

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEENAN OMAR KING,

Defendant-Appellant.

UNPUBLISHED

December 11, 2008

No. 279809

Jackson Circuit Court

LC No. 07-003708-FC

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, one count of unlawful imprisonment, MCL 750.349b, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 18 to 40 years for each of the armed robbery convictions and eight to 15 years for the unlawful imprisonment conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. Factual Background

Defendant's convictions arose from a robbery at the home of Germaine Overton on March 25, 2007. Three intruders entered Overton's house shortly after Overton, Carita Keene, and Overton's two sons arrived home late that night. Overton identified one of the intruders as defendant. According to Overton, defendant and another intruder rushed at him and knocked him to the ground. Defendant then hit Overton over the head with a gun and knelt over him, still holding the gun. While defendant and another man dragged Overton into the dining room and pointed a gun to his neck, a third intruder swung a gun at Keene to hit her, but she moved out of the way. Keene tried to escape with the two boys, but one of the intruders stopped them in the kitchen. The gunmen held Keene and the boys on the floor, against the wall, and demanded Keene's jewelry and cell phone. Defendant and his two accomplices then took Overton, Keene, and the two boys upstairs into a bedroom. They took Overton's jewelry and then searched his pockets, taking approximately \$800 in cash.

Police officers investigating other activity on the street observed suspicious activity in Overton's house and went to investigate. Officer Ralph Morgan looked through a window and saw a person on the ground with another person kneeling over him and holding a gun. After the police knocked at the door, defendant gave his gun to another intruder and told Overton to get rid

of the police. Defendant then escorted Overton downstairs. The officers eventually entered the house and arrested defendant. The other intruders apparently escaped through an upstairs window.

II. Scoring of the Sentencing Guidelines

Defendant argues that offense variables (“OVs”) 7, 8, and 16 of the sentencing guidelines were improperly scored. Because defendant did not challenge the scoring of these offense variables in the trial court, this issue is not preserved. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). We may, however, review the issue for plain error affecting defendant’s substantial rights. *Id.* at 312. Further, defendant argues that defense counsel was ineffective for failing to object to the scoring of OV 7 and 16. To establish ineffective assistance of counsel, defendant must show that his attorney’s performance was objectively unreasonable in light of prevailing professional norms and that but for his attorney’s error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

Armed robbery is categorized as a class A crime against a person. MCL 777.16y. As scored by the trial court, defendant received 25 total prior record variable points and 105 total OV points, placing him in the D-VI cell of the class A grid, for which the sentencing guidelines range is 171 to 285 months. On appeal, defendant challenges the trial court’s scoring of 50 points for OV 7, 15 points for OV 8, and five points for OV 16.

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We will uphold a trial court’s scoring decision if there is any evidence supporting the score. *Id.* Questions concerning the interpretation of the statutory sentencing guidelines are questions of law subject to de novo review. *Id.*

A. OV 7

MCL 777.37(1)(a) provides that 50 points may be scored for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” Each person who was placed in danger of injury or loss of life is considered a victim for purposes of OV 7. MCL 777.37(2). It is proper to consider the entirety of a defendant’s conduct when scoring the sentencing guidelines. See *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

MCL 777.37(3) defines “sadism” as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” We agree that defendant’s conduct does not meet the definition of sadism, because there is no evidence that a victim was subjected to extreme or prolonged pain or humiliation. The terms “torture” and “brutality” are not defined in the statute, but *Random House Webster’s College Dictionary* (1997) defines “torture” as “the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty,” and defines “brutality” as “the quality of being brutal.” “Brutal,” in turn, is defined as “savage; cruel; inhuman” or “harsh; severe.” *Id.*

Defendant's conduct throughout the course of the robbery can reasonably be described as excessively cruel, harsh, and severe. In *People v Wilson*, 252 Mich App 390, 396; 652 NW2d 488 (2002), this Court held that a defendant's excessive brutality in beating a victim in front of her family, or pointing a gun at the victim's son, was evidence supporting a 50-point score for OV 7. Here, in addition to confronting Overton and Keene with a gun in Overton's home in the presence of his two children, ages 9 and 11, defendant hit Overton over the head with the gun, forced him to the floor, pointed the gun at his neck while kneeling over him and demanding money, and then dragged him throughout the house. Additionally, one of defendant's accomplices attempted to strike Keene with a gun. Keene and the two children were also forced against a wall at gunpoint and then taken upstairs. Overton testified that the experience was very traumatic for him and his children. This entire continuum of conduct can reasonably be described as "excessively brutal." Accordingly, there was no plain error in scoring 50 points for OV 7, and defense counsel was not ineffective for failing to object to the scoring of this variable.

B. OV 8

Defendant argues that the trial court miscored OV 8 (victim asported to another place or situation of greater danger), MCL 777.38(1)(a), because the statute provides that this variable is not to be scored if the sentencing offense is kidnapping. MCL 777.38(2)(b). Although defendant contends that unlawful imprisonment, MCL 750.349b, is a form of kidnapping, the trial court did not score the guidelines for the offense of unlawful imprisonment. Instead, pursuant to MCL 771.14(2)(e)(ii) and MCL 777.21(2), the court scored the guidelines only for armed robbery, the crime having the highest crime class. Accordingly, there was no plain error.

C. OV 16

OV 16 may be scored at five points if the value of property obtained is between \$1,000 and \$20,000. MCL 777.46(1)(c). Although this variable is to be scored for all crimes against property, it is not to be scored for crimes against a person, except for home invasion. MCL 777.22(1) and (2). Armed robbery is a crime against a person, MCL 777.16y. Therefore, the trial court clearly erred in scoring five points for OV 16. But because a five-point reduction in defendant's total OV score would not affect the appropriate guidelines range, the error is harmless and resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Further, because defendant was not prejudiced by defense counsel's failure to object, his ineffective assistance of counsel claim fails as well.

III. Double Jeopardy

Defendant argues that his convictions for two counts of armed robbery and two counts of felony-firearm violate his constitutional double jeopardy protections. The Double Jeopardy Clauses of the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clause protects against multiple prosecutions and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). A double jeopardy challenge presents a constitutional issue reviewed de novo on appeal. *Id.* at 573.

The constitutional protections against double jeopardy do not prohibit separate convictions for crimes committed against different victims, even if the crimes occurred during

the same criminal transaction. Here, both Overton and Keene were robbery victims, and each was robbed at gunpoint. Therefore, defendant's convictions of two counts of armed robbery and two counts of felony-firearm do not violate double jeopardy protections. *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253 (2002). Defendant's reliance on cases holding that a defendant cannot be convicted and sentenced for both felony-murder and the predicate felony is misplaced. That theory has no relevance here, where defendant was convicted of separate offenses against separate victims.¹ Accordingly, there is no merit to this issue.

IV. Restitution

Defendant next argues that the trial court erred in ordering him to pay restitution of \$800. Defendant acknowledges that he failed to preserve this issue by objecting to the restitution award at sentencing, but argues that the trial court's restitution order constitutes plain error affecting his substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), because the record clearly reflects that the prosecution did not meet its burden of proving the amount of the loss and because the trial court failed to make factual findings on the issue.

When sentencing a defendant in a criminal action, the trial court must "order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 769.1a(2). Additionally, MCL 780.767 provides, in part:

(1) In determining the amount of restitution to order under section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense.

* * *

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

But as explained in *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997),

the language of [MCL 780.767] does not require the trial judge to make a separate factual inquiry and individual findings on the record. When determining restitution, whether it is included in the plea agreement or is statutorily imposed at the discretion of the trial court, the statute requires the court "to consider" the enumerated factors in light of all the information available at the time of the sentencing hearing and then impose the sentence. *Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of*

¹ Moreover, our Supreme Court recently overruled this rule in *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

restitution, triggers the need to resolve the dispute by a preponderance of the evidence. MCL 780.767(4). [Emphasis added.]

Here, there was no actual dispute regarding the amount of restitution, so the trial court was not required to determine whether the prosecutor had proven the amount by a preponderance of the evidence. Moreover, in light of Overton and Keene's trial testimony that jewelry valued at more than \$1,000 and \$800 in cash was stolen, and the information in the presentence report that Overton had filed an insurance claim with a deductible amount of \$1,000, there was no plain error in awarding restitution of \$800.

V. Jury Array

Defendant argues that his right to an impartial jury drawn from a fair cross-section of the community was violated because his jury array included only one African-American. In *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003), this Court stated:

To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving "that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203, 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

However, to properly preserve a challenge to the jury array, a party must raise this issue before the jury is empaneled and sworn. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). A review of the record in this case indicates that defendant failed to make any objections regarding the composition of her jury array. Further, there is no evidence in the lower court record to support defendant's argument. Consequently, we have no means of conducting a meaningful review of defendant's allegations on appeal.

In this case, not only did defendant fail to object to the jury array at trial, his counsel stated, "we are satisfied with this jury." Because defendant failed to raise this issue below, no record was developed. On appeal, defendant has not identified any evidence suggesting that any underrepresentation of African-Americans in his particular jury was due to systematic exclusion. Accordingly, there is no basis for concluding that the fair cross-section requirement was violated.

Furthermore, defense counsel expressed his satisfaction with the jury. As our Supreme Court explained in *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001), "[w]hen a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal." Defense counsel's affirmative approval of the jury waived any claim of error. *Id.*; *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

VI. Juror Partiality

Finally, defendant argues that he was denied his right to a fair and impartial jury when a juror who admitted to having previously met Overton was allowed to remain on the jury.

After the jurors were selected, but before they were administered their oath, the prosecutor revealed that Overton had disclosed that he may have had a conversation about the case with one of the prospective jurors. The trial court agreed to question the juror and the following exchange occurred:

Q. [T]he prosecutor is indicating that Mr. Overton had indicated maybe he had spoke to you about the case?

A. Um no, not really.

Q. All right. You don't recall anything about being told anything about the facts --

A. Hum-um

Q. --either from him or anybody else?

A. No. Yeah, I heard about it on the streets.

* * *

Q. And you'll be able to put that out of your mind, and upon deliberating in this matter, only consider what comes to you in the course of this trial, right?

A. Yes.

The juror further stated that she "just heard that it had happened," and denied hearing any specific details. When defense counsel asked the juror whether she had any conversation with Overton in which the robbery was mentioned, the juror denied this. The trial court commented, "I don't see any big problem based on what you've said. She can listen to what goes on here. So we'll proceed with the twelve that we have."

Defendant now argues that the trial court should have declared a mistrial or at least investigated the matter further by questioning Overton. Because defendant did not move for a mistrial below or otherwise object to the juror's continued presence on the jury, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Additionally, where a defendant contends that a jury was exposed to extraneous influences, the defendant must show that the jury was exposed to such influences, and further, that there is a real and substantial possibility that they could have affected the jury's verdict. *Id.* at 88-89. In *People v Schram*, 378 Mich 145, 159-160; 142 NW2d 662 (1966), our Supreme Court held that outside contact between a juror and an attorney for one of the parties did not require reversal unless the defendant could demonstrate that he was prejudiced by the contact. A mere possibility of prejudice was deemed insufficient to require reversal. *Id.* at 159.

In this case, upon inquiry by the trial court, the juror denied having a conversation about the case with Overton, and indicated that she had only heard "on the streets" that it had

happened, but did not hear any of the details. The juror indicated that she could set aside what little she had heard and decide the case only on the evidence presented at trial. In light of the juror's responses, there is no basis for concluding that the juror's prior exposure to information would cloud her impartiality, or that there is a real and substantial possibility that the jury's verdict was tainted by extraneous influences. Further, we are satisfied that the trial court made an appropriate inquiry. Both parties were apparently satisfied with the juror's responses and did not request any further inquiry. Accordingly, the trial court's failure to declare a mistrial or investigate the matter further was not plain error.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering