STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2004
v	No. 246263 Marquette Circuit Court
PIERRE DANIEL JOHNSON, Defendant-Appellant.	LC No. 01-039137-FC

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

A jury convicted defendant Pierre Johnson of armed robbery, MCL 750.529. The trial court sentenced Johnson to five to twenty years' imprisonment. Johnson appeals his conviction and sentence as of right. We affirm.

I. Basic Facts And Procedural History

At the trial in this matter,[1] the victim testified that an unknown assailant robbed her at gunpoint in the middle of the night on November 3, 2001. According to the victim, as she was leaving a friend's apartment building in Marquette between 2:00 a.m. and 3:00 a.m., three men followed her to her car. The victim stated that one of the men approached her and said he wanted to talk to her; however, she immediately got in her car and locked the doors.

The victim testified that one of the three men tapped on the driver's-side window, pointed a gun at her head, and told her, "I want your money, put your windows down, I want your money." The victim gave him a hundred dollar bill. According to the victim, the assailant walked away, but then returned and said, "I want your ID so I know who you are so you won't tell anybody." The victim gave him her Northern Michigan University student ID card. The assailant then said, "Be sure you don't tell anybody," and went back to the other two men.

[1] Before trial, Johnson moved for suppression of his confession, and the trial court conducted a *Walker* hearing and heard legal arguments. The testimony of both Johnson and the interrogating officers at the hearing is largely duplicative of their testimony at trial.

The victim could not identify her assailant because he wore a black hooded sweatshirt pulled low over his face. However, she believed he was African-American because she saw his hands, and, after being shown Johnson's hands in the courtroom, said the skin tone was the same. The victim also testified that the assailant did not seem intoxicated because he did not smell of alcohol and had no trouble speaking or walking.

Amanda Hamalainen, Johnson's former lover, testified that Johnson and two other men, Anthony Williams and Nick Maldonado, came to her house, which is around the corner from the apartment building where the robbery occurred, about 2:30 or 3:00 the same morning, "kind of breathing heavy." Hamalainen testified that she could smell alcohol on Johnson's breath, but he spoke coherently and was not staggering. Several nights after the robbery, Williams told Hamalainen that if the police asked where he was at the time of the crime, she should say that he was with her. Pursuant to this request, Hamalainen lied to police on Williams' behalf, denying to police that he was with Johnson and Maldonado.

Several nights later, Northern Michigan University police interrogated Maldonado and Williams about the theft of a computer from an NMU student that occurred the same night as the robbery. The interrogation led to Johnson being identified as a suspect in the robbery and police arrested Johnson pursuant to a search warrant on December 11, 2001. Police witnesses testified that they read Johnson his *Miranda*[2] rights twice, once when they arrested him and once at the police station in the presence of two police officers, one from NMU and one from the City of Marquette. According to the police witnesses, Johnson told them that he understood his rights but was willing to talk to them and, less than a minute after being advised of his rights, implicated himself in the robbery.

According to the police witnesses, Johnson's first story "was that he had walked across the baseball field, saw a girl, robbed her and got $20, and that was the end of it." Because this account was incongruous with what they had learned from other witnesses, the officers told Johnson "there was a lot more to the story than that"; but when Johnson asked them what they knew, they would not tell him what the other witnesses had said. The officers testified that they also told Johnson that if he cooperated, they would inform the prosecutor.

According to the police witnesses, Johnson then changed his story, giving them the following account of the evening: To celebrate Johnson's birthday, Johnson, Williams, and Maldonado first did some drinking, then went to Hamalainen's apartment, where they smoked marijuana and also took some ecstasy. Johnson, Williams, and Maldonado left Hamalainen's apartment between midnight and 1:00 a.m. and resumed an earlier discussion about obtaining money. Johnson wanted to commit a robbery, but Williams and Maldonado preferred to "go into people's homes and take whatever money they could find laying [sic] around." The three went to an apartment house and Johnson knocked on doors on all three floors of the building, intending to rob anyone who answered the door, but he got no responses.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Johnson, Maldonado, and Williams then found an apartment from which the tenant appeared to be absent. Maldonado entered the apartment through an unlocked window and stole a laptop computer. The three men hid the computer at the apartment of a friend in the complex. As they walked toward another apartment complex, they saw a "girl" leaving, and Johnson said he wanted to rob her. Despite the other two men's protests, Johnson decided to rob her anyway.

Johnson pulled his "do rag" over his face, and had the hood of his sweatshirt up. He walked over to the car the "girl" had just entered, saw that the window was partly open, and pointed a broken Winchester CO2-BB pistol at her, telling her first to open the window, and then to give him money. She gave him a hundred dollar bill. Johnson then asked the victim for identification, and she gave him "a school identification." After the robbery, Johnson went to Hamalainen's apartment, where he rejoined the other two men. Johnson then went to a friend's house, where he hid the gun for a while before throwing it into an overgrown area between apartment houses. The NMU police officer testified that Williams and Maldonado confirmed Johnson's taking of the victim's hundred-dollar bill and ID.

The NMU police officer said that Johnson supplied this information freely and readily without being asked leading questions. The Marquette police officer testified that he told Johnson that armed robbery was a serious offense, and may have told him it carried a potential life sentence. The NMU officer said they made no promises to Johnson, except to tell him they would tell the prosecutor's office if he cooperated.

After confessing to the crime, Johnson sent an assistant prosecutor a letter of apology, expressing his remorse to the prosecutor and to the victim and her family. He said that he was "very, very sorry," and also "humiliated," having never committed a serious crime before. He said he would not have committed the crime had he not been drunk, that now that he was back in his right mind he realized what he had done, and that he hoped the victim and her family could forgive him for this "terrible crime." This letter was admitted as evidence.

At trial, Johnson again gave a different version of events. He testified that the night before the robbery, he had received a wire of $200 from his mother. He was driven to pick up the money, then went back to Hamalainen's apartment. Johnson testified that he went to a party at the home of Aaron Peterson where he "did a lot of drinking" and also took some ecstasy that Williams gave him. He stated that he could not remember what happened after the party.

Johnson testified that he was arrested, "read his rights," and placed in "the holding tank" at the county jail, where he waited for two to three hours before the officers came to him. Johnson agreed to talk with them. According to Johnson, the first thing the city officer told him was that he "was looking at life for armed robbery." Defendant stated, "I was scared. I thought I was going away for life, nothing else. I thought, you know, it was over."

Johnson portrayed the interrogation as a "good cop-bad cop" tag-team between the city policeman and the NMU officer, with the NMU officer playing "the aggressor role" and the city officer "trying to play a role as the comforter." According to Johnson, after the interrogation began with the statement of the possible sentence, the officers inquired about Johnson's experience with ecstasy, telling him that Williams had not only revealed he had given Johnson the drug, but also that he and Maldonado had identified Johnson as being responsible for both the armed robbery and the "home invasion" resulting in the computer theft.

A hard sell for "cooperation" followed this statement, according to Johnson. The officers told him that "the best thing [he] could do" would be to confess and plead guilty, in which case "he was saying things would go easier for me, that they could vouch for me then . . . to the prosecuting attorney," and "the max I would be looking at was a two-to [sic] five-year sentence, that's what they told me. Both of them said that at different times." Because of the promise of a two- to five-year sentence, Johnson accepted the deal and asked to return to his cell; however, the police insisted on asking Johnson a number of leading questions before they would allow him to do so. Johnson testified that he came to the conclusion that, in the interest of receiving a sentence of a few years rather than a potential life sentence, he was best off responding to these questions regarding the details of how the armed robbery was committed.

Johnson said that, after the interrogation, the NMU officer went to summon the guards to take him back to his holding cell and Johnson remained with the city officer, who "was still staring at [him] like he was still mad . . . about the . . . interrogation." Johnson said that he told the officer, "If I'm going to get two to five years, I'm going to put in my plea so I can get this thing over with so I can start my time and get it over with." The officer responded that Johnson could expect to hear from them within the next few days.

Johnson explained that he wrote the letter of confession and apology to the prosecutor on the advice of an older inmate as evidence of his cooperation, in hopes of serving only a few years in prison instead of life. Johnson was also concerned that he had not heard back from the police officers about the supposed plea agreement. Johnson claimed that when he wrote the letter, he "had no independent recollection" of having committed the robbery, but "thought it was possible" because Williams and Maldonado had told him he did and because he had seen news accounts of the robbery. Johnson said that he figured out that he could not possibly be the robber when he heard the victim testify that the robber "was wearing a black hooded sweatshirt." Although Johnson owned light-colored sweatshirts, he had no black one, whereas Williams and Maldonado both owned black ones.

Johnson had both Williams and Maldonado subpoenaed as witnesses. Maldonado failed to appear and, although defense counsel indicated he was a crucial witness, Johnson elected not to move for a mistrial, and a bench warrant was issued for Maldonado's arrest. Williams did appear to testify for Johnson and, at Johnson's request, was declared a hostile witness.

Williams claimed lack of memory in response to a number of questions. He testified that initially, he told the police he knew nothing of an armed robbery. Eventually, however, he told them Johnson committed the robbery, and entered a plea agreement in which he promised to testify against Johnson in the armed robbery trial, and was assured he would not be charged with that robbery. Williams said he and Maldonado were about fifteen feet away from Johnson at the time of the robbery, behind another car, and could hear some but not all of what was said. Specifically, he said that he heard Johnson say "give me what you got" and ask for an ID. According to Williams, Johnson had followed the victim from the apartment building to the car; but Williams himself was unwilling to participate in the robbery. Johnson did not tell Williams in advance of his intention to commit the robbery. On cross-examination, Williams affirmed that it was his testimony that Johnson committed the robbery, although Williams never saw the gun.

Johnson requested that the trial court instruct the jury that Williams was a possible accomplice and that his testimony, therefore, should be treated with skepticism. In support of

this argument, Johnson asserted that the clothes Williams wore that night fit the victim's description of the robber's clothes, and that Williams' dark coloring could have led the victim to think that he was African-American. Therefore, Johnson asserted, Williams could have been the robber. Moreover, all three were involved in the earlier computer theft. The trial court responded that although Williams could have been the *perpetrator*, there was no evidence that he and Johnson were *accomplices*, and so an accomplice instruction was inappropriate.

Instead, the trial court gave the jury this instruction about Williams:

> You have heard testimony that a witness, Anthony Williams, made an agreement with the prosecutor about criminal charges against him in exchange for his testimony in this trial. You are to consider this evidence only as it relates to Anthony Williams' credibility and as it may tend to show Anthony Williams' bias or self-interest.

The jury spent a little over three hours deliberating, including time spent eating lunch in the jury room. The jury briefly returned to the courtroom to ask clarification of testimony regarding Johnson's confession and interrogation by police, but apparently elected not to wait for transcripts to be prepared. After deliberations, the jury found Johnson guilty as charged.

At the sentencing hearing, Johnson asked for changes in the presentence report including the scoring of Offense Variable 7, terrorism. The sentencing judge indicated that he scored the points only because he felt "compelled" to do so by the wording of the guidelines and because Johnson sought to place the victim in fear by taking her ID and saying he knew where to find her. However, because the sentencing judge thought the outcome arguably "unfair," particularly because of the huge impact the automatic scoring of fifty points had on the sentence range, it sentenced Johnson at the low end of the guidelines range with a sentence of five to twenty years' imprisonment.

II. Right To Counsel

A. Standard Of Review

Johnson argues that his right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, was violated when he was interrogated by police officers without counsel present after his arrest but before being formally charged with the crime. He notes that a charge was pending against him on an unrelated misdemeanor count and that he had retained counsel to defend against those charges. He asserts that because he had criminal counsel on that matter and was in an adversarial relationship with the police during interrogation, he should have had the opportunity to have counsel present for this charge. This is a constitutional question that we review de novo.[3]

[3] *People v Hill*, 257 Mich App 126, 149-150; 667 NW2d 178 (2003).

B. Attachment Of The Right To Counsel

We conclude that the trial court's ruling was correct. The United States Supreme Court held in *United States v Gouveia*[4] that "the right to counsel does not attach until the initiation of adversarial judicial proceedings such as formal charge, preliminary hearing, indictment, information or arraignment." The right to counsel does not attach at the time of arrest.[5]

III. Voluntariness Of The Confession

A. Standard Of Review

Johnson argues that his confession should have been suppressed as involuntary. We reverse a trial court's findings of fact following a suppression hearing only if they are clearly erroneous.[6]

B. Credible Evidence

We conclude that there was credible evidence to support all the trial court's factual findings. Specifically, there was credible evidence that the police twice informed Johnson of his right to remain silent, and that he chose to waive it. Johnson testified to the contrary. He also claimed he was induced to make the statement by fraudulent specific assurances as to the precise sentence he would receive if he confessed and was threatened that he could receive a life sentence if he did not. However, the two police officers who interrogated Johnson both disputed this claim. They also disputed Johnson's claim that they induced his statement through leading questions calling for a yes or no response, giving him information they had already received from other witnesses. The officers testified that they refused to supply Johnson with any information about the details of the crime, even when he requested it, and that Johnson himself supplied all the information given.

The trial court considered all this evidence and, weighing the credibility of the witnesses, made a specific finding that the police officers' testimony was credible and that Johnson's was not. This determination of credibility by the trial court is entitled to deference, and we will not disturb it.[7] The trial court concluded that, in light of its credibility determination, the only promise made to Johnson was that if he cooperated, this information would be reported to the prosecutor. The trial court correctly held that this did not constitute an improper promise of leniency.[8]

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[4] *United States v Gouveia*, 467 US 180; 104 S Ct 2292; 81 L Ed 2d 146 (1984).

