STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July19, 2011
v JASON DAVID HELLER, Defendant-Appellant.	No. 298375 Oakland Circuit Court LC No. 2009-229465-FH

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering a dwelling with intent to commit a larceny, MCL 750.110a(2). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to fifteen to forty years' imprisonment. Defendant appeals his conviction and sentence. We affirm.

The victim in this case was home alone, using a treadmill in her basement, when she heard a noise from upstairs. When she investigated, she found a man going through her kitchen cupboard and placing various things into her purse. When she demanded to know what he was doing there, he denied doing anything and attempted to leave. The victim pursued him, took back her purse, and ejected him from her house. She tried but failed to note his car's license plate number as he left, provided a description to police, helped create a sketch of the man, and identified him later from a photographic lineup. The victim had a good look at the man and identified defendant as that man. The man had gained entry to her house by smashing a window next to her front door and unlatching the door from the inside. Several other areas of her house had been ransacked. Blood from a similar home invasion several years previously was linked to defendant.

Defendant first argues that the evidence of the prior home invasion was inadmissible. We disagree. Evidence of a defendant's prior crime or act is inadmissible to show anything about the defendant's character in order to show action in conformity therewith, but it may be admitted to show a range of other possible relevant things, such as a scheme or plan, identity, or intent. MRE 404(b). Such "other acts" evidence is admissible if it is offered for a proper purpose, if it is relevant to a material fact at issue, if its probative value is not substantially outweighed by a danger of unfair prejudice, and if the trial court gives the jury a limiting instruction upon request. *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Here, the

prosecution offered the evidence of defendant's prior home invasion for the purpose of showing intent, scheme, or a system or plan. The trial court unambiguously instructed the jury that it may not consider the evidence for any other purpose.

Our Supreme Court has explained that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system," and it is not necessary for the charged and uncharged acts to be "part of a single continuing conception or plot." *Sabin*, 463 Mich at 63-64. The apparent plan or scheme does not need to be unusual or distinctive, but it does need to be more than just generally similar. *Id*. at 64-66. Both offenses at issue here featured homes that had been burglarized by a person who gained entry by breaking a window next to a door, unlatching the door from the inside, and chaotically ransacking the house during the day. While neither is a highly unusual methodology, they both involved *some* kind of methodology, and the methodologies were essentially identical. The trial court did not abuse its discretion in finding that the prior home invasion was sufficiently similar to the instant offense to show a plan or scheme.

Finally, the victim's eyewitness identification did not suffer from any distractions, poor illumination, or other possible contaminating factors at the scene, nor did it suffer from any potentially suggestive or memory-corrupting behavior by the police. Given the overwhelming evidence against defendant, the prejudicial value of the other-acts evidence was minimal under the circumstances, and it certainly was not unfairly so. The evidence of the prior home invasion was properly admitted.[1]

Defendant next argues that the trial court erred in scoring Offense Variable (OV) 4. Offense Variable (OV) 4 should be scored at 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The plain language of MCL 777.34(2) explicitly provides that it is not conclusive "that treatment has not been sought," and the issue is whether the injury *may* require professional treatment. It has been found sufficient that a victim was fearful during an encounter with a defendant, *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), or that a victim suffered anxiety and changed demeanor. *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005). The victim testified at length about the ongoing fear and anxiety she suffered as a result of the home invasion, and how she changed important parts of her life as a further consequence. The evidence unambiguously shows that she suffered a serious psychological injury that may warrant professional treatment. OV 4 was correctly scored.

Defendant asserts that the trial court erred by relying on information not specifically admitted by defendant or found by the jury. Defendant is mistaken. "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited

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[1] Defendant also complains that some of the other-acts evidence was in the form of hearsay from the other homeowner. We need not address this, because it was clear that the officer who testified had drawn his own independent conclusions as to the contents of the other homeowner's statements. Therefore, even if there was any error, it was harmless.

to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993). Evidence in support of a sentencing guidelines score need only be proven by a preponderance of the evidence. *Id*. at 126. Defendant's extensive argument in reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), are misplaced because they do not apply to Michigan's indeterminate sentencing system. *People v McCuller*, 479 Mich 672, 677-678, 686-690; 739 NW2d 563 (2007), cert den 552 US 1314; 128 S Ct 1871; 170 L Ed 2d 751 (2008).

In a perplexingly disjointed argument, defendant next asserts that the trial court violated his rights by failing to take into account mitigating circumstances. We disagree. Irrespective of whether defendant's legal arguments have any merit, an issue that we need not address, it is manifestly apparent that there were no mitigating circumstances that the trial court did not, in fact, take into account. Defendant asserts that he has strong family support and a likely mental disease or defect, and that the trial court should have ordered a psychological or psychiatric report as required by MCR 6.425(A)(1)(e).

However, defendant's family apparently wishes nothing to do with him, having even placed a block on their telephone line to prevent him from contacting them; and according to the presentence investigation report (PSIR), defendant has no mental or physical health issues and asserts none. Defendant has not presented a scintilla of support for finding the PSIR inaccurate or unreliable. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). His extensive substance abuse history was considered by the court, and the court even expressed hope that defendant would receive the treatment he so obviously needed. Finally, MCR 6.425(a)(1)(e) only requires a psychological or psychiatric report "if indicated," which is not the situation here.

Defendant also argues that the trial court failed to articulate a basis for the minimum sentence it imposed and failed to consider his potential for rehabilitation. We disagree. Although a trial court is required to articulate its reasons for imposing a sentence, that requirement is satisfied if it is apparent that the trial court relied on the sentencing guidelines. *People v Conley*, 270 Mich App 301, 312-313; 715 NW2d 377 (2006). The trial court did apparently base defendant's minimum sentence on the guidelines. Therefore, no further articulation was required. *People v Broden*, 428 Mich 343, 353-354; 408 NW2d 789 (1987). A sentence within the guidelines range is presumptively proportionate and not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Nonetheless, we note that absolutely nothing in the record or in defendant's brief suggests that defendant has any rehabilitative potential, and his extensive criminal history suggests the opposite.

Defendant finally argues that he was entitled to jail credit under MCL 769.11b. Defendant received the credit to which he was entitled. Because defendant was on parole at the time he was arrested, he was not entitled to any jail credit for the instant sentence "because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board." *People v Idziak*, 484 Mich 549, 56; 773 NW2d 616 (2009). Defendant was incarcerated because he violated his parole for a previous conviction, not because he was unable to furnish bond in the instant matter.

Id. at 562-563, 565-567. Parole violators are not deprived of credit for time spent incarcerated; rather, that time is credited against the time remaining in the sentence for which they were on parole. *People v Seiders*, 262 Mich App 702, 705-707; 686 NW2d 821 (2004).

To the extent defendant claims ineffective assistance of counsel, we find nothing in the record or in defendant's brief to suggest that counsel had any basis for raising any challenges not actually raised. Trial counsel cannot be found ineffective for failing to achieve the impossible or failing to make a futile argument. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause