STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v	No. 325197 Wayne Circuit Court
CHRISTOPHER WAYNE STOKES, Defendant-Appellant.	LC No. 13-007545 - FC

Before: K. F. KELLY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of carjacking, MCL 750.529a, and armed robbery, MCL 750.529. He was sentenced as a second habitual offender, MCL 769.10, to concurrent sentences of 20 to 30 years' imprisonment for each conviction. We affirm defendant's convictions but remand for further proceedings consistent with this opinion.

Defendant argues that he was denied the effective assistance of counsel. We disagree. To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or an evidentiary hearing with the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Defendant never moved for a new trial or a *Ginther*[1] hearing in the trial court. Defendant filed a motion for a *Ginther* hearing with this Court, which was denied for failure to persuade the Court of a necessity for a remand.[2] When an ineffective assistance of counsel claim is unpreserved, "this Court's review is limited to mistakes apparent from the record." *Id.*

"To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that,

[1] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] *People v Stokes*, unpublished order of the Court of Appeals, entered September 4, 2014 (Docket No. 325197).

but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207.

Specifically, defendant contends that his trial attorney failed to advise him that he could still be convicted of carjacking and armed robbery even though his charges of felon in possession of a firearm and possession of a firearm during the commission of a felony (felony-firearm) were dropped and no weapon was found. Defendant argues that this case should be remanded to the trial court so that he could accept plea offers that he had rejected. Contrary to defendant's assertions, the record clearly shows that defendant had been informed by his trial attorney about the plea offer before the commencement of the trial. In addition, at the start of trial, the court stated it would "be willing to even go one year below" the prosecutor's plea offer. Defendant replied that he was not "interested in that." The court informed defendant that he faced the possibility of consecutive sentencing if he was convicted in this case. Defendant stated that he understood. Defendant had originally been charged with carjacking, armed robbery, felon in possession, and felony-firearm. Defendant clearly knew that the last two of those charges had been dropped and his case was going to trial on the carjacking and armed robbery charges. In light of these facts, defendant's argument that he did not know that he still could be convicted of carjacking and armed robbery is not credible. The record belies defendant's contention that he did not receive competent advice. Therefore, defendant has failed to demonstrate that he did not receive the effective assistance of counsel.

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. Generally, "[w]e review for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). However, defendant failed to raise this issue in a motion for a new trial, thus our review is limited to plain error that affected his substantial rights. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Lacalamita*, 286 Mich App at 469.

Defendant claims that the verdict was against the great weight of the evidence because there was conflicting testimony concerning the identity of the perpetrator. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Therefore, it is axiomatic that the prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. See *Russell*, 297 Mich App at 721. "The credibility of identification testimony is a question for the trier of fact . . . ." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

The record shows that there were some conflicts in the victim's description of the perpetrator regarding height, weight, and facial hair. However, the victim identified defendant at trial, the preliminary examination, and in a pretrial photographic spread. The victim testified that defendant told him to get out of his vehicle and to give defendant his phone. As the victim got out of the car, he and defendant were facing each other and looking "eye to eye." The victim stated that he was "one hundred percent" certain that defendant committed the crime. Additionally, although defendant did not testify, the jury was able to observe his appearance as compared to the victim's initial descriptions of the perpetrator. The jury's determination that the

victim's identification of defendant was credible was supported by the record. Further, the credibility of identification testimony is a question of fact for the jury to decide. *Id*. Defendant has not demonstrated that "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Lacalamita*, 286 Mich App at 469.

Defendant next argues that he is entitled to resentencing because the trial court engaged in impermissible judicial fact-finding to score the sentencing guidelines, contrary to *Alleyne v United States*, 570 US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Because defendant did not object to the scoring of the guidelines at sentencing on the basis of *Alleyne*, this issue is unpreserved and appellate review is limited to plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

In *Alleyne*, 133 S Ct at 2163, the United States Supreme Court held that because "mandatory minimum sentences increase the penalty for a crime," any fact that increases the mandatory minimum is an "element" that must "be submitted to the jury and found beyond a reasonable doubt." In *Lockridge*, 498 Mich at 364, our Supreme Court held that Michigan's sentencing guidelines were constitutionally deficient under *Alleyne* to the extent that "the guidelines *require* judicial fact-findings beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne*." To remedy the constitutional violation, the Court severed MCL 769.34(2) to the extent that it makes the sentencing guidelines, as scored based on facts beyond those admitted by the defendant or found by the jury, mandatory. *Id*. The Court explained that a sentencing court must still score the guidelines to determine the applicable guidelines range, but a guidelines range calculated in violation *Alleyne* is now advisory only. *Id.* at 365.

Defendant challenges the scoring of OV 1 (aggravated use of a weapon), OV 2 (lethal potential of weapons possessed or used), and OV 13 (continuing pattern of criminal behavior). OV 1 should be scored at 15 points where "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31. Here, possession and use of a weapon is an element of armed robbery. MCL 750.529; *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007); *People v Jolly*, 442 Mich 458, 464-4655; 502 NW2d 177 (1993). However, the jury in this case did not find, specifically, that defendant pointed a firearm at the victim. At most, the jury found facts supporting a five-point score because a weapon was displayed or implied. OV 2 was scored at five points because "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." While armed robbery requires the jury to find the presence of a dangerous weapon, it is not specific to "a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon cutting or stabbing weapon." Accordingly, the jury did not find facts sufficient to support a five-point score under OV 2. OV 13 was scored at 25 points because "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Here, defendant was involved in a separate carjacking and armed robbery case, which would support this score. Scoring OV 13 is not necessarily impermissible: "the fact of a prior conviction" is an exception to the rule that every fact must be found by the jury. *Lockridge*, 498 Mich at 370; *Alleyne*, 133 S Ct at 2160 n 1. However, the scoring of OV 1 and

OV 2 amount to 20 points, which would have changed defendants OV level for the purposes of sentencing.

Thus, the "facts admitted by defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he [] was sentenced[,]" resulting in a violation of defendant's Sixth Amendment rights." *Lockridge*, 498 Mich at 395. This violation constitutes plain error, as defendant's sentence was not subject to an upward departure. *Id*. at 395-396. The *Lockridge* Court explained that the appropriate remedy is a *Crosby*[3] remand to the trial court for a determination whether the court would have imposed a materially different sentence but for the constitutional error. *Id*. at 396-397. "If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id. at 397*.

We affirm defendant's convictions, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[3] *United States v Crosby, 397 F3d 103, 117-118 (CA 2, 2005).*