[5] *Id.* at 190. Michigan has conformed its law to this rule. See *People v Bladel (After Remand)*, 421 Mich 39, 52; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1989).

[6] *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996).

[7] *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988).

[8] *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997).

The trial court also considered the other factors that go into the voluntariness of a confession under the rule of *Cipriano*[9] and found that none of them weighed in favor of suppressing the confession. Specifically, the trial court found that Johnson's age was nineteen, that he had a high school degree and some college education, and that he had previous experience with the criminal justice system. The length of Johnson's detention before the interrogation began was only two or three hours, and the interrogation itself was relatively short, approximately half an hour. There was no unnecessary delay in bringing Johnson before a magistrate. And, as the trial court found, there was no evidence that Johnson was injured, intoxicated, drugged or in ill health at the time he gave his statement, or that he was deprived of food, sleep or medical attention, or was abused or threatened with abuse. Resolving the credibility question raised by the conflicting testimony of Johnson and the police officers, the trial court found that Johnson was properly advised of his constitutional rights, as required by *Gideon v Wainwright*.[10] There was credible evidence to support all these findings. The trial court's findings were not clearly erroneous and we will not disturb them.

IV. Jury Instructions

A. Standard Of Review

Johnson argues that the trial court erred by failing to give a requested instruction that the testimony of witness Anthony Williams, whom Johnson called as an adverse witness, should be regarded with skepticism, as Williams was a possible accomplice. The standard for reviewing claims of instructional error was set forth in *People v Aldrich*:[11] "We review jury instructions in their entirety to determine if error requiring reversal occurred. The instructions must not be 'extracted piecemeal to establish error.' Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." The determination whether a particular instruction is applicable in view of the facts of a particular case lies in the discretion of the trial court.[12]

B. Accomplice Versus Perpetrator

As the trial court correctly found, there was evidence that Williams rather than Johnson could have been the *perpetrator* of the crime. However, all the evidence pointed to the crime being committed by a lone robber, so there was no evidence that Williams was an *accomplice*. The trial court, therefore, properly declined to give the accomplice instruction. It did, however, give an instruction regarding the manner in which Williams' testimony should be viewed, as someone who had entered a plea bargain with the prosecution. This instruction, as the trial court found, ensured that Johnson would have the benefit of the jury knowing that there might be

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[9] *Supra,* 431 Mich 334,

[10] *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[11] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[12] *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), affirmed 460 Mich 55; 594 NW2d 477 (1999).

reasons to view Williams' testimony with skepticism. If there was any error from the failure to give the accomplice instruction, it was harmless in light of the instruction that was given; therefore, reversal is not appropriate.[13]

V. Sentencing

A. Standard Of Review

Johnson argues that the trial court erred by scoring Offense Variable 7, terrorism, at fifty points. We review the trial court's scoring of a sentencing guidelines variable for clear error,[14] but we will uphold the trial court's scoring if the record contains "'*any* evidence in support' of the decision."[15]

B. Johnson's Acts

OV 7 must be scored at fifty points if "the victim was treated with terrorism, sadism, torture or excessive brutality." MCL 777.37(1)(a).[16] At the time of the offense, the term "terrorism" was defined to mean "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a).[17]

The trial court indicated that it was "compelled" to score fifty points for terrorism because Johnson took the victim's identification "in order to terrorize the victim so that she wouldn't report it." Testimony indicated that Johnson told the victim that he wanted her ID so he would know who she was, then instructed her to be sure not to tell anyone what happened. Because this constitutes the requisite record support for the trial court's scoring of OV 7, we find no clear error in the trial court's decision, and we therefore uphold it.[18]

Johnson argues that his actions would cause the victim to experience fear and anxiety only after the offense was completed, not at the time of the offense itself. However, we decline to find clear error in the trial court's determination that forcing the victim to reveal her identity to

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[13] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[14] *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003).

[15] *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis in *Witherspoon*).

[16] The 2002 amendment to MCL 777.37(1)(a) states that OV 7 should be scored fifty points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the incident."

[17] The language was amended effective April 1, 2002, with the relevant changes being primarily grammatical simplification, not substantive changes. The amendment omitted specific reference to the term "terrorism" but continued to employ the same definition for conduct warranting a score of fifty points.

[18] *Hicks*, *supra* at 522; *Witherspoon*, *supra* at 335.

her gun-wielding assailant caused a substantial increase in her fear and anxiety at the moment the demand was made.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello