STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH GREENE,

Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 263126
Kalamazoo Circuit Court
LC No. 04-002140-FC

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of 126 months to 25 years for the armed robbery conviction, and 198 days served for the resisting or obstructing conviction. He appeals as of right. We affirm.

On October 30, 2004, the victim was working as an adult entertainer for a group of males in an apartment. As she danced, the men gave her tips ranging from $1 to $20. At one point, defendant entered the apartment with two other males. This small group looked around for a few minutes and then left after the victim indicated she did not know where the weed was. Defendant later confronted the victim in the parking lot as she was entering a car that had three other individuals in it. Defendant pointed what appeared to be a handgun at the victim's side and repeatedly demanded the money the victim had just earned. When the victim did not immediately comply, defendant got into the car, rummaged though the victim's purse, and reached under the victim's leg where she had hidden some of her earnings. At one point, defendant's gun discharged, and it sounded like a cap pistol. Defendant ran, and the police were called. When police arrived, they encountered defendant near the scene. A police officer repeatedly ordered defendant to stop, but defendant continued to run. Eventually, the police captured defendant and retrieved $30, consisting of one ten-dollar bill, and 20 one-dollar bills. They did not recover a gun or the other $270 the victim estimated had been stolen. At trial, defendant explained that he ran from the police because he "had warrants out on him and did not want to go to jail."

Defendant first argues that defense counsel was ineffective for failing to investigate and argue an insanity defense and for failing to produce several alibi witnesses. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

otherwise. *Id*. at 659. At trial, defendant consistently maintained his innocence, and there is no evidence that he made a good-faith effort to avail himself of the right to present an insanity defense. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Likewise, defendant has not provided any affidavits of qualified medical personnel or other documentation indicating that he had any medical or psychological condition at the time of the offenses to support that exploration of insanity might have been reasonable. Therefore, defendant fails to demonstrate that the insanity defense could have made a difference at trial, and we will not reverse his conviction solely on the basis of his speculation. *Id*.

Defendant relies on references in the presentence investigation report and the Michigan Department of Corrections reception center psychological report to support his contention that he "suffers from a number of mental health issues" and substance abuse problems, but there is nothing in either report that provides a basis for a diagnosis of criminal insanity. In fact, the MDOC psychological report concluded that "[t]here was no behavioral evidence of a major mood disorder or formal disorder of thought. At this time, [defendant] appears stable and not in the need of further mental health treatment." Although defendant may have certain mental health issues, mental illness alone does not constitute a defense of legal insanity, and there was no evidence that defendant lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. MCL 768.21a(1). With regard to substance abuse, voluntary intoxication cannot form the basis for an insanity defense, MCL 768.21a(2), and although defendant mentions involuntary intoxication, he has not proffered any evidence that he suffered from involuntary intoxication at the time of the offenses. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Because there is no basis for concluding that an insanity defense was a substantial defense and no basis for concluding that defendant tried to assert it, defendant cannot establish a claim of ineffective assistance of counsel. *Kelly*, *supra*.

Likewise, defendant has not provided any witness affidavits or identified any evidence in the record establishing that the proposed witnesses' testimony would have yielded valuable evidence that would have affected the outcome of trial. Moreover, defendant's argument relies on information that, according to his trial counsel, came to light on the first morning of trial. The information arrived too late to file a notice of alibi, which defendant admits was the only relevant purpose of the evidence, so we reject defendant's argument that he made good-faith efforts to assert the defense. *Kelly*, *supra*.

Defendant next argues that he is entitled to resentencing because the trial court improperly scored 20 points for offense variable (OV) 1 (aggravated use of a weapon) and ten points for OV 9 (number of victims). We decline to review defendant's challenge to the scoring of OV 1 and OV 9 because the record reflects defense counsel's on-the-record expression of satisfaction with those scores. See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Next, defendant argues that he must be resentenced because the trial court's factual findings supporting his sentence were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

We also reject defendant's claim that he is entitled to resentencing because his sentence for armed robbery is disproportionate and constitutes cruel and unusual punishment. Defendant's sentence of 126 months to 25 years is at the lowest end of the sentencing guidelines range of 126 to 262 months. Under the circumstances, we find nothing disproportionate or cruel about defendant's punishment. Moreover, we generally affirm a sentence within the guidelines' range unless there was an error in the guidelines' scoring or the court relied on inaccurate information. MCL 769.34(10). Here, defendant has not demonstrated either type of error, so we defer to the Legislature's determination of sentence proportionality as delineated by the guidelines. See *id*.; *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003).

In a supplemental brief filed in propria persona, defendant argues that there was insufficient evidence to convict him of armed robbery because the witnesses' identification of him was tainted by a suggestive lineup. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Under this deferential standard, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Two witnesses, the victim and a passenger in the car, identified defendant as the perpetrator at pretrial lineups and in court. The victim testified that, during the robbery, she got "a good look at [defendant's] face," that his face was "not even a foot away from [hers]," and that defendant "was in [her] face." She also noted that defendant was the same person whom she had seen earlier in the "well-lit" apartment. The victim indicated that, when identifying defendant in a pretrial lineup, she "pretty much knew off the bat who it was." She explained that she had indicated that she was 90 percent certain that defendant was the person who robbed her, "because there's still that little chance that it could have been somebody that looked identical to him." The passenger testified that he got a "good look" at defendant's face, and was 100 percent certain that defendant was the person who committed the robbery. Levin explained that he could clearly see defendant's face under the car's dome light, that defendant was "approximately two feet" from him, and that the majority of defendant's body was inside the car. Police testimony was presented that the parking lot "was fairly well-lit." Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably conclude, beyond a reasonable doubt, that defendant was the robber. The credibility of the identification testimony was for the trier of fact. *Id.*

Defendant also claims that he was denied his right to due process because the pretrial lineup procedure was unduly suggestive. Defendant argues that the other lineup participants had a darker complexion, so he was the only individual fitting the description that the victim provided to police. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). However, "to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). In this case, the only evidence of suggestion was that defendant was the only "light-skinned" African-American in the lineup, which matched the victim's original description. However, the victim also indicated to police

that defendant was "not real light-skinned," so without more, we are not persuaded that defendant's complexion invalidated the lineup. See *People v Gunter*, 76 Mich App 483, 490; 257 NW2d 133 (1977). Police are not required to exert extraordinary effort to arrange a lineup of participants whose physical characteristics exactly match those of the defendant. See *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Even if it were possible to present a lineup in which the participants looked identical, the purpose of the lineup would be thwarted and misidentification would be almost unavoidable. Likewise, a lineup in which the defendant represents the median of all physical features is likely as suspect as one in which some of the defendant's features set him apart. "Physical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Defendant fails to persuade us that the lineup fostered irreparable misidentification. *Kurylczyk*, *supra*. Accordingly, we also reject defendant's alternative argument that he was denied the effective assistance of counsel because defense counsel failed to move to suppress the identification testimony. *Sabin*, *supra* at 660.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey