we can grant defendant relief. See *id*. at 145-146.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly