

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 1, 2011

v

DAQUAN SHANTWOINE JAMISON,

Defendant-Appellant.

No. 296138
Oakland Circuit Court
LC No. 2009-225333-FC

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

After a jury trial, defendant and codefendant were convicted of armed robbery, MCL 750.529. Defendant was sentenced to 6 to 20 years' imprisonment, and he appeals as of right. We affirm.

Defendant first argues he was denied effective assistance of counsel because trial counsel did not have defendant independently evaluated to determine if an insanity defense was viable. After review for errors apparent on the record because an evidentiary hearing was not held, we disagree. See *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).¹

To establish a claim of ineffective assistance of counsel, the defendant must prove that the counsel's representation fell below an objective standard of reasonableness and was so prejudicial it denied the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove the counsel's performance was deficient, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant demonstrates prejudice by showing the "existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* The defendant is only entitled to have counsel present all substantial defenses that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

¹ This Court denied defendant's motion for remand. *People v Daquan Shantwoine Jamison*, unpublished order of the Court of Appeals, entered September 22, 2010 (Docket No. 296138).

Defendant fails to prove trial counsel's representation was deficient. First, defendant has not established the factual predicate for his claim where nothing in the record supports that a potential insanity defense existed. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Second, he cannot overcome the presumption that defense counsel's performance constituted sound trial strategy. Again, nothing in the record indicates defendant had any mental health problems, and there was no factual basis to support an insanity defense. Defendant is unable to show that but for the failure to argue an insanity defense he would not have been convicted of armed robbery. Thus, defendant was not deprived a substantial defense. Trial counsel's failure to raise an insanity defense and have defendant independently evaluated was neither deficient nor prejudicial to defendant.

Defendant next argues there was insufficient evidence to prove beyond a reasonable doubt that he committed an armed robbery. We disagree.

In reviewing a sufficiency of the evidence claim, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). We "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "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).

"The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute." *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994).

Viewing the evidence in a light most favorable to the prosecution, the testimony at trial established that two men dressed like women and wearing wigs used mace, a BB gun, and a plastic revolver replica to assault the victim and rob him of \$9,900 in one hundred dollar bills. Defendant's telephone number was the telephone number listed on the Craigslist advertisement to which the victim was responding when he was robbed. The police discovered defendant in the building next to the building where the assault occurred. Defendant did not comply with police commands to come out of the bedroom. He claimed he was not dressed, but when the police entered the bedroom, defendant was fully clothed and hiding under the bed covers. Defendant was wearing a woman's red halter top and black pants, and he had longer hair. Defendant told the police there was nobody else in the apartment, but the police found codefendant hiding in another bedroom. In the closet where codefendant was hiding, the police discovered \$9,900 in one hundred dollar bills and a pair of black tennis shoes that matched the shoeprint on the front door of the apartment. Codefendant's DNA was in a wig and head wrap found at the crime scene. Additionally, defendant had a canister of Mace like the one discovered at the crime scene that was used to assault the victim, and he owned the BB gun used in the robbery. From this evidence, the jury could reasonably infer that defendant and codefendant used the BB gun, plastic revolver replica, and Mace to assault the victim and rob him of \$9,900. Viewed in the light most favorable to the prosecution, there was sufficient evidence to prove defendant committed an armed robbery.

Defendant also argues that he is entitled to resentencing because offense variables (OVs) 4, MCL 777.34 (psychological injury to victim), and 19, MCL 777.49 (security threat to penal institution or court or interference with the administration of justice), were improperly scored. We disagree. Although defendant contends the trial court's statutory interpretation was wrong, defendant is essentially arguing that the OV 4 and 19 scores were not supported by evidence. Additionally, he argues the trial court engaged in impermissible judicial fact finding when it scored the OVs.

With respect to the latter argument, under Michigan's indeterminate sentencing scheme, the court can use judicially ascertained facts to score OVs and sentence defendant within the statutory maximum. *People v McCuller*, 479 Mich 672, 698; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). The trial court did not engage in impermissible judicial fact finding.

With respect to the scoring challenges, the interpretation and application of statutory sentencing guidelines involve questions of law and are reviewed de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). This Court reviews OV scoring for an abuse of discretion to determine whether the evidence supports a particular score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 4 is properly scored at ten points if "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). Evidence of fear may be sufficient to support an OV 4 score of ten points. *Apgar*, 264 Mich at 330. There was evidence based on the victim's testimony and demeanor in court and the victim's statement in the presentence investigation report (PSIR) to score OV 4 at ten points. The trial court did not abuse its discretion.

Because the OV 4 score of ten points was not an abuse of discretion, it is unnecessary to determine whether OV 19 was properly scored. Any error in the scoring of OV 19 would not alter the appropriate guidelines range. Nevertheless, pursuant to *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004) and *People v Ericksen*, 288 Mich App 192; ___ NW2d ___ (2010), we would conclude that OV 19 was properly scored.

Defendant also challenges his sentence on several other bases. He claims because the trial court failed to consider mitigating factors during sentencing, his sentence was based on inaccurate information. He maintains that the trial court failed to articulate the reasons for the sentence and argues that possible mental illness was a substantial and compelling reason for downward departure from the sentencing guidelines. Finally, defendant argues that the sentence is excessive and constitutes cruel and unusual punishment. Defendant contends he was denied effective assistance of counsel because trial counsel failed to make these objections to the sentence.

MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence . . .

Aside from constitutional errors, this Court must affirm a sentence within the appropriate guidelines range unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). "Constitutional questions are reviewed de novo." *People v Rodriguez*, 251 Mich App 10, 26; 650 NW2d 96 (2002).

"Under this state's system of indeterminate sentencing, trial courts are vested with a great deal of discretion in sentencing criminal defendants." *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987). "The guidelines are structured in such a way that they subsume the most pertinent sentencing considerations." *Id.* at 354. Although a trial court must articulate its reasons for imposing a sentence on the record, reference to the sentencing guidelines is sufficient articulation. *Id.* at 346. The articulation requirement is also met if it is clear from the context of the proceedings that the court impliedly relied on sentencing guidelines in imposing the sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

A sentence within the minimum 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). At sentencing, a defendant must present any unusual circumstances which show that a sentence within the guidelines range would not be proportionate. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Absent unusual circumstances, a sentence within the guidelines is proportionate. *Id.* For a departure from the sentencing guidelines, a defendant must prove there is a substantial and compelling reason to do so. *Babcock*, 469 Mich at 263-264.

The statutory maximum sentence for armed robbery is life in prison. MCL 750.529. The recommended minimum sentence range under the legislative guidelines was 51 to 85 months' imprisonment. Defendant's sentence of 6 to 20 years' imprisonment is within the sentencing guidelines. As part of sentencing, the trial court considered the PSIR, trial testimony, and sentencing guideline factors. The record shows the trial court specifically assessed the mitigating factors. During sentencing, there was a discussion about the accuracy of the PSIR and OV scores. Defense counsel asked for a sentence on the low end of the guidelines based on defendant's lack of felony convictions, family situation, and history as a victim of abuse, and defendant spoke on his own behalf as well.

After discussing the PSIR and OV scores and hearing from defendant, the trial court weighed defendant's young age with the premeditation involved in the offense and the violence and trauma experienced by the victim. The trial court also considered defendant's remorsefulness and acceptance of culpability. Although the trial court did not explicitly state that it was relying on the sentencing guidelines, "it is clear from the context of the proceedings

the court impliedly relied on the sentencing guidelines . . .”, which satisfied the articulation requirement. See *Conley*, 270 Mich App at 313.

Nothing in the record indicates that defendant’s sentence is based on inaccurate or incomplete information. Defendant does not maintain the PSIR is inaccurate or claim the trial court relied on a piece of false or inaccurate information. Rather, defendant argues the sentence is based on inaccurate information because the trial court failed to consider mitigating factors. Defendant’s argument is without merit because the trial court considered the mitigating factors and did not rely on any inaccurate information to sentence defendant.

Defendant further claims that the sentence was based on inaccurate information because the court did not conduct a MCR 6.425(A)(5) assessment of his rehabilitative potential through alcohol, drug, and psychiatric treatment. This argument is groundless. Pursuant to MCR 6.425(A)(5), the PSIR should include “the defendant’s medical history, substance abuse history, *if any*, and *if indicated*, a current psychological or psychiatric report” (emphasis added). MCR 6.425(A)(5) only refers to PSIR information and makes no reference to additional assessments. The PSIR stated defendant “denie[d] any experimentation or use of alcohol or other substances” and “any past or present history of mental health problems.”

None of the mitigating factors defendant highlights justified a departure from the guidelines or overcome the presumptive proportionality of defendant’s sentence. Defendant specifically argues his possible mental illness provided a basis for downward departure from the sentencing guidelines. Defendant suggests an inference can be made that he has a “serious mental disease or defect” given the nature of the offense. However, defendant provides no other support for his claim and we find that it was not a substantial and compelling reason for a downward departure. There is no evidence in the record to suggest defendant has mental health problems. Defendant’s sentence was within the guidelines and was proportional. Thus, the sentence was not excessive or cruel and unusual punishment.

Finally, defendant was not denied effective assistance of counsel because trial counsel did not make objections to defendant’s sentence based on the challenges raised on appeal. Counsel is not required to advance meritless arguments or raise futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Trial counsel presented mitigating evidence to the court at sentencing, and the court weighed the mitigating factors. Consequently, defendant cannot prove counsel’s performance was deficient nor show counsel’s performance prejudiced him. See *Carbin*, 463 Mich at 600.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause