

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SETH ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2012

No. 302966

Wayne Circuit Court

LC No. 10-007582-FC

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant, Seth Robinson, appeals his sentence as of right. Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. Defendant was sentenced, as an habitual offender, second offense, MCL 769.10, to 11 to 20 years' imprisonment. Because we conclude defendant is not entitled to resentencing by the trial court judge who presided over his trial and because we find no error in the scoring of offense variable 10, we affirm.

Defendant's conviction arises from the robbery of Love McMiller. On June 18, 2010, defendant entered McMiller's business, Love's Tires. McMiller, who was 72 years old at the time of the trial, was familiar with defendant from the neighborhood and had known defendant since he was six or seven years old. Defendant asked McMiller if he had seen a dog, and when McMiller responded that he had not seen a dog defendant left. Defendant returned about 15 minutes later with two other men. The men talked to McMiller for a few minutes, and then defendant walked over to McMiller and pulled up his shirt to reveal a gun tucked inside of his waistband. Defendant demanded money from McMiller and reached into McMiller's pockets removing money and taking McMiller's cellular telephone from his belt clip. Defendant asked McMiller if he had "anything else," and ordered McMiller to take his shoes off so he could look inside the shoes. After defendant inspected McMiller's shoes, defendant and the other two men left the store.

McMiller immediately contacted the police, and informed the officers that he knew who robbed him. A few days later, McMiller identified defendant from a photographic lineup and defendant was arrested. Defendant's jury trial began on October 19, 2010, and he was convicted on October 21, 2010. Defendant was sentenced on November 23, 2010, by Wayne Circuit Court Judge John D. O'Hair (retired). Defendant's trial was presided over by Wayne Circuit Court Judge Craig S. Strong.

On appeal, defendant first argues that he was entitled to sentencing by the trial court judge who presided over his trial. Defendant concedes that he did not object to sentencing by a different judge; however, he argues that because he did not expressly waive the right to be sentenced by the judge who presided over his trial he is now entitled to resentencing.

Because defendant did not object to sentencing before a different judge, we review defendant's claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error was outcome determinative. *Id.* at 763.

"Generally, a defendant should be sentenced by the judge who presided at his trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987), citing *People v Clemons*, 407 Mich 939; 291 NW2d 927 (1979). In this case, defendant does not argue that the trial judge was reasonably available to preside at the sentencing hearing. The prosecution states in its brief on appeal that the judge who presided over the trial was on leave for surgery from November 15, 2010 through December 23, 2010. Defendant was sentenced on November 23, 2010. Defendant does not dispute the prosecution's claim that the judge who presided over his trial was on medical leave at the time of his sentencing. Therefore, defendant has failed to demonstrate plain error because he has not shown that the judge who presided over his trial was reasonably available to preside over the sentencing hearing. Further, we reject defendant's argument regarding waiver because there is no right to be sentenced by the judge who presided over the trial, and express waiver is not required before a different judge may preside over the sentencing hearing.

Further, defendant notes the reasons in support of the general policy that the same judge preside over both the trial and the sentencing hearing, but he does not argue that the judge who presided over his sentencing hearing was uninformed about the evidence introduced at trial or that the judge was unable to tailor a sentence to fit the circumstances of the offense and the offender. Moreover, the record from the sentencing hearing in this case indicates that the judge was familiar with the evidence admitted at trial. Therefore, defendant has also failed to demonstrate that sentencing by a different judge was prejudicial.

Defendant also argues that he is entitled to resentencing because the trial court improperly assessed ten points for offense variable (OV) 10.

"This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). We will uphold a scoring decision if there is any evidence to support it. *Id.* "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *Steele*, 283 Mich App at 490. The interpretation of the statutory sentencing guidelines is a question of law that we review de novo. *Id.*

OV 10 considers the exploitation of a vulnerable victim. MCL 777.40. Ten points should be assessed if “[t]he 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). “Exploit means to manipulate a victim for selfish or unethical reasons.” MCL 777.40(3)(b). For the purpose of scoring OV 10, “vulnerability” is “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” *People v Russell (On Remand)*, 281 Mich App 610, 612; 760 NW2d 841 (2008); MCL 777.40(3)(c). The mere existence of one of the specified factors does not automatically establish victim vulnerability. *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009).

In this case, the trial court scored 10 points for OV 10 because it determined that defendant exploited McMiller, who, due to his age and relationship with defendant, was a vulnerable victim. The evidence admitted at trial demonstrated that McMiller was 72 years old at the time of the trial and had known defendant since defendant was young, and had hired defendant to do odd jobs for Love’s Tires in the past. This evidence was sufficient to demonstrate that defendant manipulated McMiller because McMiller was unlikely to suspect defendant would harm him based on their relationship, and was less able to physically defend himself based on his age. Accordingly, we uphold the trial court’s scoring of OV 10 at ten points because there is record evidence to support the score and defendant’s minimum sentence is within the recommended guidelines range.<sup>1</sup> *Steele*, 283 Mich App at 490.

Affirmed.

/s/ Kathleen Jansen  
/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra

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<sup>1</sup> Defendant was sentenced to 11 to 20 years’ imprisonment; his minimum guidelines range was 108 to 225 months. MCL 777.21(3)(a); MCL 777.62.