**S T A T E   O F   M I C H I G A N**

**C O U R T   O F   A P P E A L S**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIN F. HIGGINS,

Defendant-Appellant.

UNPUBLISHED
March 25, 2008

No. 276124
Macomb Circuit Court
LC No. 2006-002630-FC

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Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529, two counts of first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of two to eight years' imprisonment for the felonious assault conviction and 20 to 40 years' imprisonment for each of the remaining convictions. We affirm.

Defendant's convictions arise from incidents occurring at two residences in close proximity in the city of Warren during the early morning hours of April 26, 2005. Tiffany Cartagena was watching television while lying in bed at approximately 2:30 a.m. A man later identified as defendant opened her bedroom door, reached around the door, and grabbed her purse from the doorknob. He then shut the door and Cartagena heard the front door slam shut. She immediately contacted the police and noticed that a window screen in her living room had been cut or torn.

At approximately 3:00 a.m. the same morning, Patricia Wolfert was sitting on her couch and reading her mail. She looked up and saw defendant standing in her home. He grabbed her purse, and she grabbed the strap of her purse to prevent him from taking it. She released the strap when defendant started pulling the purse harder toward him. Meanwhile, Wolfert's boyfriend, Nabil Abdullahad, had gotten out of bed because he heard a noise and witnessed Wolfert struggling with defendant. Abdullahad intervened in the struggle and defendant struck him with what appeared to be a screwdriver. Abdullahad chased defendant out of the home and through an alley until the police apprehended him.

Defendant first argues that he was denied his state and federal rights to confront witnesses against him, and as his Fourteenth Amendment right to due process when the trial court allowed Wolfert's preliminary examination testimony to be read during trial because she failed to appear. Defendant objected to the admission of Wolfert's preliminary examination testimony on the basis that the prosecution did not exercise due diligence in attempting to locate her for trial. We review a trial court's determination whether the prosecution made diligent, good-faith efforts to procure a witness's testimony at trial for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). Because defendant did not raise in the trial court the constitutional issues that he now asserts on appeal, our review of those issues is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Under MRE 804(b)(1), a prosecutor may present a witness's preliminary examination testimony at a defendant's trial if the witness is unavailable and the defendant had an opportunity and similar motive to develop the testimony at the preliminary examination. *Bean, supra* at 683. A witness is unavailable within the meaning of MRE 804(a)(5) if the prosecutor is unable to procure the witness's attendance using reasonable means and has shown due diligence in locating the witness. *Id.* at 683-684. A prosecutor is not required to exhaust all avenues in locating a witness, but must put forth a reasonable, good-faith effort in locating the witness. *People v Briseno*, 211 Mich App 11, 16; 535 NW2d 559 (1995). "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean, supra* at 684.

Here, the trial court abused its discretion by determining that the prosecutor exercised due diligence to procure Wolfert's attendance at trial. The record reveals that approximately three weeks before trial, the police mailed a subpoena to Wolfert at her last known address, i.e., the mobile home in Warren where the incidents giving rise to this case occurred. Approximately one week later, the subpoena was returned with a message indicating that Wolfert no longer lived there. Detective Kevin Nelson then mailed the subpoena to a new address that had been provided for Abdullahad because Nelson "assumed they were still living together as boyfriend/girlfriend." Although that subpoena was never returned, Wolfert failed to appear on the first day of trial. Nelson sent police officers to the new address, but the officers failed to make contact with Wolfert or Abdullahad. It was then discovered that Abdullahad was in the Oakland County Jail. At approximately 1:30 p.m. on the first day of trial, Abdullahad informed the officers that Wolfert had moved to either North Carolina or South Carolina with her father. Officers tried contacting Wolfert by phone at her last known phone number, but the person who answered claimed not to know Wolfert. No further efforts were made to contact her.

Nelson admitted that neither subpoena sent to Wolfert was sent by registered or certified mail. A subpoena may be served by mailing to a witness a copy of the subpoena and a postage-paid card acknowledging service. MCR 2.506(G)(2). If the card is not returned, however, the subpoena must be served either personally or by certified or registered mail, return receipt requested, with delivery restricted to the addressee. *Id.*; MCR 2.105(A). Therefore, when the prosecutor did not receive the acknowledgement of service card from the second mailing, MCR 2.506(G)(2) required that Wolfert be served either personally or by certified or registered mail. To the extent that the prosecution merely assumed that Wolfert received the second mailing because the acknowledgement of service card was not returned, this assumption was inappropriate. See *People v James (After Remand)*, 192 Mich App 568, 572; 481 NW2d 715 (1992).

Further, the prosecution made no effort to contact authorities in North Carolina or South Carolina to ascertain whether Wolfert had moved to either state. The prosecution also made no attempt to locate Wolfert's father in either state through similar means. The record does not support the prosecution's assertion that police officers attempted to locate Wolfert by contacting her father. Accordingly, we cannot conclude that the prosecution made a reasonable, good-faith effort to locate Wolfert, and the trial court abused its discretion by so finding. As such, Wolfert's preliminary examination testimony was not admissible under MRE 804(b)(1) and MRE 804(a)(5). *Bean, supra* at 683-684.

We next address whether the erroneous admission of Wolfert's preliminary examination testimony was harmless. With respect to defendant's preserved, nonconstitutional due diligence argument, defendant must establish that "it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Further, with regard to his unpreserved, constitutional issues on appeal, defendant must show that plain error resulted in conviction despite his actual innocence or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Carines, supra* at 763-764, 774.

Defendant is unable to establish the less stringent "more probable than not" outcome-determinative standard, much less the plain error standard. The admission of Wolfert's preliminary examination testimony aided defendant's case by casting doubt on Wolfert's and Abdullahad's credibility. Wolfert testified that she screamed for Abdullahad after defendant had taken her purse and ran out the door. According to Wolfert, Abdullahad then came into the room and asked what had happened. Wolfert's testimony differed significantly from that of Abdullahad, who testified that he saw defendant and Wolfert struggling over the purse and saw defendant stab Wolfert with what appeared to be a screwdriver. Abdullahad further testified that he jumped on defendant and engaged in a physical altercation with him inside the home before defendant ran outside. Accordingly, Abdullahad presented a much different version of events than did Wolfert.

Further, Wolfert testified that she did not notice any object in defendant's hand while he was struggling for the purse, and she did not see him take a cell phone from the home. In fact, defendant relies on Wolfert's testimony in support of his argument, discussed *infra*, challenging the sufficiency of the evidence supporting his armed robbery conviction. Thus, although Wolfert's testimony did not corroborate defendant's defense that he purchased marijuana from Wolfert, it favored defendant in some respects, and the inconsistencies in Wolfert's and Abdullahad's testimony presented the jury with a basis for questioning their credibility. Abdullahad's credibility could not have been challenged to the same extent had Wolfert's testimony not been admitted. Under these circumstances, it is not more probable than not that the erroneous admission of Wolfert's preliminary examination testimony was outcome determinative. Similarly, defendant cannot establish plain error affecting his substantial rights.

Defendant next argues that the evidence was insufficient to support his armed robbery conviction. We disagree. When determining whether sufficient evidence exists to support a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury verdict. *Id.* at 400. The elements of an offense may be proven by circumstantial evidence and reasonable inferences therefrom. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

Defendant argues that he was not armed with a weapon and relies on Wolfert's testimony that she did not see any object in his hand when he took her purse and did not recall being hit with anything. Viewing the evidence in the light most favorable to the prosecution, however, the jury could have believed Abdullahad's testimony that he witnessed Wolfert and defendant struggling over the purse and saw defendant stab Wolfert in her left arm with what appeared to be a screwdriver. Although Wolfert and Abdullahad presented two different versions of events, a rational factfinder could have believed Abdullahad's version. Moreover, Wolfert admitted that she noticed an inch-long injury to her arm approximately 15 minutes after defendant took her purse. Thus, the prosecutor presented sufficient evidence to support defendant's armed robbery conviction.

Defendant next argues that the complainants' identifications of him at his preliminary examination and at trial were irreparably tainted by the suggestive nature of the confrontation that occurred at the initial adjourned preliminary examination. Because defendant did not move to suppress the identifications or otherwise object in the trial court, our review of this issue is limited to plain error affecting his substantial rights. *Carines, supra* at 763, 774.

An identification procedure violates a defendant's right to due process of law when it is "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "In order to challenge an identification on the basis of lack of due process, '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.'" *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993). An impermissibly suggestive pretrial confrontation can occur at a preliminary examination. *People v Colon*, 233 Mich App 295, 305; 591 NW2d 692 (1998). If an unduly suggestive identification procedure occurs, "evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established 'that is untainted by the suggestive pretrial procedure.'" *Williams, supra* at 542-543, quoting *Kurylczyk, supra* at 303.

Here, defendant argues that an unduly suggestive confrontation occurred at his first scheduled preliminary examination that was ultimately adjourned and that, as a result, the identifications of him at his rescheduled preliminary examination and at trial should not have been admitted. He contends that the police pointed him out to Abdullahad at the adjourned preliminary examination and that Abdullahad then identified defendant to Wolfert and Cartagena. Thus, he argues that all three complainants discussed which person present in the courtroom at the adjourned preliminary examination was the perpetrator.

The record fails to support defendant's argument that he was subjected to an unduly suggestive confrontation involving Cartagena before trial. Cartagena testified that the police did not inform her before she appeared in court for the adjourned preliminary examination that the suspect would be present. She maintained that she saw defendant in the courtroom sitting with other inmates and had no doubt that he was the perpetrator. She denied that anyone had pointed him out to her. When the police asked her if she recognized anyone, she responded that defendant was the person who had broken into her home. Because no impermissibly suggestive confrontation involving Cartagena occurred, her identifications of defendant at both the preliminary examination and at trial were proper. *Williams, supra* at 542-543.

With respect to Abdullahad and Wolfert, the record is unclear whether there existed an unduly suggestive pretrial confrontation. At trial, Abdullahad had difficulty remembering what occurred at the adjourned preliminary examination as opposed to the actual preliminary examination. At one point, he testified that he pointed defendant out to the police and to Cartagena and Wolfert, but thereafter denied doing so. He maintained that he did not have a clear memory of the two different court dates. Wolfert's testimony fails to address the circumstances of the adjourned preliminary examination altogether. Because the record does not clearly establish an unduly suggestive pretrial confrontation, plain error has not been shown.

Furthermore, the record supports the existence of an independent basis for Abdullahad's and Wolfert's identifications of defendant. Though briefly, Wolfert was able to observe defendant when she was struggling with him over her purse. He turned toward her and faced her during the struggle. Moreover, Abdullahad was able to observe defendant when he was fighting him and testified that there was no doubt in his mind that defendant was the perpetrator. Abdullahad saw defendant's face and described him to the police. Abdullahad thereafter chased defendant until the police apprehended him and never lost sight of him. Therefore, even if an impermissibly suggestive confrontation occurred at the adjourned preliminary examination, the existence of an independent basis for Abdullahad and Wolfert's identifications of defendant precludes a finding of a plain error affecting defendant's substantial rights.

Defendant next argues that his trial attorneys were ineffective for failing to file a motion for a *Wade*[1] hearing or otherwise challenge the complainants' identifications of him. Because the identifications were admissible, however, defendant's argument is meritless. A defense attorney is not ineffective for failing to make futile objections or file frivolous motions. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next contends that resentencing is required because his sentence was increased based on facts that were not proven beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In particular, defendant argues that the trial court erred by scoring points under offense variables (OVs) 1, 3, 9, and 13, because the scoring of these variables was not based on facts admitted by defendant or found by the jury beyond a reasonable doubt. In *People v McCuller*, 479 Mich 672, 667-677; 739 NW2d 563 (2007), our Supreme Court determined that under Michigan's indeterminate sentencing scheme, a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OVs to determine a defendant's minimum sentence. Therefore, the sentencing court's assessment of points under OVs 1, 3, 9, and 13 did not violate *Blakely*.

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Defendant also challenges the scoring of OVs 1, 3, and 9 on statutory grounds. Although defendant did not object to the scoring of these variables at sentencing on the same bases that he now asserts on appeal, he raised these challenges in a timely motion to remand filed with this Court as permitted by MCL 769.34(10). A sentencing court has discretion in determining the number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*.

MCL 777.31 provides that 25 points should be scored under OV 1 for "aggravated use of a weapon" if "a victim was cut or stabbed with a knife or other cutting or stabbing weapon." In addition, MCL 777.33 provides that OV 3, pertaining to physical injury to a victim, should be scored at five points if "[b]odily injury not requiring medical treatment occurred to a victim." Abdullahad testified that he saw defendant stabbing Wolfert with what appeared to be a screwdriver as he was trying to take her purse. After the incident, Wolfert noticed an inch-long cut on her arm that was bleeding. Therefore, the evidence supported the trial court's scoring of OVs 1 and 3.

The trial court's scoring of ten points under OV 9 was also proper. MCL 777.39, pertaining to the number of victims, states that ten points should be scored under OV 9 if "[t]here were 2 to 9 victims." Wolfert testified that she struggled with defendant to prevent him from taking her purse. Moreover, Abdullahad testified that he intervened in the struggle to help Wolfert, and defendant hit him in the chest and ran away with the purse. Accordingly, the evidence supported the trial court's scoring of ten points under OV 9.

We affirm.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey