STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS PARKER,

Defendant-Appellant.

UNPUBLISHED
May 12, 2000

No. 212389
St. Clair Circuit Court
LC No. 98-000261-FH

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12; MSA 28.1082, sentenced defendant to fifteen to fifty years' imprisonment. We affirm.

Defendant first argues that he was unconstitutionally denied notice of the charge against him because the prosecutor, without seeking approval from the trial court, issued an information indicating that the offense occurred in "November/December 1997," even though the complaint, warrant, and bindover form stated that the offense occurred on December 24, 1997. [1] This Court reviews constitutional issues de novo. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999).

We disagree that this issue requires reversal. First, defendant waived any objections to the date listed in the information by failing to raise this issue in the trial court. See *People v Jones*, 75 Mich App 261, 266-268; 254 NW2d 863 (1977). Second, the evidence adduced at the preliminary examination was sufficient to support a finding that defendant committed the charged crime on the date listed on the information, i.e., "November/December 1997." See *People v Hutchinson*, 35 Mich App 128, 132; 192 NW2d 395 (1971); cf. *People v Erskin*, 92 Mich App 630, 641; 285 NW2d 396 (1979), abrogation recognized in *People v Fortson*, 202 Mich App 13 (1993). Third, defendant made no claim that he was unaware of the factual basis of the charge against him, and the evidence adduced at the preliminary examination sufficed to apprise him that he was being accused of possessing a gun during the first half of November, 1997. See *People v Mast (On Reh)*, 128 Mich App 613, 616; 341 NW2d 117 (1983). Under these circumstances, reversal is inappropriate.

Next, defendant argues that he is entitled to a new trial because (1) the guilty verdict was against the great weight of the evidence, and (2) the guilty verdict was supported by insufficient evidence. We need not review defendant's great weight of the evidence claim because defendant failed to move for a new trial on this basis in the trial court. *People v Patterson*, 428 Mich 502, 515; 410 NW2d 733 (1987). Moreover, defendant's insufficiency argument must fail because, viewing the evidence in the light most favorable to the prosecution, the jury could have reasonably found that the prosecution proved its case beyond a reasonable doubt. See *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Indeed, to obtain a valid conviction, the prosecutor had to show that defendant was a felon and that he was in possession of a firearm, MCL 750.224f; MSA 28.421(6), and the testimony of the prosecution witnesses sufficiently established each of these elements.

Defendant contends that there was insufficient evidence to sustain his conviction because the prosecution witnesses were not credible. However, when reviewing claims based on the sufficiency of the evidence, this Court may not disturb the jury's determination regarding witness credibility. *People v Pena*, 224 Mich App 650, 659; 659 NW2d 871 (1997), modified on other grounds 456 Mich 885 (1998). The jury here heard the witnesses for plaintiff and defendant on both direct and cross examination and evidently found plaintiff's witnesses more credible. This Court may not second-guess that determination. *Id*.

Next, defendant argues that the trial court imposed a disproportionately long sentence. We review a trial court's sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which mandates that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*.; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). If it is shown that an habitual offender, in the context of his previous felonies, demonstrates an inability to conform his conduct to the laws of society, a trial court does not abuse its discretion in sentencing within the statutory limits established by the Legislature. *Hansford, supra* at 326. Here, defendant's sentence was within the limits authorized by the Legislature for a fourth-offense habitual offender. See MCL 769.12(1)(a); MSA 28.1084(1)(a), and MCL 750.224f(3); MSA 28.421(6)(3). Moreover, defendant's extensive criminal history demonstrated his inability to conform his conduct to the laws of society. Accordingly, the trial court did not abuse its discretion in imposing sentence. *Hansford, supra* at 326.

Defendant additionally suggests that the trial court (1) should have used the judicial sentencing guidelines as a guidepost in imposing sentence, and (2) imposed cruel and unusual punishment in violation of US Const, Am VIII. We disagree. First, the judicial sentencing guidelines do not apply to habitual offenders. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Second, the proportionality of defendant's sentence precludes a finding that it constituted cruel and unusual punishment. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993); see also *People v Potts*, 55 Mich App 622, 639; 223 NW2d 96 (1974) (the habitual offender statutes do not facilitate cruel and unusual punishment).

Next, defendant argues his sentence should be vacated because the presentence investigation report (PSIR) contained inaccurate, prejudicial information and he did not have an opportunity to review the PSIR. We review this issue de novo. See generally *People v Hampton*, 176 Mich App 383, 385-386; 439 NW2d 365 (1989). We disagree that a vacation of defendant's sentence is warranted, because (1) the sentencing transcript reveals that both defendant and his attorney reviewed the PSIR, and (2) neither defendant nor his attorney challenged the information it contained. Under these circumstances, defendant effectively waived any challenges to the report. See *Hampton, supra* at 385-386; *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996); and MCR 6.429(C).

Finally, defendant argues that the trial court committed error requiring reversal during jury voir dire by questioning, outside of defendant's presence, a juror who allegedly was familiar with defendant and a trial witness. Defendant contends that this juror had reason to be biased against him and that he would have explored this bias if he had been present during questioning of the juror. Defendant did not object to the trial court's questioning procedure at trial, however. Therefore, this issue warrants reversal only if "defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We have no basis on which to claim that defendant was actually innocent. Moreover, the fairness, integrity, or public reputation of the judicial proceedings were not impeded by the court's questioning, since (1) defense counsel was present during the questioning of the juror and indicated that she should remain on the jury panel, and (2) the juror indicated that she could be impartial. Accordingly, reversal is unwarranted.[2] *Id*.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] Defendant argues that the prosecutor improperly "amended the information" when he changed the date of the offense to "November/December 1997." However, the initial information listed the date of the offense as "November/December 1997." The change in dates about which defendant complains occurred when the date listed on the complaint, warrant, and bindover form – December 24, 1997 – was changed to "November/December 1997" on the information.

[2] Defendant cites *People v Harris*, 43 Mich App 746; 204 NW2d 734 (1972), and *People v Palmer*, 28 Mich App 624; 185 NW2d 94 (1970) for the proposition that a trial court's questioning of a prospective juror outside of the defendant's presence requires automatic reversal. However, these cases were effectively overruled by the Supreme Court in *People v Morgan*, 400 Mich 527, 535-537; 255 NW2d 603 (1977), in which the Court indicated that the absence of a defendant during questioning of a juror requires reversal only if a reasonable possibility of prejudice resulted. We find that reversal under *Morgan* would not be warranted even if defendant had preserved this issue by objecting to the questioning procedure, since (1) defense counsel was present during the questioning and assented to having the juror remain on the jury panel, and (2) the juror indicated that she could remain impartial.