

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ASHFORD,

Defendant-Appellant.

UNPUBLISHED

May 17, 1996

No. 153855

LC No. 91-45742 FH

Before: O’Connell, P.J., and Hood and C.L. Horn,* JJ.

PER CURIAM.

Defendant was convicted by jury of armed robbery. MCL 750.529; MSA 28.797. Following a subsequent bench trial, he was convicted of being an habitual offender, fourth offense. MCL 769.12; MSA 28.1084. He was sentenced to a term of imprisonment of thirty to fifty years, and now appeals as of right. We affirm.

Defendant first argues that the trial court erred where it refused to give CJI2d 5.7, the addict-informer instruction. As stated in *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994) (emphasis altered), the addict-informer instruction “is to be used where the uncorroborated testimony of an addict informer is the *only* evidence linking the accused with the alleged offense.” Here, while the testimony of the witness in issue may have been uncorroborated, it was not the only evidence linking defendant with the offense – defendant was in possession of the items stolen, and admitted storing the items at the house next door to the house in which the armed robbery culminated. In light of this evidence, the trial court did not err in refusing to give the addict-informer instruction.

Defendant next contends that he was deprived of his right to a fair trial where the prosecution questioned him concerning his drug addiction. The decision whether to admit or to exclude evidence is within the trial court’s discretion, and is reviewed for an abuse of that discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). However, because defendant failed to object below to the prosecution’s questions, we will not tamper with the verdict absent manifest injustice. *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993). We find none. Evidence of drug

* Circuit judge, sitting on the Court of Appeals by assignment.

addiction is admissible where relevant to motive. *People v Jones*, 119 Mich App 164, 168; 326 NW2d 411 (1982). In the present case, defendant's drug use was relevant to the issue of motive and was elicited only for this purpose. Additionally, given the fact that the transcript abounds in references to illegal drug use, both by the defendant and other witnesses, we would find any error to be harmless. *People v Robinson*, 386 Mich 551, 563; 536 NW2d 293 (1972).

Defendant also challenges the scoring of offense variables (OVs) 1, 5 and 7. A sentencing court's "scoring of the sentencing guidelines will be upheld if there is evidence to support the score." *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). With respect to OV 1, evidence supports the court's finding that an instrument fashioned to appear to be a firearm was pointed at the victim where the victim testified that defendant pointed a concealed object at him that appeared to be a gun. With respect to OV 5, evidence supports the court's finding that the victim was moved to a situation of greater danger where defendant forced the victim, apparently at gunpoint, to drive him to the seclusion of the victim's house and to assist defendant in robbing the house.¹ See *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995). With respect to OV 7, evidence supports the court's finding that defendant exploited the victim due to the victim's advanced age where, "had defendant not immediately dismissed the possibility that the elderly victim would offer any resistance, which dismissal can only be attributed to [his] age," the victim would likely have been terrorized for a far shorter period of time. *Piotrowski, supra*, p 532. Therefore, we find no error in the scoring of the offense variables.

Finally, defendant submits that the sentence imposed violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The sentences of habitual offenders such as defendant are reviewed for proportionality. *People v Derbeck*, 202 Mich App 443, 446; 509 NW2d 534 (1993). After reviewing defendant's criminal history of assaultive robbery offenses, nine previous felony convictions and the particular facts of the present case, we find no abuse of discretion in the sentence imposed.

Affirmed.

/s/ Peter D. O'Connell

/s/ Harold Hood

/s/ Carl L. Horn

¹ That defendant was acquitted of the offense of kidnapping is of no moment. Given both that a sentencing court may consider the facts underlying an offense of which a defendant was acquitted, *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995), and that the evidentiary burden for purposes of sentencing is a preponderance of the evidence as opposed to proof beyond a reasonable doubt, *Piotrowski, supra*, p 529, the sentencing court here properly found that a

preponderance of the evidence supported its scoring of OV 5 despite defendant's acquittal of kidnapping charges.