

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

June 11, 1996

Plaintiff-Appellee,

v

No. 163593

LC No. 92-603

IVAN RAYNARD SLAUGHTER,

Defendant-Appellant.

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a twenty to forty year term of imprisonment for the armed robbery conviction. A two-year sentence was imposed for the felony-firearm conviction, to be served consecutively to the armed robbery sentence. We affirm defendant's convictions and sentence except that part of the sentence imposing costs, which we vacate. We also remand for correction of defendant's PSIR.

Defendant first argues that the trial court improperly denied his motion for directed verdict on both the charge of armed robbery and felony-firearm. Defendant contends that the prosecution failed to prove that defendant had the requisite specific intent to commit the crime of armed robbery. Specifically, defendant contends that the evidence showed he was incapable of forming the specific intent necessary to commit the crime due to his alcohol and drug usage.

The defense of intoxication will negate the specific intent element of the crime charged if the degree of intoxication is so great as to render the accused incapable of entertaining the intent. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The question of whether a defendant was so intoxicated as to be unable to form the requisite intent is one of fact for the jury. *People v Acosta*, 143 Mich App 95, 103; 371 NW2d 484 (1985). The concept of sufficiency of the evidence focuses on whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires

judgment as a matter of law. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988), lv den 432 Mich 897 (1989). In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The only evidence presented that defendant was under the influence of drugs at the time he committed the crime was defendant's statement to the police that he had smoked one marijuana joint on the day in question. The remaining evidence showed that defendant was able to enter the store, walk to a cooler to remove beer, pull out a gun and while grabbing the victim's hair aim the gun at her forehead, and was able to pull her head down on the counter and demand money. Defendant was also capable of driving a vehicle and capable of climbing from the driver's side of the vehicle to the passenger side of the car in an effort to escape from the police. In addition, defendant was able to run away from the police and was able to swim about two hundreds yards in freezing water in an attempt to escape from the police. From this evidence the jury could reasonably conclude that defendant was not so intoxicated that he was unable to form the requisite intent to commit the crimes at issue; therefore, the trial court did not err in denying defendant's motion for directed verdict.

Defendant next argues that he is entitled to resentencing because the trial court erred in scoring fifty points under offense variable two (OV2). Specifically, defendant contends that this was error because no evidence was presented showing that defendant treated the victim with excessive brutality.

This Court reviews a trial court's scoring decision under an abuse of discretion standard. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992), lv den 440 Mich 882 (1992). Appellate review of guidelines calculations is very limited, and this Court will uphold scoring decisions for which there is any supporting evidence. *Id.* OV2 provides that fifty points may be assessed where the victim was treated with excessive brutality. Michigan Guidelines (2d ed, 1988), p 99.

The evidence shows that defendant placed a gun against the victim's forehead, grabbed her hair, and pulled her head down onto a counter. Then instead of removing the gun from the victim's forehead, defendant continued to hold it against her head throughout the course of the robbery. Because being forced to bend over and having a gun placed against one's head for an extended period of time could be considered an excessively brutal act, this Court does not find that the trial court abused its discretion in concluding that defendant treated the victim with excessive brutality. Therefore, because some evidence was presented supporting the trial court's scoring decision, this Court will not disturb the trial court's scoring decision.

Defendant next contends that this case should be remanded because the trial court failed to respond or strike certain inaccuracies contained in the presentence investigation report. Defendant argues that the trial court improperly considered evidence that immediately after committing the instant crime, defendant robbed another store and shot two people. Defendant also argues that the trial court erred in refusing to strike charged offenses that were not prosecuted. Defendant does not contest that

he committed all of the above charged offenses. A presentence report may include information about defendant that was not admissible at trial, including information about prior convictions or other alleged criminal activity committed by defendant. *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987). In addition, a trial court is afforded wide discretion in the sources and types of evidence used to assist it in determining the kind and extent of punishment to be imposed. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). Therefore, because evidence regarding other criminal activity committed by defendant is admissible, the trial court did not err in refusing to strike the complained-of evidence.

Two of the complained of errors, however, must be corrected. The lower court is ordered to correct the dates regarding the commission of certain crimes on page five of defendant's PSIR as agreed to at the sentencing hearing. Also, if it can be determined, defendant's three siblings should be added to the personal history section of his PSIR

Defendant next argues that the trial court abused its discretion when it departed from the recommended guidelines range in sentencing defendant. The sentencing guidelines are intended to assist the trial court in assessing the appropriate sentence and to promote statewide consistency in sentencing. *People v Stone*, 195 Mich App 600, 608; 491 NW2d 628 (1992). Departures are permitted, but are subject to careful scrutiny on appeal. *People v Milbourn*, 435 Mich 630, 659; 461 NW2d 1 (1990). When a court departs from the guidelines because of special characteristics of the offense or the offender, it must specifically explain those characteristics. *Id.* The recommended guideline range was five to fifteen years of imprisonment. The trial court departed from this range and imposed a twenty to forty year term of imprisonment, which is a departure of five years over the recommended maximum. The trial court stated that it was departing from the recommended range because the guidelines did not adequately reflect defendant's subsequent criminal activity which included an armed robbery conviction, two assault with intent to murder convictions and an unarmed robbery conviction. Therefore, because the trial court set forth special characteristics of the offender that are supported by the record, this Court finds that the trial court did not abuse its discretion in departing from the guidelines, and thus finds defendant's sentence to be proportionate to the offense and the offender. *Id.*

Defendant also claims that his sentence amounts to cruel and unusual punishment. Because defendant's sentence is proportionate, it is neither cruel nor unusual. *People v Williams (Aft Rem)*, 198 Mich App 537, 543; 499 NW2d 404, 1v den 444 Mich 908 (1993).

Defendant's final contention of error is that the trial court erred in imposing costs and attorney fees. We agree in part. A trial court may only require a convicted defendant to pay court costs where such a requirement is expressly authorized by statute. *People v Antolovich*, 207 Mich App 714, 716; 525 NW2d 513 (1994); *People v Jones* 182 Mich App 125, 126; 451 NW2d 525 (1989). Neither the armed robbery nor the felony-firearm statute authorizes a trial court to order a defendant to pay costs. MCL 750.529; MSA 28.797 and MCL 750.227b; MSA 28.424(2). However, the trial court properly required reimbursement from defendant for the cost of his attorney. *People v Nowicki*, 213

Mich App 383; 539 NW2d 590 (1995). Therefore, this Court vacates the trial court's assessment of costs, but affirms the assessment of attorney fees. *Jones, supra*, 128.

We affirm defendant's convictions and sentence except that part of the sentence imposing costs, which we vacate. This matter is remanded for the ministerial act of correcting defendant's PSIR. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald