

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 22, 2013

v

DAVID LEROY SHELLNBARGER, JR.,

Defendant-Appellant.

No. 308245
Ionia Circuit Court
LC No. 2011-015029-FC

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant David Shellenbarger, Jr., appeals as of right his conviction of armed robbery,¹ following a jury trial. The trial court sentenced Shellenbarger as a fourth offense habitual offender² to serve 22 to 50 years' imprisonment. We affirm Shellenbarger's conviction, but vacate his sentence and remand for resentencing.

I. FACTS

A. BACKGROUND FACTS

At about 10:43 p.m. on April 19, 2010, Shellenbarger drove an all-terrain vehicle behind a Mobil gas station. Robert Quesnot, who lives next to the gas station and works maintenance and security, testified that he saw an all-terrain vehicle with one headlight burned out stop behind the gas station. Quesnot testified that he saw the driver park at the back of the gas station, exit the vehicle, and pull a hooded sweatshirt up over his head. Quesnot thought that this behavior was "weird," so he began to dress to go to the gas station.

Ann Burch testified that she arrived to work at about 10:45 p.m. that evening. Savannah Baker was also working at the gas station. Shortly after Burch arrived, she saw a man wearing a black hooded sweatshirt and a camouflage mask. She testified that he walked toward the register and said "give me the cash or I will shoot you." Burch complied with the command and, after a

¹ MCL 750.529.

² MCL 769.12.

short exchange, the man left. Burch testified that the man was “a smaller guy” with blue eyes and scruffy blond facial hair. Baker’s description of the incident was consistent with Burch’s.

Quesnot testified that, as he approached the gas station, he saw Shellenbarger leave the store. Quesnot testified that he heard a young woman yell that the store had been robbed, and he saw Shellenbarger get in his vehicle and flee. Quesnot testified that he followed Shellenbarger in his own vehicle, but he returned to the gas station when Shellenbarger left the main road.

Michigan State Police Trooper Paul Neal testified that he spoke with Robert Quesnot in front of the gas station at about 10:54 p.m. that evening. Trooper Neal testified that Quesnot described the all-terrain vehicle, and he described the vehicle over his radio.

Sarah Husman, who worked at the store next to the gas station, also witnessed the robbery. She testified that she made direct eye contact with Shellenbarger, and that she told this to Trooper Neal. A police sergeant prepared a six-person photographic lineup and brought it to the gas station. Trooper Neal testified that Husman identified Shellenbarger in the lineup. Husman testified that she told Trooper Neal that “I wasn’t 1,000% sure but I thought it was [Shellenbarger].” Trooper Neal testified that he informed officers on the radio to “be on the lookout” for Shellenbarger.

Trooper Neal testified that dispatch informed him that someone called to report that the vehicle went “down the two track at the cemetery.” Michigan State Police Trooper Trevin Antcliff testified that went to the cemetery and met with another officer before walking to a nearby house. Trooper Antcliff testified that he saw an all-terrain vehicle outside and touched the radiator area. Because it was warm, he believed that someone used it recently. Trooper Antcliff testified that he went to the house and spoke with Bradley Montgomery, the home’s owner. Montgomery testified that he owned the all-terrain vehicle, but frequently left the keys in it and let others use it.

Trooper Antcliff testified that he asked Montgomery if Shellenbarger had been around the house, and that in response, Montgomery told him that Shellenbarger and Montgomery’s son were friends and Shellenbarger left shortly before Trooper Antcliff arrived. Trooper Antcliff testified that Montgomery guessed that Shellenbarger “did it.” When cross-examined about his statements to Trooper Antcliff, Montgomery testified that he might have said that Shellenbarger “did it”; however, he did not have any evidence or information to support the statement.

Trooper Neal testified that he did not consider Montgomery or his son as suspects because they were both large men and Burch and Baker described the robber as a smaller man. Shellenbarger was later arrested and charged with armed robbery.

B. PROCEDURAL HISTORY

After the jury was sworn and empanelled, Shellenbarger’s trial counsel argued that prospective jurors saw Shellenbarger in restraints and his prison uniform and requested a curative instruction. The prosecutor stated that she was with Shellenbarger on the way to the courtroom, that it was 40 minutes before the jury was scheduled to arrive, and that she did not see any jurors. The trial court urged defense counsel to consider whether he wanted to draw attention to the issue, and stated that he could “take [it] up later.” Defense counsel asked for

Shellenbarger to be brought to trial earlier, which the trial court granted, and did not renew his challenge.

The jury found Shellenbarger guilty of armed robbery. Shellenbarger's appellate counsel moved the trial court for a new trial or evidentiary hearing, asserting that that Shellenbarger did not receive a fair trial because (1) the jury learned that he was incarcerated, and (2) defense counsel was ineffective for failing to challenge that issue and Trooper Antcliff's hearsay testimony. The trial court denied Shellenbarger's motion for a new trial or evidentiary hearing because even assuming that there were errors, it was not reasonably probable the errors affected the outcome of the trial.

At sentencing, the trial court scored Shellenbarger 25 points for predatory conduct under offense variable (OV) 10, on the basis of Quesnot's statement to police. The trial court also scored Shellenbarger 25 points under OV 13 because the prosecutor had charged Shellenbarger with two counts of safe breaking³ in an unrelated case.

II. RESTRAINTS AT TRIAL

A. STANDARD OF REVIEW

This Court reviews de novo issues of due process,⁴ and reviews for an abuse of discretion a trial court's denial of a motion for a new trial.⁵ The trial court abuses its discretion when its outcome is outside the reasonable and principled range of outcomes.⁶ When a defendant fails to challenge an omitted jury instruction, we review the issue for plain error affecting the defendant's substantial rights.⁷

B. LEGAL STANDARDS

"Freedom from shackling is an important component of a fair trial."⁸ When a defendant appears before a jury in handcuffs or shackles, it "negatively affects the defendant's constitutionally guaranteed presumption of innocence."⁹ Thus, a defendant generally has the

³ MCL 750.531.

⁴ *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011).

⁵ *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

⁶ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁷ *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

⁸ *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1993).

⁹ *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002); see *People v Dunn*, 446 Mich 409, 425 n 26; 521 NW2d 255 (1994).

right to be free from shackles or handcuffs in a courtroom, unless the restraints are necessary to maintain order, prevent the defendant's escape, or prevent injury to persons in the courtroom.¹⁰

If a juror inadvertently sees a defendant in restraints, the defendant must show that he or she was prejudiced.¹¹ The defendant is not prejudiced as a matter of law if there is no indication that the jury saw the defendant's restraints.¹²

C. APPLYING THE STANDARDS

As an initial matter, we note that trial counsel appears to have abandoned his request for a curative instruction after the trial court agreed to have the defendant brought to trial earlier. The trial court invited defense counsel to consider whether he wanted to draw attention to the defendant's shackles with a jury instruction, and invited counsel to "take [it] up later." Trial counsel did not renew his request for a curative instruction, and did not challenge the trial court's omission of a jury instruction addressing Shellenbarger's restraints. When defense counsel does not request a jury instruction or fails to object to an instruction's omission, the defendant may not argue that the omitted instruction was error.¹³

We conclude that the trial court did not abuse its discretion when it denied Shellenbarger's motion for a new trial. In his motion for a new trial, appellate counsel relied on trial counsel's statements during the pretrial argument concerning whether prospective jurors saw Shellenbarger. Contrary to Shellenbarger's assertion on appeal that the trial court did not allow him to present evidence that the jury saw him in restraints, the trial court immediately questioned the prosecutor and defense counsel to determine whether the prospective jurors had actually seen Shellenbarger in restraints when trial counsel raised the issue. The trial court found that there was no evidence that any juror had seen Shellenbarger in his prison uniform and restraints. "Absent any indication that a member of the jury saw defendant in restraints, we are unable to conclude that defendant suffered any prejudice."¹⁴ Further, the arguments that appellate counsel relied on were related to trial counsel's request for a curative instruction that, as we note above, trial counsel subsequently abandoned. Because there was no indication that Shellenbarger was actually prejudiced and because Shellenbarger abandoned any related claim of instructional error, we conclude that the trial court's denial of Shellenbarger's motion for a new trial on the basis of a shackling error did not fall outside the reasonable range of principled outcomes.

¹⁰ *Id.* at 426.

¹¹ *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008).

¹² *Id.*

¹³ *Gonzalez*, 468 Mich at 642.

¹⁴ *Horn*, 279 Mich App at 37.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

A defendant's ineffective assistance of counsel claim "is a mixed question of fact and constitutional law."¹⁵ This Court reviews for clear error the trial court's findings of fact, and reviews de novo questions of constitutional law.¹⁶

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.¹⁷ To prove that his defense counsel was not effective, the defendant must show that: (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant.¹⁸ A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.¹⁹

C. APPLYING THE STANDARDS

Shellenbarger argues that his trial court was ineffective for failing to make objections to the following testimony of Trooper Neal in response to the prosecution's questions:

Q. On that night of your investigation, what evidence did you have that would lead you to believe that [Shellenbarger] was the suspect?

A. Statements by Mr. Montgomery stating that [Shellenbarger] was there earlier in the night, that [Shellenbarger] was wearing a black hooded sweatshirt, just like the suspect was wearing in the video. Mr. Montgomery indicated if he had to guess, that he would guess [Shellenbarger] did this.

Trooper Antcliff also testified that: (1) Montgomery told him that when Shellenbarger was at his residence that day, he was wearing a black hooded sweatshirt, and (2) Montgomery believed that Shellenbarger "did this." Finally, both Troopers testified that Montgomery reported that Shellenbarger said "he [was] going back to prison." When cross-examined about his statements,

¹⁵ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁶ *Id.*

¹⁷ US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

¹⁸ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

¹⁹ *Id.* at 312.

Montgomery testified that he could not remember why he said Shellenbarger “did it,” but that he did not base the statement on any information available to him on the night of the robbery.

We conclude that the trial court correctly determined that, even if trial counsel acted unreasonably when he failed to challenge the Troopers’ testimony, any error did not prejudice Shellenbarger. The majority of the Troopers’ hearsay testimony was cumulative to Montgomery’s own testimony. “[T]he admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence.”²⁰ Here, Montgomery testified consistently with what the Troopers reported that he told them. The Troopers’ testimony of what Montgomery told them the night of the robbery was simply cumulative to Montgomery’s own testimony about his conversation with Shellenbarger.

We must also consider any error in the light of the weight and strength of other, untainted evidence.²¹ First, Montgomery’s testimony that Shellenbarger said he was “going back to prison” was admissible as a statement by a party,²² and thus, the untainted evidence at trial supported the Troopers’ testimony that Montgomery told them that Shellenbarger said that.

Second, the color of Shellenbarger’s sweatshirt was not the only evidence that linked Shellenbarger to the crime; Husman testified that she observed Shellenbarger directly, and identified Shellenbarger in a photographic lineup immediately after the robbery and at trial. Thus untainted identification evidence also linked Shellenbarger to the crime.

Finally, although a witness is generally not permitted to opine on the defendant’s guilt or innocence,²³ Montgomery’s statement that, on the night of the robbery, he might have told the Troopers that he thought Shellenbarger “did it” was far from an expression of his opinion of Shellenbarger’s guilt. Montgomery testified that “it wouldn’t surprise me if it was any one of the jurors” that robbed the gas station, and that he was just guessing. Montgomery also testified that at the time he believed that Shellenbarger was involved in the robbery, but that he did not have any evidence or reason for believing that.

We conclude that any error in admission of the hearsay testimony was harmlessly cumulative to Montgomery’s own proper testimony. Shellenbarger has not shown that counsel’s failure to challenge the statements prejudiced the outcome of his trial.

²⁰ *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010).

²¹ *Id.*

²² MRE 801(d)(2); see *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

²³ See *People v Row*, 135 Mich 505, 506-507; 98 NW 13 (1904); also see *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

IV. SENTENCING GUIDELINES SCORES

A. STANDARD OF REVIEW

This Court reviews the trial court's scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.²⁴ The trial court's scoring decision is not erroneous if the record contains any evidence supporting the decision.²⁵ The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.²⁶

B. PREDATORY CONDUCT

Shellenbarger argues that the trial court erred in scoring 15 points for OV 10 (exploiting vulnerable victims), because the trial court improperly found that he engaged in predatory conduct. We agree.

The trial court must score 15 points under OV 10 if “[p]redatory conduct was involved.”²⁷ The statute defines predatory conduct as “preoffense conduct directed at a victim for the primary purpose of victimization.”²⁸ The Michigan Supreme Court has provided standards to help a trial court determine whether it should assess points for predatory conduct:

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40.^[29]

²⁴ *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

²⁵ *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

²⁶ *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

²⁷ MCL 777.40(1)(a).

²⁸ MCL 777.40(3)(a).

²⁹ *Cannon*, 481 Mich at 161-162.

Further, the term “predatory” means that the conduct must be “‘predatory’ in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or ‘preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequently escape without detection.’”³⁰

Here, the trial court stated that it based its determination that Shellenbarger engaged in predatory conduct on Quesnot’s statement to police. The trial court did not answer the above questions on the record. Though the parties argued about Quesnot’s statement to police before the trial, the police report was not evidence at trial, and it is not attached to Shellenbarger’s presentence investigation report.

From the record evidence, we must conclude that the trial court erred when it relied on Quesnot’s statement to police to conclude that Shellenbarger engaged in predatory conduct under the statute. The only record evidence from Quesnot is his testimony that Shellenbarger parked at the back of the gas station, concealed his features, walked to the front of the building, paused for one or two seconds, and then entered the building. This is consistent with the video surveillance, which shows that at about 10:48 p.m., Shellenbarger walks around the corner of the building, pauses for one or two seconds at the corner of the sidewalk, and then heads around the corner. Two seconds later, he enters the store. On cross-examination, defense counsel asked Quesnot if he had reported to the police that Shellenbarger waited for the customers to exit the store, and Quesnot responded that he did not tell the police that because he could not see the front of the store from his position.

Even assuming from defense counsel’s cross-examination question that Quesnot reported to the police that it appeared that Shellenbarger waited for the customers to exit the store, this still could not provide a basis for predatory conduct. The Michigan Supreme Court has held that waiting until customers leave a restaurant before committing robbery is not predatory conduct under the statute.³¹ The only record evidence is that between arriving at the gas station and entering to rob it, Shellenbarger undertook run-of-the-mill steps to conceal his identity. We conclude that the trial court erroneously scored 15 points under OV 10.

C. CRIMES AGAINST A PERSON

Shellenbarger also argues that the trial court erred in scoring 25 points under OV 13 (crimes against a person). We disagree.

If the sentencing offense was “part of a pattern of felonious criminal activity involving 3 or more crimes against a person[,]” the trial court properly scores the offender 25 points under OV 13.³² For the purposes of OV 13, “all crimes within a 5-year period, including the

³⁰ *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), quoting *Cannon*, 481 Mich at 162.

³¹ *Cannon*, 481 Mich at 155, 162.

³² MCL 777.43(1)(c).

sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction.*”³³ Shellenbarger was charged with two counts of safe breaking in unrelated crimes occurring on April 21 and April 22, 2010. The Legislature has defined safe breaking as a crime against the person.³⁴ Thus, counting the two charges for safebreaking and his conviction for armed robbery, Shellenbarger committed three crimes against a person within five years. We conclude that the trial court properly scored 25 points under OV 13.

D. RESENTENCING IS REQUIRED

If a sentencing error results in a different sentencing guidelines range, the defendant is entitled to resentencing.³⁵ Here, the trial properly scored 25 points under OV 13. But a score of zero points for OV 10 would have lowered Shellenbarger’s sentencing guidelines range to 126 to 420 months’ imprisonment, instead of 135 to 450 months’ imprisonment. Thus, we must vacate Shellenbarger’s sentence and remand for resentencing.

We affirm Shellenbarger’s convictions, but vacate his sentence and remand for resentencing within the appropriate guidelines range. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Douglas B. Shapiro

³³ MCL 777.43(2)(a) (emphasis supplied).

³⁴ MCL 777.16y.

³⁵ *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010).