STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 322687 Wayne Circuit Court
LAYMAR PIERRE AGEE, Defendant-Appellant.	LC No. 13-009057-FC

Before: RONAYNE KRAUSE, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Laymar Pierre Agee, appeals by right his jury trial convictions of three counts of armed robbery, MCL 750.529, assault with intent to do great bodily harm, MCL 750.84[1], carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Agee as a fourth habitual offender, see MCL 769.12, to serve 75 years to 75 years and one day in prison for each of the armed robbery convictions and the assault with intent to do great bodily harm conviction, to serve 10 to 15 years in prison each for the carrying a concealed weapon and felon in possession of a firearm convictions, and to serve two years in prison for the felony-firearm conviction. For the reasons explained below, we affirm Agee's convictions but remand for reconsideration of his sentences.

I. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Agee first argues that the prosecution presented insufficient evidence to support his convictions. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

[1] The prosecutor charged Agee with assault with intent to murder, MCL 750.83, but the jury found him guilty of the lesser included offense of assault with intent to do great bodily harm.

B. ANALYSIS

Agee contends that there was insufficient evidence of his identity as the perpetrator; specifically, he notes that the eyewitnesses did not testify that he had tattoos on his face or facial hair. "[I]t is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

The three witnesses to the robbery and shooting, Mohammed Alfasih, Christian Baciu, and Kevin Hickey, each unequivocally identified Agee as the perpetrator. Alfasih and Baciu had ample opportunity to observe Agee. They testified that Agee and his accomplice, Twan Baker (Twan), sat in the small auto dealership for 30 to 40 minutes before committing the crimes. Agee and Twan sat approximately 6 feet from the desks where Alfasih and Baciu sat. Alfasih testified that he will never forget Agee's face and that, while Agee was sitting in the office, Alfasih focused his attention on Agee because of the look on his face and the fact that he seemed to be waiting for an opportunity. Baciu was likewise certain of his identification, explaining that he sees Agee in his head all the time. Hickey, who was delivering an auto part to the dealership when the robbery occurred, also positively identified Agee as the perpetrator. This testimony was sufficient to identify Agee as Twan's accomplice and the man who fired the shots both in the dealership and from outside. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Although Agee asserts that none of the victims indicated that he had facial hair, Alfasih testified that Agee had some facial hair at the time. Alfasih did not tell the police anything about facial hair, but he explained that he was asked only to describe the perpetrator, which he understood to mean what the perpetrator was wearing, his skin color, and his height. Although the witnesses did not testify that Agee had tattoos on his face, it is possible that they did not notice or remember the tattoos, or that Agee obtained or enhanced his tattoos after the events. There was evidence supporting an inference that Agee manipulated his appearance at trial. Overall, the witnesses' positive identification testimony was properly left to the jury to evaluate for credibility and weight. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *Id*. Discrepancies between a witness's initial description and a defendant's actual appearance are relevant to the weight of the testimony. *Id*. at 705. And this "Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Agee also argues that there was insufficient evidence from which the jury could conclude that he intended to cause great bodily harm when he fired at Alfasih—namely, because Alfasih fired the first shot and he merely returned fire. In order to convict Agee of assault with the intent to do great bodily harm, the prosecutor had to prove that Agee attempted with force or violence to do corporal harm to Alfasih and that he did so with the specific intent "to do serious injury of an aggravated nature." *People v Stevens*, 306 Mich App 620, 628-629; 858 NW2d 98 (2014) (quotation marks and citation omitted).

Testimony and evidence established that Agee pointed a gun at Alfasih, the owner of the car dealership, when Baciu pulled out money to pay Hickey for a delivery. Agee then ordered them to hand over their money. As Twan locked the door, Agee continued to scream, "Give me

your money now." Twan walked in front of Agee and, at that moment, Alfasih grabbed his own gun and began firing. Agee returned fire at Alfasih and evidence showed that numerous bullets were fired in Alfasih's direction; Alfasih also suffered a grazing injury to his finger. After this exchange of gunfire, Agee left the building, but came back and fired into the building; the shots shattered the door. Agee's intent can be inferred by his use of a deadly weapon and by the fact that he returned to the building and fired still more shots. *Id.* at 629. The fact that Alfasih fired first does not negate Agee's intent given that Agee first pointed his gun at Alfasih and demanded money. *Id.* at 628-629. There was sufficient evidence of Agee's intent to do great bodily harm.

