

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALCOLM ERIC LANG,

Defendant-Appellant.

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UNPUBLISHED

November 16, 2006

No. 263050

Genesee Circuit Court

LC Nos. 04-013833-FC;

04-013837-FC

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

A jury convicted defendant Malcolm Lang of two counts of armed robbery.<sup>1</sup> The trial court sentenced Lang as an habitual offender, fourth offense,<sup>2</sup> to concurrent prison terms of 30 to 50 years for each conviction. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

Lang was charged with three separate armed robbery offenses arising out of a series of robberies perpetrated against women at apartment complexes in February 2004, along an area of Maple Road that separates the city of Burton from Grand Blanc Township. Each victim identified Lang as the robber, both at trial and in an earlier photographic array that was shown to each victim on February 23, 2004. But there was evidence that the police initially arrested someone else after the first victim, Leslie Daniels, was robbed at knifepoint on February 17, 2004, at the Boulder Creek Apartments.

The second victim, Renita Frye, was robbed in a parking area of the Maplebrook Village Apartments at approximately 3:00 a.m. on February 20, 2004, as she was returning home from work. Although Frye did not see a weapon, she thought that Lang had a weapon in his pocket. According to Frye, Lang pushed her against a truck and took her cell phone and two necklaces. Frye stated that Lang departed after having her walk with him to an unlit area of the parking lot.

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<sup>1</sup> MCL 750.529.

<sup>2</sup> MCL 769.12.

Frye testified that Lang was sipping a drink with a straw from a cup when he first approached her outside her car, but dropped the cup during the robbery. Frye later pointed out the cup to a police officer, who collected it as evidence. Susan Bach, an expert in DNA analysis, testified that she determined from an analysis of a piece of the straw that at least two males contributed to the DNA mixture found on the straw. Kathy Fox, an expert in forensic science and DNA analysis, testified that Lang's DNA profile could not be excluded from the DNA types on the straw.

The third victim, Marniece Hammon, was robbed at the Boulder Creek Apartments at approximately 10:25 p.m. on February 21, 2004, as she was returning home from work. Hammon testified that she did not see a weapon during the robbery, but saw that Lang had his hand in his pocket and acted like he had a gun. Hammon stated that she gave \$60 to Lang, but he did not leave until after he patted her down for other property items and she started crying.

The jury convicted Lang of the armed robbery charges involving Frye and Hammon, but acquitted him of the charge that he robbed Daniels.

## II. Ineffective Assistance Of Counsel

### A. Standard Of Review

Lang seeks a new trial on the ground that defense counsel's failure to timely move for a defense expert to review the results of the DNA tests constituted ineffective assistance of counsel. Lang argues that a defense expert could have better explained to the jury why his DNA profile could have been absent from the DNA mixture found on the straw. Because Lang failed to move for a new trial or *Ginther*<sup>3</sup> hearing in the trial court, we limit our review to mistakes apparent from the record.<sup>4</sup>

### B. Legal Standards

To establish ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial."<sup>5</sup> With regard to defense counsel's performance, a defendant must overcome a strong presumption that defense counsel's actions constituted sound trial strategy.<sup>6</sup> Decisions whether to call witnesses are generally presumed to be matters of trial

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>4</sup> *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

<sup>5</sup> *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

<sup>6</sup> *Id.*

strategy.<sup>7</sup> To establish ineffective assistance of counsel, a defendant must show that he was deprived of a substantial defense that would have affected the outcome of the proceeding.<sup>8</sup>

### C. Applying The Standards

Here, the record indicates that defense counsel was appointed to represent Lang in October 2004, after the trial court granted Lang's retained attorney's motion to withdraw. In November 2004, the trial court rescheduled the trial for January 11, 2005, to accommodate a defense motion for DNA testing. A hearing was held on December 1, 2004, because Lang would not consent to providing a DNA sample, but rather sought to have an existing DNA sample in his prison record used for DNA testing. The trial court granted the prosecutor's motion to have Lang provide a DNA sample.

The results of the DNA tests were available to defense counsel approximately three weeks before trial began on April 11, 2005. Defense counsel moved on the first day of trial for an expert to review the results solely at Lang's request. Defense counsel informed the trial court, "DNA is only [sic] one of the three cases and it's of minor – there's other strategic things that are involved in it, but Mr. Lang did make the request today to ask the Court to allow an expert to take a look at this stuff."

We find no indication in the record that having a defense expert review the DNA test results or testify at trial could have provided Lang with a substantial defense. It is incumbent on a defendant to establish the factual predicate for his claim of ineffective of counsel.<sup>9</sup> Lang has not met his burden of showing that he was deprived of a substantial defense.

## III. Sentencing

### A. Standard Of Review

Lang challenges the scoring of two offense variables used to determine the sentencing guidelines range for each conviction. We review de novo questions of law concerning the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11, *et seq.*<sup>10</sup> We review for clear error a trial court's factual findings at sentencing.<sup>11</sup> A trial court has discretion in determining the number of points to be scored for offense variables, provided that record evidence adequately supports the score.<sup>12</sup> We will uphold the trial court's scoring decision if

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<sup>7</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>8</sup> *Rodgers*, *supra* at 714.

<sup>9</sup> *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

<sup>10</sup> *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

<sup>11</sup> *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

<sup>12</sup> *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

there is any record evidence to support it.<sup>13</sup> If the minimum sentence is within the appropriate guidelines range, we “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.”<sup>14</sup>

## B. Predatory Conduct

With regard to Lang’s challenge to the trial court’s score of 15 points for offense variable (OV) 10, we reject Lang’s argument that his intent to steal precludes a finding of predatory conduct. “Predatory conduct” is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.”<sup>15</sup> Although robbery contains an element of theft, it is primarily an assaultive crime.<sup>16</sup> Indeed, it is within the category of crimes against a person for purposes of the sentencing guidelines.<sup>17</sup>

The timing and location of assaultive conduct is probative of whether a defendant engaged in predatory conduct.<sup>18</sup> A score of 15 points for OV 10 was upheld in *Witherspoon*, where there was evidence that the defendant watched the nine-year-old victim and waited for an opportunity to be alone with her in an isolated location in her home to commit a sexual assault. A score of 15 points was upheld in *People v Kimble*,<sup>19</sup> where there was evidence that the defendant and his accomplices followed the victim home and, after watching the victim pull into the driveway, shot the victim for the purpose of stealing her car.

Here, the prosecutor argued at sentencing that 15 points should be scored for each victim because Lang engaged in a pattern of lurking around and preying on unaccompanied women entering their apartment buildings. The trial court agreed, finding that, in each of Lang’s cases, a young female was accosted late at night or during the early morning hours. The trial court determined that 15 points was appropriate “because of the predatory nature of this offense and the fact that there was a significant difference here in the size of the respective parties, the fact that [Lang] chooses two young and much smaller female victims.”

We find that the evidence supports the trial court’s decision. The trial court had an opportunity to view the physical characteristics of Lang and the victims at trial. Further, the evidence that Lang was lying in wait for unaccompanied women to commit a robbery supports

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<sup>13</sup> *Houston*, *supra* at 471; *Hornsby*, *supra* at 468.

<sup>14</sup> MCL 769.34(10).

<sup>15</sup> MCL 777.40(3)(a).

<sup>16</sup> *People v Hendricks*, 446 Mich 435, 449; 521 NW2d 546 (1994).

<sup>17</sup> MCL 777.5(a); MCL 777.16y.

<sup>18</sup> *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

<sup>19</sup> *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), *aff’d* 470 Mich 305 (2004).

the score of 15 points with respect to each conviction. The trial court could reasonably find that Lang's preoffense conduct was directed at each victim for the primary purpose of victimization.

C. OV 4

We find it unnecessary to address Lang's challenge to the score of ten points for OV 4 under MCL 777.34. Reducing the total offense variable score from 50 to 40 points would not affect the appropriate guidelines range for each conviction because Lang would remain at offense level III (40-59 points).<sup>20</sup> Because the trial court sentenced Lang as a fourth habitual offender, the trial court would still be required to increase the upper limit of the guidelines range by 100 percent.<sup>21</sup> Resentencing is not required if a scoring error does not alter the appropriate guidelines range.<sup>22</sup>

Affirmed.

/s/ William C. Whitbeck  
/s/ David H. Sawyer  
/s/ Kathleen Jansen

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<sup>20</sup> See MCL 777.16y (armed robbery is a class A offense); MCL 777.62 (minimum sentence ranges for class A offenses).

<sup>21</sup> MCL 777.21(3)(c).

<sup>22</sup> *Francisco*, *supra* at 89 n 8; *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).