

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 18, 2011

v

HARRY JONES JOHNSON,  
  
Defendant-Appellant.

No. 299784  
Macomb Circuit Court  
LC No. 2010-000421-FC

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Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a concealed weapon (CCW), MCL 750.227, and carrying a firearm with unlawful intent, MCL 750.226. He was sentenced as a fourth-habitual offender, MCL 769.12, to 15 to 30 years' imprisonment on the armed robbery conviction, 2 years' imprisonment on the felony-firearm conviction, and 2 to 5 years' imprisonment on each of the two remaining weapons' charges. We affirm.

This case arose out of an evening robbery at a Rite-Aid store. Defendant conceded at trial that he had shoplifted merchandise from the store earlier in the day in order to obtain drugs in exchange for the merchandise. He also testified that he was again shoplifting from the store when he decided to rob the store's lone cashier at the time. Defendant, using profanity, yelled at her to open her register and to give him all the money, threatened that he would come after her by going around her checkout station, and took all the money out of the cashier's register after she opened it in response to his demands. The cashier testified that defendant brandished a gun, revealing it in his waistband by lifting up his shirt and then keeping his right hand on it throughout most of the robbery. She also claimed that defendant threatened to shoot her. Defendant, on the other hand, denied having a gun, nor did he imply that he had a gun. Accordingly, the jury needed to determine whether it was an armed or unarmed robbery, and the issue regarding the gun was also relevant to the various firearm charges. A DVD comprised of video from the store's surveillance cameras was admitted as evidence at trial and at times narrated by the cashier and defendant when they were on the stand. Because of certain camera angles, the video footage did not reflect whether or not defendant actually had a gun, even though much of the interactions between the cashier and defendant and their movements were captured on the videotape. The jurors, after making a request, were given the DVD and a

computer upon which to play the DVD during their deliberations. The jury convicted defendant as indicated above.

At the sentencing, defense counsel was addressing a challenge to the scoring of offense variable (OV) 1, MCL 777.31 (aggravated use of a weapon), when counsel stated:

And there was a great argument during the course of this trial, whether or not there was or was not a weapon.

I will tell you that even though I didn't have, or the court didn't allow me the opportunity to speak to the jury at the conclusion of the trial, in my exiting from the court, I came across three of the jurors sitting out on the park bench or out on the picnic table out in front of the court.

And I walked by, and they addressed me and discussed with them. And it was only, their statement was it was only the result of one of the jurors having technical knowledge in how to enhance the video that we had been given, which we could not do, nor present to them at trial, that they made a determination that some gesture made by my client walking out of the [store] indicated that he must have had some kind of weapon.

Defense counsel, however, confined his arguments to a challenge of some of the sentencing variables, and he never presented a motion or an argument that a new trial was necessary because of juror misconduct or improper juror exposure to extraneous evidence.

On appeal, defendant first argues that he was denied his rights to confront the evidence and witnesses against him and to have the jury solely consider evidence actually presented against him at trial when a juror impermissibly manipulated the videotape evidence during deliberations and then shared those results with the other jurors. Defendant also argues that trial counsel was ineffective when he failed to bring an allegation of juror misconduct to the court's attention as soon as he became aware of it and failed to seek a new trial based on the information regarding enhancement of the DVD.

Defendant failed to preserve the argument that juror misconduct through enhancement of the DVD denied him his confrontation rights and right to have the jury solely consider evidence presented at trial. Unpreserved forfeited claims of error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles governing a claim of ineffective assistance of counsel, stating:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient.

This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. 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 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to mistakes apparent on the record because no evidentiary hearing took place. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

With respect to extraneous evidence and influences, in *People v Budzyn*, 456 Mich 77, 88-90; 566 NW2d 229 (1997), our Supreme Court observed:

A defendant tried by jury has a right to a fair and impartial jury. During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming. [Citations omitted.]

Here, the lower court record does not support reversing the verdicts. First, the claim that the jury considered extraneous evidence is based solely on hearsay, with trial counsel conveying what a few jurors supposedly told him shortly after the trial. Second, assuming that we can give any weight to counsel’s comments at the sentencing hearing, they are too vague and insufficient to support reversal under a *Budzyn* analysis. Indeed, we cannot even conclude from counsel’s comments at the sentencing hearing that true “extraneous” evidence was considered, as the DVD was admitted into evidence and played at trial and there is no indication that the gesture

referenced by the three jurors was in no way observable on the DVD as viewed during trial. Additionally, for these same reasons, we cannot conclude that counsel's performance was deficient or that defendant was prejudiced for purposes of the ineffective assistance claim. Even were we to consider trial counsel's affidavit that was submitted with a motion to remand, we would reach the same conclusion because the affidavit adds little if anything to the comments already made by counsel at the sentencing hearing. Reversal is unwarranted.

Finally, defendant challenges the scoring of OV's 1 and 10. Defendant's total OV score was 36 points, which placed him at OV level II on the sentencing grid for class A offenses (armed robbery), thereby resulting in a minimum sentence range of 108 to 360 months after also taking into consideration his status as a fourth-habitual offender and prior record variable (PRV) score of 59 points (PRV level E). See MCL 777.16y (armed robbery – class A offense); MCL 777.62 (sentencing grid for class A offenses); MCL 777.21(3)(c) (enhancement of top end of minimum sentence range for habitual offenders). OV's 1 and 10 were each scored at 15 points, and if 15 points is deducted from the total OV score of 36 points, leaving a total score of 21 points, defendant would still be at OV level II on the sentencing grid, which covers a point range of 20 to 39 points. Thus, even if the trial court erred in scoring OV 1 at 15 points or, alternatively, if the court erred in scoring OV 10 at 15 points, with zero being the correct score, it would not be necessary to vacate the sentence and remand for resentencing because the minimum sentence range would not change. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Obviously, if both OV's were scored incorrectly, resentencing would be necessary, as the minimum sentence range would decrease to 81 to 270 months' imprisonment, regardless of the fact that the minimum sentence imposed, 15 years (180 months), would still fall within the range. *Id.* at 91-92.

The scoring of the sentencing guidelines variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). “[T]his Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.” *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009) (citation omitted). 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. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Here, defendant preserved an appeal of the scores for OV's 1 and 10 by challenging the scoring on the two variables at the sentencing hearing.

OV 1 provides for a score of 15 points when “[a] firearm was pointed at or toward a victim[.]” MCL 777.31(1)(c). Defendant argues that, although there was evidence that defendant was armed with and held a handgun, there was no evidence indicating that he had pointed it at or toward the cashier. The prosecution contends that it can be reasonably inferred from the evidence that defendant pointed the gun at or toward the cashier, given her testimony about defendant keeping his right hand on the gun when considered in conjunction with her testimony that defendant threatened to shoot her. On reviewing the cashier’s testimony, she never expressly stated that defendant pointed the gun at or toward her during the robbery. Rather, she merely testified that defendant raised his shirt so that she could see the gun and that he kept his right hand on the gun throughout the robbery. We note, however, that several times during her testimony, the cashier physically and visually demonstrated what defendant did with his hands relative to lifting up his shirt and holding the gun. Unfortunately, we do not have video of her testimony. At sentencing, the trial court recalled that the cashier had believed that the gun was “pointed in her direction with his hand under his shirt.” But we do not know whether the court was referring to any physical demonstration by the cashier during trial, and she never did testify that defendant pointed the gun at her or in her direction. Regardless, for the reasons indicated below, we conclude that the trial court correctly scored OV 10 at 15 points; therefore, any assumed scoring error as to OV 1 was harmless.

With respect to OV 10, which addresses the exploitation of a vulnerable victim, 15 points is to be scored if “[p]redatory conduct was involved.” MCL 777.40(1)(a). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). MCL 777.40(2) provides that “[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.” Vulnerability is defined as “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). In *People v Huston*, \_\_ Mich \_\_; \_\_ NW2d \_\_, issued July 26, 2011 (Docket No. 141312), slip op at 1, our Supreme Court addressed OV 10, stating:

Contrary to the Court of Appeals' holding, in order to assess 15 points for OV 10, the defendant's preoffense conduct only has to be directed at “a victim,” not any specific victim, and the victim does not have to be inherently vulnerable. Instead, a defendant's “predatory conduct,” by that conduct alone (*eo ipso*), can create or enhance a victim's “vulnerability.” In this case, defendant engaged in “predatory conduct” to exploit a vulnerable victim because, before defendant and his cohort robbed the victim, they were lying in wait, armed with two BB guns and a knife, and hidden from the victim, who was by herself at night in an otherwise empty parking lot. Because the trial court properly assessed 15 points for OV 10, we reverse the judgment of the Court of Appeals and reinstate the trial court's judgment of sentence. [Quotations, ellipsis, and alteration omitted.]

Here, defendant, armed with a handgun and having initially engaged the cashier in the pretense of seeking cigarettes, meandered through the store before the robbery while contemplating the commission of the crime, re-approached the register but waited to “check out” until all the other customers had left the area so as to prevent intervention, and he then proceeded to rob the lone cashier working at the time, which robbery occurred in the evening. We conclude that this evidence sufficiently supported the score of 15 points with respect to OV 10. We also

note that the cashier, as evidenced by her trial testimony, was prone to nervousness and spoke broken English, which added to her vulnerability.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Talbot

/s/ Christopher M. Murray