

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVON LAMONZ WIGGINS,

Defendant-Appellant.

UNPUBLISHED

February 14, 2008

No. 273920

Wayne Circuit Court

LC No. 06-007207-01

Before: Gleicher, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and carjacking, MCL 750.529a. He was sentenced to concurrent prison terms of 10 to 20 years for each conviction. We affirm. This case arose when a group of six young men ambushed a pizza deliveryman, knocked him to the ground, and repeatedly kicked and stomped on him as he lay helpless. The young men took everything from the deliveryman’s pockets, stole his cellular phone, and drove off in his car. The deliveryman saw defendant struggle with the car door before the car drove away, and he remembered defendant’s distinct features, later identifying him as one of the young men who assaulted him.

Defendant first claims that arguments made by the prosecutor improperly shifted the burden of proof to the defense. We disagree. Although “the prosecution may never shift its burden to prove that defendant is guilty beyond a reasonable doubt and obligate the defendant to prove his innocence,” *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987), the prosecutor’s argument in this case did not undermine defendant’s presumption of innocence or shift the burden of proof.

The challenged comments were made during the prosecutor’s rebuttal argument and were efforts to impeach the credibility of the evidence supporting the defense’s theory of the case. Taken out of context, the prosecutor pointed to the defense’s exculpatory evidence and argued that it did not “pass” the “reasonable doubt test.” Although any reference to the defense passing a test of proof is unsavory and dubious argument subject to special scrutiny, the context of the arguments in this case alleviate any misgivings that the prosecutor shifted its burden of proof. In context, the prosecutor’s comments were a colloquial way of arguing that the defendant’s weak explanation of events did not raise a reasonable doubt in light of the strong evidence against him, which is always a fair argument in rebuttal. “Arguments regarding the weight and credibility of the witnesses and evidence presented by defendant do not shift the burden to the defendant to

prove his innocence, but rather question the reliability of the testimony and evidence presented.” *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). Moreover, any possible prejudice was cured by the trial court’s reminder to the jury, before deliberations began, that the burden of proving defendant’s guilt beyond a reasonable doubt rested entirely with the prosecutor. Each attorney also reiterated this maxim of law, so we are not persuaded that the prosecutor’s arguments in this case improperly affected the jury’s allocation of the burden of proof.

Defendant next claims that the evidence was insufficient to establish beyond a reasonable doubt that he was a perpetrator of the charged crimes. We disagree. The victim’s positive identification of defendant, together with the other evidence of his involvement, was sufficient to identify him as one of the criminals involved in the ambush. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Even when, as here, the circumstances prevent the victim from providing a clear, definite, and unreserved identification of his attacker, the question remains one for the finder of fact. *Id.*; see also *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972). Here, the victim positively identified defendant in a photographic lineup held within a month after the incident and again at trial. His testimony indicated that, during the incident, he had an opportunity to observe defendant on two occasions: when defendant first approached him and when defendant was struggling with the car door. The investigating detective’s testimony indicated that defendant was identified as a suspect only after he had spoken with other eyewitnesses, even though they later recanted their identification. Moreover, defendant’s statement to police placed him at the scene of the crime, but did not otherwise incriminate him. From this evidence, and in light of the conflicting evidence, a rational juror could infer beyond a reasonable doubt that defendant was one of the young men who committed the offenses.

Defendant finally claims that his sentence was disproportionate, amounting to cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. We disagree. Defendant failed to properly preserve this issue for appellate review, so we review it for plain error that affected his substantial rights. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003).

“If the trial court’s sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant’s sentence.” *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); see also MCL 769.34(10). Defendant neither disputes that his sentence fell within the guidelines range nor argues that the court improperly scored the guidelines or relied on inaccurate information in determining his sentences. “Consequently, defendant’s proportionality claim is outside the limited scope of review provided for by the statute.” *McLaughlin*, *supra* at 671. Because defendant’s sentence reflects the Legislature’s policy determinations about the criminal factors that warrant punishment, defendant’s sentence is presumptively proportionate, see *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), and defendant fails to argue any unique circumstances that might render the sentence disproportionate, cruel, or unusual. *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Therefore, defendant fails to establish plain error that affected his substantial rights, and he is not entitled to resentencing. *McLaughlin*, *supra* at 670.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly