STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 14, 2008
V	No. 277097 Wayne Circuit Court
CLERANCE CLARK, Defendant-Appellant.	LC No. 06-012419-01

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 15 to 30 years in prison for the armed robbery conviction, one to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. Basic Facts

The victim rode his bicycle to a liquor store in Detroit to purchase lottery tickets, and he remained inside the store for 15 to 20 minutes. He noticed defendant and four other men in the store because they were speaking loudly and acting "rowdy." Some of the men left the store, and the victim left as well. The victim got on his bicycle, rode a few blocks, and a man pushed him. Defendant and another man approached, and defendant lifted his jacket, displaying a revolver that was tucked in his waistband. Defendant instructed the victim to go around the corner, and the victim complied. Defendant removed the gun, pointed it at the victim, and threatened to shoot the victim if he did not give him the contents of his pocket. One of defendant's companions searched the victim's front pockets, retrieving cash. Defendant searched the victim's back pockets and took the victim's wallet, which contained credit cards and an automatic teller machine card.

The victim viewed the surveillance videotape from the liquor store and recognized one of the men in the store as the person who had robbed him with a revolver. Officer Paul Warner reviewed some still photographs that had been taken from the surveillance video, and testified at trial that he "recognized [defendant] from having contact with him prior to [the day of the robbery]." Warner located defendant's name from his log sheets and informed the officer in

charge, Kevin Wight. Wight testified that he utilized the information received from Warner and compiled a photographic array for the victim to view, obtaining defendant's photograph from the police database. No other details of defendant's prior contact with law enforcement were elicited from either witness. The victim identified defendant as the perpetrator after reviewing the photographic array and subsequently identified defendant at trial as well.

II. Prior Police Contact

Defendant argues that testimony indicating that he had prior contacts with law enforcement was improperly admitted pursuant to MRE 404(b). He further contends that the prosecution committed misconduct when cross-examining him about his arrest. We disagree. Because defendant failed to object to this testimony at trial, this issue is unpreserved, *People v Pipes*, 475 Mich 267, 277-278; 715 NW2d 290 (2006), and we review it for plain error affecting substantial rights, *id.* at 278; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A. MRE 404(b)

MRE 404(b) provides that a prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Such evidence may, however, be admissible for another purpose, including "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1). To be admissible, the other acts evidence must be offered for a purpose other than character or propensity, it must be relevant, and its probative value may not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, *supra* at 74-75.

Defendant denied that he had been at the liquor store on the date in question, that he had robbed the victim, and that he was the person depicted in the surveillance videotape. Defendant also asserted an alibi defense, claiming that he had been at his mother's home on the evening of the robbery. Therefore, his identity, a proper purpose for admitting other acts evidence, was at issue. From the surveillance videotape, the victim was able to point out the person he claimed to be the person who robbed him. However, because he did not know defendant, he was unable to provide the perpetrator's identity to the police. Warner was able to identify defendant from the still photographs taken from the videotape and supplied Wight with defendant's name. Wight obtained photos of defendant from the police database. Two or three weeks after the robbery, the victim selected defendant's photograph from a photographic array.

The testimony was properly admitted. Evidence of the process employed by police in identifying defendant made it more likely that defendant was the one who robbed the victim with a revolver. As such, it went directly toward establishing defendant's identity and was therefore relevant. MRE 401; MRE 402. It was necessary for the prosecutor to make a logical connection between the surveillance videotape, the identification of an actual suspect, and the victim's identification of defendant.

Furthermore, the probative value of the evidence was not outweighed by the danger of unfair prejudice. MRE 403. None of the testimony about defendant's prior contact with the police contained any details regarding any specific conduct or charges. Defendant waived his right to a jury trial, he was charged as an habitual offender, and he stipulated that he was a felon ineligible to possess a firearm for purposes of the felon in possession of a firearm charge. The trial court was already aware that defendant had a felony conviction and some prior contact with the police.

A trial judge conducting a bench trial is presumed to only consider properly admitted evidence, *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), and to know and apply the applicable law, *People v Sherman-Huffman*, 466 Mich 39, 43; 642 NW2d 339 (2002). Defendant has not over come the presumption that the trial court considered the evidence for its proper purpose and not as character evidence or for defendant's propensity for criminal behavior. See *VanderVliet, supra* at 74. We find no error requiring reversal.[1]

B. Prosecutorial Misconduct

Defendant's argument that the prosecutor improperly impeached defendant regarding his arrest is also without merit. During cross-examination, the prosecutor asked defendant, "[Y]ou were arrested on October 10th?" Defendant replied, "Yes, when I came here." The prosecutor clarified, "So you were arrested in this courtroom on October 10th?" Defendant replied, "Yes."

We review claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Generally, a prosecutor may not impeach a witness's credibility with evidence of an arrest that did not result in a conviction. *People v Yarbrough*, 183 Mich App 163, 164-165; 454 NW2d 419 (1990). However, the prosecutor did not ask defendant whether he had been previously arrested in another matter; rather, she asked if he had been arrested in this case on a specific date. Defendant volunteered the information that he was arrested when he appeared in court. Defendant was not prejudiced by his own non-responsive answer to a proper question. See *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995).

