STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2011
v	No. 294920 Calhoun Circuit Court
RONALD ALAN BISH, a/k/a RONALD ALLEN BISH, JR., Defendant-Appellant.	LC No. 2009-001532-FC

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, third-degree fleeing and eluding a police officer, MCL 257.602a(3)(a), unlawfully driving away a motor vehicle, MCL 750.413, felon in possession of a firearm, MCL 750.224f, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 45 to 70 years' imprisonment for armed robbery, 20 to 40 years' imprisonment for first-degree home invasion, 14 to 30 years' imprisonment for unlawful imprisonment, 4 to 10 years' imprisonment for third-degree fleeing and eluding, unlawfully driving away a motor vehicle, and felon in possession, and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing.

According to the evidence, on April 1, 2009, defendant and Domonique Nichols robbed Jacob Weiderman at his home in Burlington, Michigan. The men asked Weiderman if they could borrow his cellular telephone, but a few seconds after Weiderman handed the telephone to Nichols, defendant pulled out a gun, shot it into the air and said, "We're done [messing] around." Weiderman was ordered onto the ground, and Nichols bound Weiderman's hands with rope before walking him into the house behind defendant. After Nichols removed Weiderman's guns from his bedroom closet, Nichols put Weiderman in the closet. Weiderman could hear the closet door being barricaded, and the men thereafter went through the house for 5 to 10 minutes. The men took Weiderman's Jeep Cherokee and other valuables, and eventually led police on a high-speed chase on M-66 before crashing the Jeep Cherokee.

Defendant was arrested and gave a statement to Detective Steven Hinkley at the hospital, where he was being treated for a head wound, and provided a consistent statement the next day at the Calhoun County Sheriff's Office. Defendant stated that after Nichols asked Weiderman for his telephone and Weiderman took too much time, defendant, who has a "violent temper" and "doesn't have a lot of patience," fired a handgun, ordered Weiderman down on the ground, and had Nichols tie him up. They went inside the house and took long guns and electronics, and defendant drove Weiderman's Jeep during the chase. Hinkley also testified that defendant told him that the pair took Weiderman's guns because they "knew that country people could shoot," and defendant was worried that Weiderman would shoot them as they left. Detective Bryan Gandy testified on cross-examination that he interviewed Nichols, who blamed the incident on defendant and said it was his idea.

Defendant first argues that his trial counsel was ineffective where counsel questioned Gandy on cross-examination regarding the hearsay statements made by Nichols, which effectively reaffirmed the prosecutor's position that defendant committed the offenses. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, where no *Ginther*[1] hearing was held and no factual findings were made, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's error there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which [the Court] will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotations omitted).

The record reflects that counsel elicited Nichols' alleged statements as a matter of trial strategy. There was already ample evidence showing that defendant was involved in the commission of the crimes, and counsel was attempting to minimize defendant's role by showing that while Nichols claimed it was defendant's idea, it was Nichols who performed most of the physical acts. Counsel also elicited testimony from Hinkley that defendant told Hinkley that defendant wanted to take the blame for everything to avoid Nichols getting into trouble; and testimony from defendant's sister that Nichols always coerced defendant into illegal activity, and had threatened defendant and her aunt. Counsel argued in closing remarks that defendant was simply covering for Nichols to protect his family. On this record, defendant has not demonstrated that his counsel's performance was objectively unreasonable.

---

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Defendant also argues that because Nichols was not called as a witness, his Sixth Amendment right of confrontation was violated. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. This argument was waived by the doctrine of invited error because defense counsel elicited the statements. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Nevertheless, testimonial statements of witnesses absent from trial are admissible only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009). Nichols' alleged statements were testimonial, but "the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). Counsel clearly did not elicit the statements to show that the crimes were defendant's idea, but rather to show that Nichols refused to accept blame even though he performed most of the physical acts at Weiderman's home.

Defendant also argues that counsel was ineffective for failing to move to suppress defendant's statements made to Hinkley and failing to request a *Walker*[2] hearing. We apply an objective standard to determine if a confession was knowing, voluntary, and intelligent. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). We review all of the surrounding circumstances, including the age of the accused, his lack of education or intelligence, the extent of his previous experience with the police, whether he was advised of his rights, the length of the detention, whether he was injured, intoxicated, drugged, or in ill health, and whether he was physically abused or threatened. *People v Sexton (After Remand)*, 461 Mich 746, 753; 609 NW2d 822 (2000). Defendant was read his *Miranda*[3] rights before both interviews, and he waived them and indicated he wanted to speak. Although defendant was being treated for a head injury and Marcia testified that he had ADHD, Hinkley and Gandy testified that there were no signs of mental health issues, and defendant was "intelligent" and "coherent." The record does not show that police threatened, abused, or coerced defendant, and the statements were detailed and consistent, supporting a finding of voluntariness. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that the trial court erred in the scoring of Offense Variables (OVs) 7 and 14. At sentencing, defendant objected to the scoring, thus preserving this issue for review. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10). 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, lv den 477 Mich 931 (2006). A sentencing court has discretion in determining the number

---

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

of points to be scored for each offense if record evidence adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000), lv den 464 Mich 858 (2001). To the extent that a scoring issue calls for statutory interpretation, review is de novo. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The trial court scored OV 7 at 50 points. MCL 777.37 provides in pertinent part:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) 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 ... 50 points
>
> (b) No 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 ... 0 points
>
> * * *
>
> (3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

As to this variable, this Court has found that actual physical abuse or injury to the victim is not required. See *People v Mattoon*, 271 Mich App 275, 277; 721 NW2d 269 (2006). However, we have also held that, "[f]or OV 7, only the defendant's actual participation should be scored." *People v Hunt*, ___ Mich App ___ (2010). Thus, in *Hunt*, the Court found that, where defendant was present and armed during the commission of the crimes, but did not himself commit, take part in, or encourage others to commit the codefendant's acts in that case that constituted "sadism, torture, or excessive brutality" under OV 7, it was erroneous to score 50 points for this variable.

Here, Weiderman's testimony supports a finding that he was threatened at gunpoint, forced to the ground where his hands were tied by Nichols, returned to his home where he was made to lie on the floor while defendant and Nichols took his keys and wallet, taken to various locations and made to lie still while the two took various items, and finally barricaded in a closet by Nichols before the two men left the home with his belongings.

Even assuming that each of these acts were properly charged to defendant as a participant pursuant to *Hunt* for the purpose of scoring this variable, we hold that the trial court erred when it found that defendant had engaged in conduct for which the scoring of 50 points was appropriate. Defendant's conduct did not equate to "sadism" because nothing indicates that he or Nichols subjected Weiderman to prolonged pain or humiliation for the purpose of causing him to suffer, or for the defendant's gratification. Nor did defendant's conduct amount to "torture" or "excessive brutality." Recognizing that the scoring of 50 points is also appropriate when the

conduct is "designed to substantially increase the fear and anxiety a victim suffered during the offense" we find that defendant's actions do not rise to this level. Instructive is *Hunt*'s own summary of cases where this Court has found an adequate basis for scoring this variable:

> Cases upholding scores of 50 points for OV 7 are distinguishable [from the facts in *Hunt*], because they involve specific acts of sadism, torture, or excessively brutal acts *by the defendant*. In *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005), the defendant was convicted of assault with intent to commit great bodily harm less than murder for inflicting a prolonged and severe beating that left lasting and serious effects. The defendant in that case choked the victim a number of times, cut her, dragged her, and kicked her in the head. After her hospital stay, the victim was in a wheelchair for three weeks and used a cane for another three weeks. Another case where OV 7 was scored at 50 points is *People v Mattoon*, 271 Mich App 275, 276; 721 NW2d 269 (2006) and after remand, *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued 10/18/07 (Docket No. 272549). In *Mattoon*, the defendant was convicted of kidnapping, felonious assault, and felony firearm. He held the victim at gunpoint for nine hours, made her look down the barrel of a gun, repeatedly threatened to kill her and himself, and asked her what her son would feel like when he saw yellow crime tape around his mother's house. Similarly, in *People v Hornsby*, 251 Mich App 462, 468-469; 650 NW2d 700 (2002), the defendant pointed a gun at the victim, cocked it, and repeatedly threatened the victim and others in the store. In *People v Kegler*, 268 Mich App 187, 189-190; 706 NW2d 744 (2005), the defendant removed the victim's clothes, assisted with carrying him naked outside, and admitted that she wanted to humiliate him by leaving him outside naked. In *People v James*, 267 Mich App 675, 680; 705 NW2d 724, (2005), the defendant repeatedly stomped on the victim's face and chest and deprived the victim of oxygen for several minutes causing the victim to sustain brain damage and remain comatose. And, in *People v Horn*, 279 Mich App 31, 46-48; 755 NW2d 212 (2008), the defendant terrorized and abused his wife with recurring and escalating acts of violence including threatening to kill her. [*Hunt*, ___- Mich App at ____ (emphasis in original)].

Hunt itself involved a case where the victims were subjected to kidnappings, repeated beatings and forced confinement, being struck with an assault rifle, and other brutality. *Id*. at ___.

In contrast, defendant's actions in the instant case, while reprehensible, were not *designed* to *substantially* increase Weiderman's fear and anxiety. Rather, if any motivation can be inferred on defendant's part, it is that the treatment of Weiderman was intended to force him to comply with defendant's and Nichol's orders, and to prevent Weiderman from coming after them with a gun or contacting the police.

The scoring of 50 points for this offense is among the highest in the guidelines. Many, if not most, serious assaults, armed robberies, or other serious crimes can be fairly said to involve brutality, or to include circumstances where the defendant causes fear or anxiety to a victim, because the very nature of these offenses involves brutality or violent actions by the defendant. However, OV 7's large number of "all-or-nothing" points, as well as the plain language of MCL

777.37, indicates that the Legislature intended that the scoring of this variable should be reserved for depraved criminal behavior that seeks gratification from unnecessarily torturing, brutalizing, or terrorizing a victim. This did not occur in the instant case. Accordingly, we find that the trial court erred by scoring 50 points for OV 7. We thus remand for resentencing.

Defendant also argues that the trial court erred in scoring OV 14 by assessing ten points. Ten points may be scored if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). The court views the entire criminal episode when determining if an offender was a leader. MCL 777.44(2)(a); *People v Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993). Defendant was the one who initially waved Weiderman outside, and defendant shot off the gun and led Weiderman and Nichols into the home. Defendant confessed to Hinkley that the incident was his idea, that he ordered Weiderman onto the ground and ordered Nichols to tie him up, and that he took the long guns and drove the vehicle during the police chase. Given these facts, the court did not err in scoring OV 14 at ten points.

Defendant finally argues that if this Court does not remand for resentencing, he is entitled to reinstatement of his originally imposed sentence for armed robbery because the trial court lacked the authority to modify the valid sentence. Because we remand for resentencing, we need not reach this issue. However, because this alleged error may affect defendant upon resentencing, we will address it.

We agree with defendant's argument. At sentencing, the trial court announced a sentence of 45 to 60 years, but the Judgment of Sentence indicates a sentence of 45 to 70 years. Defendant asserts that the maximum sentence was likely altered due to the misconception that the minimum of 45 years violated the rule that a minimum sentence cannot exceed two-thirds of the statutory maximum. *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972); MCL 769.34(2)(b). However, no *Tanner* violation exists where the statutory maximum is life imprisonment, *People v Powe*, 469 Mich 1032, 1032; 679 NW2d 67 (2004), as is the case with armed robbery, MCL 750.529. Thus, the original sentence was valid and did not violate the *Tanner* rule.

A trial court may correct an invalid sentence after sentencing, but it may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). A sentence is not effectively imposed until the defendant is remanded to jail to await execution of the sentence, or the sentencing order is actually issued. *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984). Defendant asserts that he left the courtroom and had begun to serve his sentence. Although it is not clear that defendant had actually been remanded, the valid sentence was changed after he left the courtroom, which is plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "A defendant has a right to be present during the imposition of sentence . . . ." *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993). Moreover, the presentence investigation report indicates that only 45 to 60 years were recommended, suggesting that the entry of 45 to 70 years was a clerical error.

Defendant's convictions are affirmed. We remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro