

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS L. MOORE,

Defendant-Appellant.

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UNPUBLISHED

March 16, 2001

No. 220536

Wayne Circuit Court

LC No. 98-014052

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529; MSA 28.797, assault with a dangerous weapon, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty to forty years' imprisonment for the armed robbery conviction, two to four years' imprisonment for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient identification evidence to support his conviction. Defendant contends that complainant was uncertain when he selected defendant out of a police lineup and therefore the identification evidence was insufficient to sustain defendant's conviction. We disagree.

Due process requires that a criminal conviction be based on evidence sufficient to justify a rational trier of fact in finding defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court examines the sufficiency of evidence in the light most favorable to the prosecution. *Id.* at 723.

There is no legal requirement that a victim unhesitatingly identify a culprit for the line-up results to be valid. See *People v Sawyer*, 215 Mich App 183, 194; 545 NW2d 6 (1996). Moreover, "[w]here there are other indicia of reliability, an initial inability to identify the defendant or a tentative false identification of another person will not invalidate a witness' identification of the defendant." *People v Kurylczuk*, 443 Mich 289, 309; 505 NW2d 528 (1993).

After a careful review of the record, we are convinced that there was sufficient evidence to support defendant's conviction. On the night in question, complainant and his sister had a clear view of defendant's facial features and his vehicle. The descriptions complainant and his sister provided to the police led to defendant's later apprehension. Moreover, the police recovered complainant's property and a gun, which matched the description of the gun used against complainant, inside defendant's vehicle. The next day, complainant and his sister viewed a police lineup of possible suspects. Although complainant initially hesitated, he did, in fact, positively identify defendant. Complainant's sister, also an eye witness, instantly identified defendant as the culprit. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence for the jury to hold, beyond a reasonable doubt, that defendant was the perpetrator of the crimes in question.

Defendant also argues that he was deprived of his right to the effective assistance of counsel when his attorney failed to poll the jury. Because defendant did not request a *Ginther*<sup>1</sup> hearing, this Court's review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). The burden is on defendant to show that counsel made serious errors that prejudiced the defense and deprived defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.*

The record does not reveal defense counsel's reasoning for declining a jury poll. Additionally, even though defense counsel did not insist on a jury poll, the jurors could have been polled at the court's discretion. MCR 6.420(C). There is no indication in the record that the court questioned the reliability of the foreperson's stated verdict or the other jurors' response to the stated verdict. Moreover, defendant has failed to demonstrate that his attorney's failure to poll the jurors was unreasonable, unprofessional, or that the outcome of the trial would have differed in any way. As a result, defendant has not overcome the presumption of his counsel's effectiveness.

Finally, defendant asserts that his armed robbery sentence violates the principle of proportionality. We disagree.

Defendant's sentence for armed robbery was enhanced, as permitted for felonies committed by second habitual offenders, under MCL 769.10; MSA 28.1082, which states:

(1) If a person has been convicted of a felony or an attempt to commit a felony . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(b) If the subsequent felony is punishable upon a first conviction by imprisonment for life, the court . . . may place the person on probation or sentence the person to imprisonment for life or for a lesser term.

The principle of proportionality provides that trial court's sentences must "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant argues that this principle is violated because his minimum sentence is four times greater than the five year minimum the Michigan Supreme Court's sentencing guidelines prescribe for armed robbery. Our Supreme Court's sentencing guidelines, however, do not apply to sentences imposed on habitual offenders. *People v Cervantes*, 448 Mich 620, 630; 532 NW2d 831 (1995).

This Court reviews an habitual offender's sentence for an abuse of discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000) (citing *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997)). The Supreme Court has rejected the application of the principle of proportionality to the review of habitual offender sentences. *Hansford, supra*, 454 Mich at 323-327. Rather, "[a] trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of previous felonies, evinces the defendant's inability to conform his conduct to the laws of society." *Reynolds, supra*, 240 Mich App at 252 (citing *Hansford, supra*, 454 Mich at 326). In reaching this determination, a court may consider the seriousness of the underlying crime, defendant's criminal history, and defendant's ability or inability to reform. *Hansford, supra*, 454 Mich at 326.

The record reflects that defendant approached complainant as he was leaving a store. Complainant testified that defendant pointed a black semiautomatic gun at him and demanded his money and jacket. When defendant returned to his vehicle, he fired several shots in the general direction of complainant and the car that complainant's sister was driving.

The trial court directly addressed the violent nature of defendant's actions when it sentenced defendant. The court emphasized that defendant's actions had great potential to cause serious harm or death to complainant, his sister, or any unfortunate passerby. The court also referred to defendant's prior criminal history and the fact that defendant was on parole for another armed robbery at the time of the instant offense. Finally, the court stated that "whatever time Mr. Moore spent with the Department of Corrections did not result in any positive outcome." These facts support a finding that defendant has not conformed his conduct to society's laws. Thus, defendant's sentence does not constitute an abuse of discretion.

Affirmed.

/s/ William B. Murphy  
/s/ Harold Hood  
/s/ Jessica R. Cooper