III. Ineffective Assistance of Counsel

Defendant contends that he was denied effective assistance of counsel because his trial counsel did not object to the foregoing testimony. We disagree. "'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.'"

[1] To the extent that defendant challenges the prosecutor's failure to provide advance notice of her intent to introduce evidence of defendant's prior police contact pursuant to MRE 404(b)(2), this argument was not included in the "Questions Presented" section of defendant's brief on appeal as required by MCR 7.212(C)(5). We deem this issue waived and not subject to appellate review. MCR 7.212(C)(5); *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). In any event, because we have already determined that defendant was not prejudiced by this testimony, no plain error occurred in the prosecutor's failure to provide notice. See *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001).

People v Matuszak, 263 Mich App 42, 48; 687 NW2d 342 (2004), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because no *Ginther*[2] hearing was conducted, we limit our review to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish ineffectiveness of counsel, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). In light of our conclusion, *supra*, that there was no error in the admission of the testimony regarding his prior police contact, defendant was not denied the effective assistance of counsel.

IV. Scoring of Offense Variables

Defendant claims that the trial court improperly scored ten points for offense variable (OV) 10 because there was no evidence that defendant exploited the victim's agedness. We conclude that, even if OV 10 were improperly scored, resentencing is not warranted.

Ten points are to be assessed pursuant to OV 10 if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b); *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006). The mere existence of agedness "does not automatically equate with victim vulnerability." MCL 777.40(2). If there is record evidence to support the scoring of a particular variable, a trial court has discretion in determining the number of points to assign under the sentencing guidelines. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An abuse of discretion occurs when the sentencing court chooses an outcome that falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *Endres*, *supra* at 417. Interpretation of the statutory sentencing guidelines is a question of law that we review de novo. *Id.*

The surveillance videotape from the liquor store was admitted into evidence at trial. At sentencing, the prosecutor argued it demonstrated that the victim was targeted because he is elderly.[3] The trial court agreed. Accordingly, defendant's minimum guidelines range was calculated to be 108 to 225 months, based on a Prior Record Variable (PRV) score of 52, and an OV score of 30. However, if defendant had not been scored ten points for OV 10, his OV score would have been 20. This would not have changed his minimum guidelines range of 108 to 225 months, i.e., Level II for 20 to 39 points. MCL 777.62. Because any error in scoring OV 10 does not change the guidelines minimum range, remand for resentencing is unnecessary. *People*

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[3] This Court made several requests for a copy of the videotape and the trial court ordered that it be made available for our review. Despite these repeated efforts to obtain the videotape, it has yet to be produced.

v Francisco, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

In a footnote to his brief on appeal, defendant also suggests that OV 1 was incorrectly scored at 15 points because there was no evidence that he actually pointed a gun at the victim. This argument is waived because counsel expressly indicated at sentencing that he agreed to the scoring of 15 points, see *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000), and because defendant failed to include it in the "Questions Presented" section of his brief on appeal as required by MCR 7.212(C)(5), *Mackle*, *supra* at 604 n 4. In any event, the victim testified during cross-examination that the gun was pointed at him. Therefore, there was record evidence to support this score, and no error occurred. See *Endres*, *supra* at 417.

V. *Blakely v Washington*

Defendant argues that he is entitled to resentencing because the trial court relied on facts not found at trial in scoring his offense variables, in violation of *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Because defendant raises this issue for the first time on appeal, we review it error for plain error affecting defendant's substantial rights. *Carines*, *supra* at 774.

Blakely provides that any fact, other than that of a prior conviction, that increases a criminal sentence beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. *Blakely*, *supra* at 301, 303-304, applying *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Defendant acknowledges that our Supreme Court held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme in *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). However, he asserts that *Drohan* is not "a definitive ruling on the merits of the Sixth Amendment claim[,]" and that *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007), is arguably broader than *Blakely*. However, after considering *Cunningham*, our Supreme Court recently reaffirmed that "[a] sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OVs to calculate a defendant's recommended minimum sentence range[.]" *People v McCuller*, 479 Mich 672, 686, 689-690; 739 NW2d 563 (2007).

Defendant also contends that the fact that the maximum sentence in Michigan is set by statute, and not determined by the sentencing court, has no bearing. This assertion is contrary to our Supreme Court's holdings in *McCuller*, *supra* at 689-691, and *Drohan*, *supra* at 161-164, in which the Court distinguished *Blakely* for this exact reason. The fact that a defendant's minimum guidelines range may be increased by facts not determined by the fact-finder does not affect the maximum allowable penalty for the defendant's crimes. MCL 769.8(1). In this case, defendant was convicted of armed robbery, the maximum penalty for which is life imprisonment. MCL 750.529. Defendant was sentenced to 15 to 30 years in prison, far less than the maximum penalty allowable by statute. Therefore, resentencing is not required.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly