STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2011
v	No. 295839 Kent Circuit Court
JOSEPH JOVAN MARCUS WARD, Defendant-Appellant.	LC No. 07-010127-FJ

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.157a[1]; assault with intent to rob while armed, MCL 750.89; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to three terms of 126 months to 25 years' imprisonment for the armed robbery, conspiracy, and assault with intent to rob convictions, and two years' imprisonment for the felony-firearm conviction.[2] We affirm, but remand for correction of the judgment of sentence.

Defendant's convictions arise out of an incident that took place in July 2007 and involved victims Anthony Kramer and Danielle Schulman.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient credible evidence to support his convictions, especially with respect to his identity as a perpetrator and the existence of a conspiracy. We disagree.

[1] Defendant was charged and convicted of conspiracy under MCL 750.157a; however, the judgment of sentence does not contain the correct statutory citation.

[2] The judgment of sentence does not reflect the concurrent/consecutive nature of defendant's sentences as entered on the record at the sentencing hearing.

"Criminal defendants do not need to take special steps to preserve a challenge to the sufficiency of evidence." *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999); see also *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "In reviewing a sufficiency argument, this Court must not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses." *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). Any conflicts in the evidence are resolved in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

With respect to the charge of armed robbery, MCL 750.529, the prosecutor was required to prove beyond a reasonable doubt that,

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

The victims, Kramer and Schulman, testified that when they were out walking during the late evening hours of July 26, 2007, three men began to follow them. As the men drew near, Kramer and Schulman started to step aside when one of the men confronted them with a small semi-automatic handgun and advised them not to scream. The gunman pointed the gun at Kramer and demanded all his possessions while the other two men stood behind Kramer. Kramer surrendered his cellular telephone, which was all he was carrying at the time. The gunman questioned Kramer about additional possessions, stating, "This isn't a joke. I've killed before. I'll kill you. This isn't funny. Give me all you have." The gunman showed Kramer that the gun was loaded. The encounter lasted approximately three minutes and Kramer saw the gunman's face and remembered his clothing.

Shortly after the robbery, police found defendant in a parking lot near the crime scene and the victims both identified him as the gunman without any hesitation. The victims indicated they were "100-percent" confident of their identifications. Further, police found defendant with his brother, Ezra Ward, who had Kramer's cellular telephone in his possession, and defendant's clothing matched the clothing that the gunman wore. At the time of his arrest, defendant had a .32-caliber bullet in one of his pockets. Additionally, defendant initially refused to stop for police when an officer pulled into the parking lot and instructed him to stop, complying only after he was warned that a police canine would be released to pursue him, and when

apprehended, defendant provided police with false identification. These actions show a consciousness of guilt. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003) ("evidence of flight is admissible to support an inference of 'consciousness of guilt….'"); *People v Cutchall*, 200 Mich App 396, 398-401, 404-405; 504 NW2d 666 (1993), overruled in part on other grounds *People v Edgett*, 220 Mich App 686, 691-94; 560 NW2d 360 (1996) (defendant's attempts to conceal involvement in a crime are probative of his consciousness of guilt). Moreover, defendant eventually admitted to police that he was involved in the incident, and stated that one of the victims gave him a cellular telephone. Viewed in the light most favorable to the prosecution, there was sufficient evidence to support the jury finding defendant guilty beyond a reasonable doubt of armed robbery of Kramer.

There was also sufficient evidence to allow a rational juror to convict defendant of conspiracy to commit armed robbery, MCL 750.157a, beyond a reasonable doubt. "Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). "[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). In this case, although there was no direct proof of a conspiracy, evidence showed that defendant and two other men were standing in a group together near Kramer's residence when Kramer and Schulman stepped outside to take a walk. Defendant and the two other men immediately started to follow Kramer and Schulman and they hastened their pace to gain ground on the victims. After defendant and the men caught up to the victims they all participated in the offense. While defendant confronted Kramer, the other two men stood behind Kramer. Schulman testified that it appeared that the two other men were "standing guard" in case Kramer tried to run away. In addition, one of the men searched Kramer's back pocket to see if he had a wallet. After the robbery, all three men fled together in the same direction. Later, police found defendant and two men in a parking lot together. All three men tried to avoid police. Police found Kramer's cellular telephone and a shell casing in Ezra's pocket and a bullet in defendant's pocket. This evidence would allow a rational juror to convict defendant of conspiracy.

There was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant assaulted Schulman with intent to rob her while armed. MCL 750.89 provides in relevant part as follows:

> *Any person, being armed with a dangerous weapon*, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, *who shall assault another with intent to rob and steal* shall be guilty of a felony . . . [Emphasis added.]

As discussed above, the evidence supports a rational juror finding that defendant was the gunman. Further, Schulman testified that after robbing Kramer, the gunman pointed the gun at her and demanded to know what she had on her person. Although Schulman was wearing a sundress and had no possessions, the evidence supports a finding that defendant intended to rob and steal from her.

Finally, there was sufficient evidence to support a rational jury finding defendant guilty beyond a reasonable doubt of felony-firearm, MCL 750.227b. "The elements of felony-firearm

are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). As discussed above, there was sufficient evidence to support the jury finding defendant committed felonies in this case beyond a reasonable doubt. The same evidence supports a rational juror finding that defendant possessed a firearm when he committed those felonies.

II. DEFENDANT'S SENTENCES

Defendant argues that the trial court imposed a constitutionally invalid sentence, erred in scoring several legislative sentencing guidelines' offense variables (OVs), and erred in denying his motion for resentencing. We disagree.

We review a trial court's scoring decisions, including a trial court's denial of a motion for resentencing, for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). With respect to the constitutional aspect of defendant's arguments, we review constitutional issues de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Defendant challenges the constitutionality of Michigan's sentencing scheme based on the United States Supreme Court's holding in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and their progeny. In *People v Drohan*, 475 Mich 140, 143, 145-146, 159, 164; 715 NW2d 778 (2006), our Supreme Court addressed and rejected the same argument defendant raises on appeal, and that case is binding precedent upon this Court. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

Defendant argues that the trial court erred in scoring OV 1, aggravated use of a weapon, at 15 points. MCL 777.31 governs the scoring of OV 1. It requires that the trial court assess 15 points when "[a] firearm was pointed at or toward a victim . . ." Ezra was convicted and sentenced separately, for the same offense. Defendant argues that, because the sentencing court in Ezra's case scored OV 1 at zero points, the trial court was required to score OV 1 at zero in his case. Defendant cites MCL 777.31(2)(b) in support of his argument, which provides: "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points."

In *People v Libbett*, 251 Mich App 353, 365-367; 650 NW2d 407 (2002), this Court addressed the same argument and held that, where a sentencing court erroneously scores OV 1 in a codefendant's case, a subsequent sentencing court is not bound under MCL 777.31(2)(b) to assess the same erroneous score. In the present case, similar to *Libbett*, the sentencing court in

the Ezra's case erred by scoring OV 1 at zero.[3] Here, the evidence plainly shows that a gun was pointed at Kramer and Schulman during the armed robbery and shows that the accurate number of points for OV 1 in both cases was 15. MCL 777.31. Thus, the trial court did not err in scoring OV 1 at 15. *Libbett*, 251 Mich App at 367. Defendant's argument that *Libbett*, is not binding in this case lacks all merit. MCR 7.215(J)(1); *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009).

Next, defendant argues that the trial court erred in scoring OV 4, psychological injury to victim, at ten points. MCL 777.34 governs the scoring of OV 4. It provides that the trial court assess ten points where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). For purposes of scoring OV 4, "[t]he court need not find that the victim actually sought professional treatment . . . and the victim's expression of fearfulness is enough to satisfy the statute." *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009), citing *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). We find that the record supports the trial court's scoring OV 4 at ten points where the victim impact statements indicated that both victims suffered lingering psychological effects from the offense and where one victim sought counseling at a university.

Next, defendant argues that the trial court erred in scoring OV 9, multiple victims, at ten points. MCL 777.39 governs the scoring of OV 9. It provides that the trial court score ten points when, "[t]here were 2 to 9 victims who were placed in danger of physical injury or death…." MCL 777.39(1)(c). The statute defines a "victim" as "each person who was placed in danger of physical injury or loss of life or property." MCL 777.39(2)(a).

Defendant argues that, pursuant to *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), OV 9 should have been scored at zero because he was convicted of two separate crimes, each involving a separate victim. Defendant's reliance on *McGraw* is misplaced. In *McGraw*, the Court held that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *Id.* at 135. The Court articulated that, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id.* at 122. The trial court herein scored OV 9 in accord with *McGraw*, in that the court did not consider conduct after the sentencing offense (i.e. armed robbery) was completed. *Id.* The evidence discussed in detail *supra*, supports that, during the sentencing offense, two victims were "placed in danger of physical injury or death." MCL 777.39(1)(c).

Defendant also argues that the trial court violated his due process rights when it considered the same conduct to assess points for prior record variable (PRV) 7, and OV 9. Defendant fails to cite any authority in support of his argument and he has therefore abandoned this aspect of his appeal for review. See *People v Kelly*, 231 Mich App 627, 640-641; 588

---

[3] The codefendant in *Libbett* was incorrectly scored five points for OV 1, when the proper amount under the facts of the case was fifteen points. *Id*. at 366-67.

NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority").

Moreover, defendant's assertion lacks substantive merit. As discussed above, the trial court properly scored OV 9. Further, MCL 777.21(1)(b) requires that a trial court score all PRVs for all offenses. Nowhere is a court instructed to omit the scoring of any PRV in situations such as that presented here. MCL 777.57 provides that PRV 7 is to be scored at 20 points if the offender "has 2 or more subsequent or concurrent convictions," MCL 777.57(1)(a), and specifically instructs the trial court to "[s]core the appropriate point value if the offender was convicted of multiple felony counts . . .," MCL 777.51(2)(a). Thus, the trial court properly scored PRV 7 at 20 points. Because the trial court properly scored both PRV 7 and OV9, and then imposed a sentence within the legislative guidelines recommended minimum sentencing range, defendant's sentence is "presumptively neither excessively severe nor unfairly disparate." *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000).

Next, defendant argues that the trial court erred in scoring OV 14, offender's role, at ten points because the evidence does not support the score. MCL 777.44 governs the scoring of OV 14 and provides in relevant part that the trial court score ten points where "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). The statute provides that the trial court should consider the entire "criminal transaction" when scoring OV 14. MCL 777.44(2)(a). This Court has determined that whether a defendant was the first to make contact with the victim and whether he had the most contact with the victim are valid considerations in determining whether evidence supports a finding that defendant acted as a "leader" under OV 14. *Apgar*, 264 Mich App at 330-331. In the present case, defendant was the first offender to make contact with the victims. Defendant instructed the victims to remain quiet. Defendant threatened the victims and demanded that they turn over all of their personal property. Defendant showed the victims that his gun was loaded. The two accomplices stood in the background and then left with defendant as he fled the scene. This evidence supports the trial court's finding that defendant acted as a leader during the armed robbery. *Endres*, 269 Mich App at 417.

In sum, the trial court did not err in scoring any of the challenged OVs, or abuse its discretion in denying defendant's motion for resentencing. *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006). Therefore, because we find that the trial court properly scored the OVs in this case, and then sentenced defendant within the recommended minimum sentencing range under the legislative guidelines, we reject defendant's argument that his sentence was disproportionate and violated his due process rights. See *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000) ("A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate").

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises two claims of ineffective assistance of counsel. Defendant failed to preserve these issues for review because he did not first move for a new trial or an evidentiary hearing on the same basis. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant failed to preserve this issue, appellate review is limited to mistakes apparent on the record. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*. at 600.

First, defendant argues that defense counsel was ineffective because he did not object to and move to suppress evidence of the victims' eyewitness identification of defendant for police on the night of the incident. Defendant argues that the identification was suggestive and should have been suppressed and that the evidence was unduly prejudicial. "An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). After reviewing the totality of the circumstances, we conclude that the police in-field identification did not violate due process. Here, police conducted the in-field identification a short time after the robbery took place. Kramer testified that the robbery lasted approximately three minutes, which allowed both him and Schulman to get a good view of the robber's face and clothing. Police found defendant a short distance away from the crime scene and he was wearing the same clothing that, according to the victims, the gunman wore. A police officer testified that the parking lot where the identification took place was well lit. Police told both victims to specify if they were "100-percent" sure of their identifications and both Kramer and Schulman immediately identified defendant as the gunman without any hesitation and indicated they were "100-percent" positive of their identifications.

In addition to satisfying constitutional requirements, the eyewitness identification was not unduly prejudicial under MRE 403. Evidence is not unfairly prejudicial simply because it is damaging to a defendant's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Instead, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case, the identification evidence was relevant and at least "marginally probative" because identification of the gunman was one of the quintessential issues in this case. Further, there was no danger that the jury would give "undue or preemptive weight" to the identification evidence where there was a significant amount of other evidence of defendant's guilt. *Id*.

In sum, because the eyewitness identification evidence was admissible, defense counsel was not ineffective when he failed to object and move to suppress the evidence. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002) (counsel is not ineffective for failing to raise a futile objection).

Second, defendant argues that counsel was ineffective for failing to call an expert witness to testify concerning the unreliable nature of the police in-field identification. Generally, decisions regarding whether to call an expert witness, particularly one on eyewitness identification, are presumed to be matters of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Failure to call an expert witness "only constitutes ineffective assistance if it deprives defendant of a substantial defense." *People v Dixon*, 263 Mich App 393,

398; 688 NW2d 308 (2004). "A substantial defense is one might have made a difference at trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

At trial, defense counsel elicited testimony from the victims regarding the factors that may have compromised their ability to accurately identify defendant as the gunman at the time of the in-field identification. He also obtained an admission from Grand Rapids Police Department Detective Timothy DeVries that eyewitness identification can be inaccurate and that every individual is different insofar as their ability to recall things when scared or agitated. Trial counsel may have been concerned that the jury would react negatively to expert testimony on a subject that it had already heard and may have deemed obvious: memories and perceptions are sometimes inaccurate. See *Cooper*, 236 Mich App at 658. Moreover, significant other evidence linked defendant to the crime aside from the in-field identification, including the presence of Kramer's cell phone in Ezra's possession when he and defendant were stopped by the police soon after the robbery, that defendant's clothing matched that of the gunman, and that defendant later admitted that he had been involved in the incident. Defendant also had the benefit of jury instructions on factors the jury should consider in deciding the reliability of identification testimony and the credibility of witnesses generally. Under the circumstances of this case, defendant has not established that counsel's failure to call an eyewitness identification expert fell below an objective standard of reasonableness or was outcome determinative. *Carbin*, 463 Mich at 599-600; *People v Efinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence.[4] We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[4] See footnotes 1 and 2.