

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

JAMES ALLEN WILFORD,
Defendant-Appellant.

No. 303028
Ingham Circuit Court
LC No. 09-001310-FC

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit robbery while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to prison terms of 300 to 480 months for assault with intent to commit robbery while armed and 24 months for felony-firearm. Defendant appeals as of right. We affirm.

According to the victim, he was home with his seven-month-old son when three men broke through his front door. Defendant had a gun and the men were demanding money and drugs. The victim, who testified that someone hit him in the face, eventually gave the men money he had in his pocket. At some point, the victim and his son were escorted to the basement and left alone. The victim called 911. The police arrived and apprehended defendant and the other two men. Defendant claimed that he went to visit the victim and that while he was knocking on the door the two other individuals “ran from around the side of the house” and “[o]ne pulled a gun on me and told me to open the front door.”

Defendant’s claim that he was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s factual findings for clear error and questions of law de novo. *Id.*

A claim of ineffective assistance of counsel requires a defendant to show “that counsel’s performance was deficient in that it fell below an objective standard of professional reasonableness” and that there is a reasonable probability that the outcome of the trial would have been different but for counsel’s performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). A presumption of effective assistance of counsel exists and the burden is on the defendant to prove otherwise. *LeBlanc*, 465 Mich at 578. An appellate court should

neither “substitute [its] judgment for that of counsel on matters of trial strategy, nor . . . use the benefit of hindsight when assessing counsel’s competence.” *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Further, there is a strong presumption that counsel’s performance is reasonable trial strategy and defense counsel is given broad discretion when it comes to trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); *Jordan*, 275 Mich App at 667-668.

Defendant argues that defense counsel was ineffective by failing to call defendant’s girlfriend, Angel Porter, and defendant’s mother, Evelyn Yvonne Wilford Tansell, as witnesses, and by waiving the testimony of Detective Kranich. Defendant claims Porter would have testified that the two other perpetrators had robbed her five days earlier. Defense counsel testified that he did not call Porter as a witness because she would not have helped his defense strategy. Likewise, counsel agreed to waive the testimony of Kranich because it would not have aided the jury in deciding the case since it would not have provided the jury with any new information. Thus, the record indicates that defense counsel was not ineffective for failing to call these witnesses because it was a matter of sound trial strategy. In addition, defense counsel testified that defendant’s mother never expressed an interest in testifying and never indicated that she had information that would be helpful to the defense. Counsel cannot be deemed ineffective for failing to call a witness when he was unaware that the witness had information that might have been helpful.

Defendant also argues that defense counsel was ineffective for failing to inform him of a plea offer. The failure to inform a defendant of a plea offer can constitute ineffective assistance of counsel if the defendant can show prejudice as a result. *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988). Defense counsel testified that he informed defendant of both plea agreements offered by the prosecution. There is no indication that defendant was not informed about both plea agreements and their terms. Further, although defendant asserts that defense counsel promised him a sentence of 19 months to five years, the trial court found that defense counsel’s testimony that he was unable to negotiate such a sentence to be more credible. “This Court will not interfere with the [trial court’s] role of determining the weight of the evidence or the credibility of witnesses.” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Next, defendant argues that the evidence presented was not sufficient to convict him of the charged offenses. We review sufficiency of the evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515-514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). In doing so, all evidence must be viewed in a light most favorable to the prosecution. *People v Railer*, 288 Mich App 213, 216; 792 NW2d 776 (2010). We defer to the fact-finder’s weighing of the evidence and assessment of the credibility of the witnesses. *Wolfe*, 440 Mich at 514.

“The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant’s being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.” *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991) (citation omitted). Defendant’s entire

argument is based upon witness credibility. However, this Court defers to the jury's weighing of the evidence and assessment of the credibility of the witnesses. The prosecution presented numerous witnesses who testified to defendant's involvement in the attempted robbery. There was testimony that defendant and two other men planned to rob the victim of marijuana. One of the perpetrators testified that he and defendant came up with the plan before going over to the victim's house. Further, the victim testified that defendant held a gun to him and said "he was going to burn his ass." Given the evidence presented, a rational jury could have concluded beyond a reasonable doubt that defendant committed an assault with intent to rob while armed.

Defendant was also charged with felony-firearm. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Both the victim and another perpetrator testified that defendant had a gun in his possession while he tried to rob the victim. Thus, a rational jury could have determined that defendant was guilty of felony-firearm beyond a reasonable doubt.

Lastly, defendant argues that the sentence imposed constitutes cruel and unusual punishment. However, MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

"[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment[.]" *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citations omitted). Defendant's crime was considered a class A crime. He had a prior record variable score of 122, which placed him in level F. He had an offense variable score of 20, which placed him in level II. The minimum sentence range was determined to be 126 to 210 months, but because he was a fourth-offense habitual offender, the upper range was increased to 420 months pursuant to MCL 777.21(3)(c). Defendant's sentence of 300 to 480 months was within the statutory guidelines range. Thus, it is presumptively proportionate.

Defendant argues that consideration should have been given to "the offender." However, given his past criminal record, defendant has not shown that he has the potential to be rehabilitated such that he could even overcome the presumption of proportionality. See *Powell*, 278 Mich App at 323. Defendant also argues that his sentence was cruel and unusual because there was insufficient evidence to support his convictions and he received ineffective assistance of counsel. However, the remedy for these claims would be to vacate the conviction and not address his sentencing. Nevertheless, as stated above, defendant did not receive ineffective assistance of counsel and there was sufficient evidence to convict him. "Further, the fact that defendant's sentence must be served consecutively to the remaining portion of his parole-related sentence is insufficient to overcome the presumptive proportionality of his sentence for his offense." *Id.* at 324.

Defendant has raised five issues in a Standard 4 brief, none of which we find to have merit. First, the record does not support defendant's unpreserved argument that the trial court

punished defendant for exercising his right at sentencing to challenge his prior convictions of assault with intent to rob while armed and felony firearm at the time of allocation. Second, defendant's unpreserved argument that the trial court denied defendant a fair trial by breaching the veil of impartiality at sentencing in an attempt to bias the Court of Appeals against defendant is similarly without record support. Third, the prosecutor did not impermissibly vouch for the credibility of an accomplice when he elicited testimony that the witness was testifying truthfully as a condition of his plea agreement. Introduction of an accomplice's promise to testify truthfully is not necessarily error unless "used by the prosecutor to suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 33; 650 NW2d 96 (2002). Here, the prosecutor briefly questioned the witness about the plea agreement and did not suggest any special knowledge for truthfulness. Rather, the testimony suggested that the witness testified pursuant to a plea agreement, which is allowed. *People v Dowdy*, 211 Mich App 562, 572; 536 NW2d 794 (1995). Further, after defense counsel questioned the credibility of the witness during closing arguments, the prosecutor stated in rebuttal that, "We are not asking you to see that [the witness] is telling you the truth. We are not asking you to say that anybody is telling the truth beginning to end, even the officers." Fourth, the record does not support defendant's contention that he was denied due process as a result of the prosecutor's introduction of perjured testimony. There is no indication in the record that the testimony was false, that the prosecution knowingly offered perjured testimony, or that it failed to disclose information to the court and defense counsel. Any inconsistencies in evidence between defendant's first and second trial were available in the trial transcripts and police reports and were not withheld from the court and defense counsel. Lastly, we conclude that none of the additional ineffective assistance of counsel arguments raised by defendant demonstrates that counsel's performance fell below an objective standard of reasonableness.

Affirmed.

/s/ /E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Mark T. Boonstra