Agee also claims that there was insufficient evidence to support his conviction for robbing Hickey because there was no evidence that the perpetrator intended to rob anyone other than the dealership. There was evidence that Agee brandished a dangerous weapon—pointing it at Hickey at one point—and demanded money from everyone in the room, including Hickey, who was about to take payment for the delivery of a part. This evidence was sufficient to support the charge of armed robbery of Hickey. *People v Rodgers*, 248 Mich App 702, 707-713; 645 NW2d 294 (2001).

II. ACCOMPLICE STATEMENT

Agee next argues that the trial court improperly admitted Twan's statement implicating Agee and that this violated his constitutional right of confrontation. This Court reviews de novo questions of constitutional law. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

A court violates a defendant's right to confront the witnesses against him or her when it allows the admission of a codefendant's confession implicating the defendant at a joint trial. *Bruton v United States*, 391 US 123, 127-128; 88 S Ct 1620; 20 L Ed 2d 476 (1968); *Pipes*, 475 Mich at 269. As noted, the *Bruton* rule applies in the context of a joint trial, which did not occur here. *Bruton*, 391 US at 137. Twan pleaded no contest to two counts of armed robbery before Agee's trial. Agee does not assert a Confrontation Clause claim outside the context of *Bruton*. Agee has therefore abandoned this claim of error to the extent that it is not premised on *Bruton*. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

In any event, we conclude the trial court did not improperly allow testimony that Twan implicated Agee. In the testimony cited by Agee, the prosecutor asked the officer-in-charge how he came to consider Agee as a suspect. The officer verified that he had interviewed Twan and stated that he came to include Agee's photo in the photo lineup on the basis of the investigation that followed up that interview. At that point, the court interjected: "All right. All right. That's about as clear as we can make it."

Although the officer indicated that his investigation included interviewing Twan, he did not testify concerning any statements that Twan made. Rather, he referred only to his "follow-up investigation" when asked how he came to include Agee's picture in the photo lineups. Moreover, outside the limited portion of the transcript that Agee highlights, the officer's testimony made it clear that he came to suspect Agee on the basis of his relationship with Twan's sister and the fact that Agee matched the eye witnesses' descriptions of the perpetrator. Consequently, this claim of error is meritless.

III. HANDCUFFING AT TRIAL

Agee next argues that the trial court deprived him of a fair trial by having him handcuffed after the lunch break. A criminal defendant has the right to be presumed innocent, which includes the right to have the trial court avoid procedures or arrangements that might undermine the presumption. See *People v Rose*, 289 Mich App 499, 517-518; 808 NW2d 301 (2010).

There is record evidence that Agee threatened a deputy at lunch; specifically, he warned: "when you bring me back out, you better put the handcuffs on." The trial court stated that it was "accommodating" Agee's wishes and ordered him to be cuffed. The trial court also clarified that it was doing so because the statement caused some concern. Agee did not and has not disputed that he made the statement;[2] and the statement arguably amounts to the intentional abandonment of his right to be free from restraint at trial. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nevertheless, even assuming that he has not waived this unpreserved claim of error, he has not established plain error that warrants relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court has the discretion to order a defendant to be handcuffed in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). However, "a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *Id.* (quotation marks and citation omitted). Even if the trial court abused its discretion when it ordered the defendant to be handcuffed, the error will not warrant relief unless the defendant can show that he suffered prejudice as a result. *Id.*

Before the recess for lunch, an exchange occurred on the record outside the presence of the jury in which there was evident tension between Agee and his trial lawyer regarding defense strategy. In particular, there was a dispute over Agee's trial lawyer's decision not to call Twan's mother and about whether Tanisha had previously stated that she could provide Agee with an alibi. Agee's trial lawyer emphatically stated on the record that Tanisha never stated that she could give Agee an alibi in ten meetings. It was shortly after this tension-filled exchange that Agee apparently warned the deputy that he better bring him back in cuffs.

After returning from lunch, the trial court noted Agee's statement to the deputy outside the presence of the jury and stated that "we better put the handcuffs on." Agee's lawyer at that point explained that he had been a victim of an attack in a prior case: "I had [a] murder trial a year ago where the guy just blasted me in the face in front of the jury. We ended up in a fight. Deputies had to be called, and obviously a mistrial was declared." Agee was then brought out in handcuffs. The trial court again referred to Agee's comment and stated, "[W]e're just accommodating the defendant's wishes. I'm sorry the jury has to see him that way, but, you know, he gave us some cause for concern." Although the record does not reflect that the jurors saw Agee in cuffs, it is reasonable to infer that they did.

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[2] Agee asserts that the trial court failed to verify that he made the statement, but we do not construe that as a denial.

Even if the issue were not waived, the trial court's decision was adequately supported on this record. There was plainly some tension between Agee and his trial lawyer before lunch and Agee's lawyer's comments permit an inference that he felt that the tension had become dangerous. In addition, Agee's statement—if not understood as an affirmative request to be handcuffed—was at the very least a threat to be disruptive or engage in acts of violence. The trial court's statement that Agee had given "us some cause for concern[]" was a reference to legitimate safety considerations. Therefore, although the trial court's findings could have been elaborated more fully, we conclude that, in context, the court's comments essentially amounted to a finding that handcuffing was necessary to maintain order or to prevent injury to persons in the courtroom.

There was no plain error.

IV. INEFFECTIVE ASSISTANCE

Agee next argues that he was denied the effective assistance of counsel. Because the trial court did not hold a hearing on Agee's claim of ineffective assistance, this Court's review is limited to the lower court record alone. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. In order to establish that his trial lawyer provided ineffective assistance, Agee must show that his lawyer's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *Id.* at 22.

Agee first contends that his lawyer's failure to call Tanisha as an alibi witness and to undertake a complete investigation regarding the alibi defense she could have provided amounted to ineffective assistance. Agee's trial lawyer called Tanisha to testify regarding Agee's physical appearance on or before the date of the events at issue but did not try to establish an alibi defense with her testimony. At trial, Agee's lawyer explained that he spoke with Tanisha on numerous occasions and she never indicated that she could provide Agee with an alibi. Despite this, Agee testified that he was with Tanisha and their child in Dearborn on the date of the offenses.

A defendant claiming ineffective assistance has the burden of establishing the factual predicate for the claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Yet, there is no indication on the record that Tanisha would have testified that she was with Agee at the time of the offenses. Agee's lawyer also had a duty to undertake reasonable investigations or to make a reasonable decision that renders particular investigations unnecessary. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Agee's lawyer stated on the record that he spoke to Tanisha approximately 10 times and that she never said that she could provide an alibi for Agee. On this record, Agee's lawyer's decision not to try and present an alibi defense through Tanisha was reasonable. Agee has not shown that his lawyer's investigation was deficient. See *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990). On this record, we cannot conclude that Agee's lawyer's decision not to question Tanisha about a possible alibi fell below an objective standard of reasonableness under prevailing professional norms. *Gioglio*, 296 Mich App at 22.

Agee next argues that his lawyer was ineffective for failing to present to the jury a purported affidavit from Twan indicating that Agee was not present at the robbery or to call Twan as a witness. Agee supported this contention on appeal with an undated, handwritten statement purportedly signed by Twan, which is also not notarized or authenticated in any way. Accordingly, this document is not a valid affidavit. See *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). Because the purported affidavit is not authenticated, there is no basis to conclude that it is in fact Twan's statement. Moreover, Twan's purported statement is not in the lower court record and Agee has not otherwise established that Twan would have testified in support of Agee's defense.[3] Accordingly, he has not established the factual predicate for this claim. *Carbin*, 463 Mich at 600.

Agee next contends that his trial lawyer was ineffective for failing to call Agee's mother as a witness or to present photographs of his tattoos taken before the date of the offenses to demonstrate that he had the tattoos at the time. There is no basis in the record to conclude that Agee's mother was willing to testify in support of his theory. Nor does the record contain the photographs Agee would like to have shown.

At sentencing, Agee's trial lawyer said that Tanisha did have photos, but he thought the pictures might not be helpful because Agee appeared to be flashing gang signs. Agee's lawyer also reminded the court about Tanisha's testimony concerning the tattoos: "If you recall, the young lady testified that when he came home from prison, which was a great response to my question that I told her not to mention that, that he was – he was tatted up." His lawyer also stated that, although Agee's mother had been attending trial, she left the morning they picked the jury and did not come back. On this record, a reasonable trial lawyer could conclude that the pictures and the testimony about the pictures would be more harmful than helpful. Similarly, there is simply no record evidence that Agee's mother could have testified favorably. *Gioglio*, 296 Mich App at 22.

Agee also maintains that his lawyer should have objected to the court's decision to handcuff him at trial. Even if Agee did not waive his right to be free of handcuffs, as already explained, there was adequate support for the trial court's decision to restrain Agee. Hence, any objection would have been meritless. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Finally, even if we were to conclude that any of these acts or omissions fell below an objective standard of reasonableness under prevailing professional norms, we would nevertheless conclude that the acts or omissions—separately and collectively—would not warrant relief. The

[3] After Agee raised this issue at sentencing, his lawyer stated that Twan implicated Agee in his initial confession. He later received an affidavit from Twan stating that, because of his mental condition, he could not recall whether Agee was with him. Agee's lawyer also stated that Twan originally agreed as part of a plea deal to testify against Agee, but refused to testify after Agee sent him a letter.

overwhelming evidence established Agee's guilt. Accordingly, Agee cannot demonstrate that any error prejudiced his trial. *Gioglio*, 296 Mich App at 22.[4]

In addition, we have considered Agee's claims that his trial lawyer provided him with ineffective assistance at sentencing. We address some of those claims below and conclude that the underlying claims of error are without merit; as such, Agee's lawyer cannot be faulted for failing to raise them. *Ericksen*, 288 Mich App at 201. And, because we have determined that Agee is entitled to a remand under our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; ___ NW2d ___ (2015), we decline to address his remaining claims concerning his representation at sentencing.

V. SENTENCING ERRORS

Agee next argues that the trial court erred by scoring Offense Variables (OVs) 1, 12, and 19 using facts not found by the jury and erred by imposing a sentence in violation of the prohibition against cruel and unusual punishment. Agee preserved his challenge to the scoring of the OVs by filing a motion to remand. See *People v Jackson*, 487 Mich 783, 795-796; 790 NW2d 340 (2010). However, Agee did not challenge his sentence on the ground that it amounted to cruel and unusual punishment; consequently, that claim of error is unpreserved. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). This Court reviews de novo questions of constitutional law. *Lockridge*, 498 Mich at 373.

In *Lockridge*, 498 Mich at 364, our Supreme Court held that Michigan's sentencing guidelines are constitutionally deficient under the Sixth Amendment to the extent that "the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne*." As a remedy, our Supreme Court "sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Id.* The Court also struck "down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id*. at 364-365. The Court held that the "guidelines minimum sentence range" is advisory only and "that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Id.* at 365. Courts must continue to determine the applicable guidelines range and take it into account when sentencing a defendant. *Id*.

[4] We also reject Agee's invitation to remand this matter for an evidentiary hearing. We have already determined that an evidentiary hearing is unnecessary and Agee has not presented any arguments or evidence to warrant revisiting that decision. See *People v Agee*, unpublished order of the Court of Appeals, entered February 26, 2015 (Docket No. 322687); see also MCR 7.211(C)(1)(a) (requiring a motion to remand to "be supported by affidavit or offer of proof regarding the facts to be established at a hearing.").

We conclude that the trial court's assessment of 25 points for OV 1 was based on facts that were not admitted or found beyond a reasonable doubt by the jury. OV 1 addresses aggravated use of a weapon. MCL 777.31(1). Under OV 1, a court must assess 25 points if "a firearm was discharged at or toward a human being . . . ." MCL 777.31(1)(a). Although there was overwhelming evidence that Agee in fact discharged a firearm at a human being, that finding was not an essential element of any of the offenses charged in this case. It does not, therefore, necessarily follow that the jury found this to be the case. However, in order to convict Agee of assault with the intent to do great bodily harm, the jury had to have found that Agee—at the very least—pointed his firearm at another human being. Consequently, the facts found by a jury support a score of 15 points under this variable. See MCL 777.31(1)(c).

The trial court's assessment of 25 points for OV 12 was also based on facts that were not admitted by or found beyond a reasonable doubt. OV 12 addresses contemporaneous felonious criminal acts. MCL 777.42(1). Under OV 12, a court must assess 25 points if "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). A felonious criminal act is contemporaneous if it occurred within 24 hours of the sentencing offenses and it has not and will not result in a separate conviction. MCL 777.42(2)(a). It must be separate from the behavior establishing the sentencing offenses. *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010). In this case, the jury did not make any findings concerning any felonious criminal act that has not and will not result in a separate conviction.

The trial court's score of 10 points under OV 19 was also founded on facts that were not admitted or found by the jury. OV 19 addresses, in relevant part, interference or attempted interference with the administration of justice. MCL 777.49(1). Under OV 19, the court must assess 10 points if "the offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(1)(c). "The plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). None of the crimes of which Agee was convicted contains an element requiring the jury to find that he interfered with or attempted to interfere with the administration of justice.

When scored on the basis of the facts necessarily found by the jury, Agee's total OV score would be 55, which changes his OV level from VI to III. As a fourth habitual offender, his sentencing guidelines range would be 135 to 450 months, instead of the originally calculated range of 270 to 900 months or life. See MCL 777.62; MCL 777.21(3)(c). Agee's original 75-year minimum sentences fell within the calculated guidelines range of 270 to 900 months or life. Therefore, it is necessary to remand the case to the trial court in accordance with the remand procedure set forth in *Lockridge* to determine whether the court would have imposed a materially different sentence but for the constitutional error. See *Lockridge*, 498 Mich at 395-399.

Agee also argues that his sentences of 75 years to 75 years and one day comprise cruel or unusual punishment. Specifically, he argues that, because he was 29 years old at the time of sentencing with a life expectancy of an additional 48.62 years, the trial court effectively sentenced him to life without parole.

"In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). The fact that Agee was 29 years old at the time of sentencing does not establish that his 75-year minimum sentences are cruel or unusual. Agee does not have a right to parole under Michigan law. See *Bowling*, 299 Mich App at 558. Moreover, a court is not required to consider a defendant's age in determining whether a sentence is disproportionate. See *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). Other than his age, Agee fails to articulate any ground on which to suggest that his sentences are disproportionate. He has therefore abandoned any claim that his sentences are disproportionate aside from his argument about his age. *Kevorkian*, 248 Mich App at 389.

In any event, we conclude that Agee's sentences are proportionate. A proportionate sentence does not constitute cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). In this case, the trial court aptly took note of Agee's extensive and disturbing juvenile and adult criminal history.[5] Agee's long and violent criminal history along with the circumstances involved here support the conclusion that there is not a realistic possibility of rehabilitating him. See *Bowling*, 299 Mich App at 558-559. Because his sentences are proportionate, they do not constitute cruel or unusual punishment. *Powell*, 278 Mich App at 323.

Affirmed, but remanded for reconsideration of Agee's sentence consistent with *Lockridge*, 498 Mich at 395-399. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Michael J. Kelly

[5] The trial court stated that it had never seen a juvenile history as disturbing as Agee's and that he has "been completely out of control" for virtually his entire life and "has been a complete menace to this community."