STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2010
v	No. 291882 Kent Circuit Court
MARVIN MICHAEL JONES, Defendant-Appellant.	LC No. 08-004992-FC

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of assault with intent to rob while armed, MCL 750.89, and sentenced to 85 to 365 months' imprisonment. Defendant appeals as of right. We affirm defendant's conviction and his minimum sentence of 85 months' imprisonment, but remand for the ministerial task of amending the judgment of sentence to reflect a 360-month maximum sentence as ordered by the trial court at the sentencing hearing.

David Pirkola was working at his comic book store when Jevon Sawyer shot him after Pirkola refused to give Sawyer money from the cash register. Defendant and James Thompson, both cousins of Sawyer, were with Sawyer immediately before the shooting, and all three arrived at the same location shortly after the shooting.

On appeal, defendant argues that the evidence was insufficient to support his conviction on an aiding and abetting theory. We disagree.

MCL 767.39 states:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

To support a finding that a defendant aided and abetted a crime, the prosecution must show that

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had

> knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Carines*, 460 Mich at 757, quoting *Turner*, 213 Mich App at 568.

It is undisputed that Sawyer committed the crime of assault with intent to rob while armed. Defendant argues, however, that insufficient evidence was presented to establish that he assisted in the commission of the crime or that he either intended the commission of the crime or knew that Sawyer intended its commission at the time he gave aid or encouragement. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757-758.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant intended to commit the crime of assault with intent to rob while armed, or that he knew that Sawyer intended to commit this crime at the time he provided assistance. Although defendant insisted to the police that Sawyer was Thompson's friend and that defendant had no independent relationship with him, the evidence established that all three men were in fact cousins. It is beyond question that defendant and Thompson were with Sawyer in the immediate vicinity of Pirkola's store in the hour before the shooting.[1] Employees of a Frames Unlimited store adjacent to Pirkola's store testified that two men matching the description of defendant and Sawyer came into their store shortly before the time of the shooting. The jury could rationally have inferred from the testimony of these witnesses regarding the odd demeanor of the two men, their unusual request to use the restroom together, the strange position of the taller man's hands as they left, and the watchful behavior of a third man waiting outside in the men's vehicle that, as theorized by the prosecution, the two were "casing" the store as a possible armed robbery site and that defendant was aware that Sawyer was carrying a weapon.

The testimony of the witnesses, together with defendant's statement to the police, constituted sufficient circumstantial evidence to establish that he knew of and participated in the plan to rob Pirkola at gunpoint, that he agreed to aid in the crime by driving the getaway car, and that he did, in fact, drive the getaway car following the shooting. See *People v Norris*, 236 Mich App 411, 421-422; 600 NW2d 658 (1999); *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). Defendant admitted to the police that he was with both Thompson and

[1] Defendant and Thompson were recorded on videotape in an adjacent Alltel store minutes before the shooting. While at the Alltel store, defendant completed a credit application, using his correct name and address.

Sawyer before the shooting. Defendant further admitted that he and the others had intended to commit a crime together; he stated that the three had formulated a plan to steal items from Pirkola's store and that defendant's role in the crime was to drive the getaway car. Defendant stated that he drove Thompson away from the scene of the crime, and approximately 40 minutes after the shooting, defendant, Thompson, and Sawyer arrived at defendant's sister's house. Although defendant's version of events did not include a specific admission that he knew Sawyer had a gun and planned to rob Pirkola at gunpoint or that Sawyer was present in the getaway car, it was up to the jury to determine what inferences to draw from defendant's statement and the other evidence and to decide the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Because sufficient evidence was presented to establish defendant's guilt on an aiding and abetting theory, the prosecutor was not required to disprove any other theory, such as defendant's claim that he assisted only in a plan to steal comic books. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant additionally challenges his sentence on several bases, arguing that he was deprived of liberty without due process of law under the state and federal constitutions and that his sentence constitutes cruel or unusual punishment because an offense variable (OV) was misscored and because the trial court relied on inaccurate information. Because these issues are unpreserved, we review them for plain error affecting defendant's substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). Barring constitutional error, if a sentence is within the appropriate guidelines range, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003); *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant first argues that the trial court erred in scoring 10 points for OV 4. "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). Facts used to support a sentencing variable need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). The rules of evidence do not apply to a sentencing proceeding and are not required by due process. *People v Uphaus* (*On Remand*), 278 Mich App 174, 183-184; 748 NW2d 899 (2008); MRE 1101(b)(3). "Thus, when considering a defendant's sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence." *Uphaus*, 278 Mich App at 184. A sentencing court may consider the contents of the presentence investigation report (PSIR) when calculating the guidelines. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993); MRE 1101(b)(3).

MCL 777.34(2) requires a score of 10 points for OV 4 when the victim has suffered "[s]erious psychological injury requiring professional treatment," even if the victim has not actually sought treatment. *People v Ericksen*, 287 Mich App ___; ___ NW2d ___ (2010), slip op, p 5.

Defendant contends there was no evidence that Pirkola suffered any psychological injury requiring professional treatment. This argument is meritless. Pirkola submitted a victim impact statement prior to defendant's sentencing that stated:

> I feel that I have lost months form [sic, from] my life due to this crime. Anger and depression were common, especially in the early weeks. I was confined to a bed for several weeks in pain and discomfort. This was followed by weeks of trying to re-learn walking, physical therapy will take months. I had extreme difficulty even communicating for a few weeks. I still feel anxiety being alone in my store. My doctors are arranging for counseling. An ostomy bag will be present for an indefinite period.

Pirkola's statement indicating that he suffered from anger, depression, and anxiety, that he had difficulty communicating, and that counseling was being arranged, constitutes sufficient evidence to uphold the trial court's decision to score ten points for OV 4. *Ericksen*, slip op at 5.

Defendant additionally argues that he is entitled to resentencing under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the jury did not determine that Pirkola suffered a psychological injury within the meaning of MCL 777.34. However, because Michigan's sentencing scheme does not permit a trial court to impose a maximum sentence in excess of the statutory maximum, MCL 769.8(1), *Blakely* is not violated when a trial court uses judicially ascertained facts to impose a sentence within the range authorized by the jury's verdict. *Drohan*, 475 Mich at 164.

Next, defendant argues that the trial court relied on inaccurate information in sentencing him. A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV and Const 1963, art 1, § 17. The PSIR is presumed to be accurate, *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003), and defendant raises no argument that the PSIR contained any incorrect information or that the trial court otherwise considered any inappropriate factors in imposing sentence. Rather, defendant contends that he was sentenced on the basis of inaccurate information because the trial court failed to consider his strong family support, his remorse, and his parents' addictions to drugs as mitigating factors. However, the PSIR made note of defendant's good relationship with his family and his parents' drug addictions, and at sentencing, defense counsel emphasized that defendant had a very supportive family and that defendant was remorseful, as expressed in several letters that defendant submitted to the trial court. Before imposing sentence, the trial judge specifically stated that he had "made a complete review of the presentence report" and had listened to defense counsel's arguments. Thus, there is simply no factual merit to defendant's claims that the trial court failed to consider these factors in imposing sentence or that defense counsel was ineffective for failing to bring them to the trial court's attention. Moreover, mitigating factors are already taken into account when scoring the sentencing guidelines. *People v Sargent*, 481 Mich 346, 348-349; 750 NW2d 161 (2008); MCL 769.31(d).

Defendant further argues that consideration of these factors should have resulted in a downward departure from the guidelines range. However, the factors identified by defendant are not the type of unique or compelling circumstances that would justify a downward departure; such "substantial and compelling" reasons exist only in exceptional cases. *Babcock*, 469 Mich at 257. Accordingly, defendant's suggestion that defense counsel was ineffective in failing to seek a departure from the guidelines range lacks merit. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (defense counsel is not required to raise meritless objections or make futile arguments).

Defendant next contends that because the trial court did not order an assessment under MCR 6.425(A)(5) to determine his rehabilitative potential through substance abuse and psychiatric treatment, his sentence was based on inaccurate information. MCR 6.425 requires a probation officer to conduct an investigation and complete a presentence report before a sentencing hearing. MCR 6.425(A)(5) provides that the PSIR must include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." Thus, contrary to defendant's assertion, there is no requirement that a trial court order a "rehabilitative assessment." Moreover, the PSIR in this case indicated that defendant reported no history of substance abuse issues, no physical problems, and no mental health issues. Accordingly, the requirements of MCR 6.425(A)(5) were fulfilled, and there was no indication that drug, alcohol, or mental health treatment or evaluation was necessary.

Defendant also argues that his sentence is invalid because the trial court failed to explain why the sentence it imposed was proportionate. However, "if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines," then the trial court is not required to articulate any additional reasons for the sentence. *Conley*, 270 Mich App at 313. The trial court explicitly stated that it was sentencing defendant within the guidelines range.[2] A trial court must impose a minimum sentence within the statutory sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); *Babcock*, 469 Mich at 255-256. A sentence within the guidelines range is presumptively proportionate, and a proportionate sentence does not constitute cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because defendant's sentence is within the appropriate guidelines range and because defendant has failed to identify any inaccurate information on which the sentence was based, this Court must affirm it. MCL 769.34(10).

Finally, defendant challenges his maximum sentence of 365 months as indicated in the judgment of sentence, noting that at the sentencing hearing, the trial court orally imposed a maximum sentence of only 360 months. We agree that the discrepancy appears to be a purely clerical error and that permitting the erroneous sentence to stand would affect defendant's substantial rights. *Carines*, 460 Mich at 774. Accordingly, we remand for the limited purpose of correcting the clerical error in the judgment of sentence to reflect the trial court's imposition of a 360-month maximum sentence. See *People v Seals*, 285 Mich App 1, 19; 776 NW2d 314 (2009).

Remanded for the ministerial task of amending the judgment of sentence to reflect a 360-month maximum sentence. In all other respects, defendant's conviction and sentence are affirmed. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[2] Defendant's maximum sentence is appropriate under MCL 750.89, which authorizes a term of life or a lesser term of years.