

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC LAMONT HUNTLEY,

Defendant-Appellant.

UNPUBLISHED

July 19, 1996

Nos. 171200; 176795

LC No. 93-000637-FH

Before: McDonald, P.J., and Wahls and D.B. Leiber,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of armed robbery, MCL 750.529; MSA 28.797, larceny of firearms, MCL 750.357b; MSA 28.589(2), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to terms of twelve to thirty years' imprisonment for the armed robbery conviction, five to seven and a half years for the larceny conviction, and ten to fifteen years for the assault conviction. In docket no. 171200, defendant appeals these convictions and sentences as of right. We affirm.

Following defendant's bench convictions, defendant pleaded guilty to being a second habitual offender. However, the trial court subsequently granted defendant's motion to withdraw this guilty plea. A jury then convicted defendant of being a third habitual offender, MCL 769.11; MSA 28.1083. The trial court vacated defendant's original sentences, and sentenced defendant to terms of twelve to forty years' imprisonment for the armed robbery conviction, five to ten years for the larceny conviction, and ten to twenty years for the assault conviction. In docket no. 176795, defendant appeals as of right from this judgment of sentence. We affirm.

Docket no. 171200

Defendant's argument that his sentences were not proportionate is moot in light of the trial court's vacation of those sentences. In addition, although the trial court did not follow defendant's sentencing agreement when it sentenced defendant beyond the guidelines, it subsequently granted defendant's motion to withdraw his guilty plea. Accordingly, that issue is also moot.

Defendant argues that there was insufficient evidence to convict him of the underlying offenses. We disagree. To the extent that defendant is claiming that he was not afforded effective assistance of counsel, this issue was not preserved for appellate review because defendant failed to make a testimonial record in connection with a motion for a new trial or an evidentiary hearing and the alleged deficiencies are not apparent on the record. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994). In addition, this issue was waived since it was not raised in defendant's statement of issues presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

As to the sufficiency issue, both the victim and his neighbor Rick Cook testified that Cook had previously introduced defendant to the victim. The victim testified that defendant was one of two men who came to his door on January 24, 1993. After defendant entered the victim's house to make a phone call, the other man attacked the victim on the head with a blunt object. The victim fell to the floor, and the assailant continued to hit him about fifteen times on the skull. The victim heard the two men rifling through his house, and observed them leaving his house with his guns and camping equipment. The victim testified that the two men took two shotguns, a black powder rifle, a .300 Winchester Magnum rifle, and hunting supplies, including ammunition. Viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented for a rational trier of fact to find beyond a reasonable doubt that it was defendant who committed the crimes in question. *People v Chandler*, 201 Mich App 611, 612; 506 NW2d 882 (1993).

Defendant argues that the trial court did not make sufficient findings of fact as to defendant's defense of alibi. In making its decision, the trial court stated that although defendant made an alibi defense, it was the prosecutor's burden to prove defendant's presence. The court mentioned that it took into consideration the factors in the jury instruction as to identification. The court stated that the victim was a credible witness. Furthermore, the court referred to the victim's identification of defendant at a photographic lineup as a credible means of relying on the identification by the victim. Finally, the trial court supported its finding by citing to the victim's relative familiarity with defendant, the light conditions, and the victim's mental state. It is apparent from the record that the trial court was aware of the issue of alibi, resolved the issue, and further explication would not facilitate appellate review. *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992).

Defendant argues that defendant's conviction for larceny of firearms violated the principle of double jeopardy. We disagree. Under the *Blockburger*¹ test, armed robbery requires that the perpetrator be armed, whereas larceny of firearms does not. MCL 750.529; MSA 28.797, MCL 750.357b; MSA 28.589(2). In addition, larceny of firearms requires that it must be firearms that are asported whereas armed robbery does not. MCL 750.529; MSA 28.797, MCL 750.357b; MSA 28.589(2).

We also believe that the statutes for armed robbery and larceny of firearms manifest distinct legislative intents. Armed robbery is primarily an assaultive crime. *People v Hurst*, 205 Mich App 634, 638; 517 NW2d 858 (1994). Larceny, on the other hand, concerns theft of property. See

People v Ainsworth, 197 Mich App 321, 326; 495 NW2d 177 (1992). The fact that the Legislature has chosen to enact separate legislation barring the larceny of firearms represents a determination that firearms present a danger distinct from normal larceny. Defendant's conviction of both armed robbery and larceny of firearms did not violate the Double Jeopardy clause. *Hurst, supra*, pp 638-639.

Defendant argues that the trial court improperly precluded the testimony of defendant's alibi witness. We disagree. The notice of alibi gave the wrong name and address of the witness. The alibi testimony would have been cumulative to the five alibi witnesses who did testify. Reversal is not required. *People v Igaz*, 119 Mich App 172, 193; 326 NW2d 420 (1982), vacated on other grounds 418 Mich 893; 341 NW2d 467 (1983); *People v Bedford*, 78 Mich App 696, 703; 260 NW2d 864 (1977).

Defendant argues that the trial court erred by relying on bad acts evidence that was not properly in evidence. We disagree. To the extent that defendant argues that the evidence was improperly admitted, this issue was not properly preserved for appellate review by a specific ground of objection. MRE 103(a)(1); *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993). The trial court did not go outside the record where there was evidence of defendant's assaultive personality, defendant's assault on Anthony Jordan and Rick Cook, and that Jordan was afraid of defendant. The trial court properly relied on this evidence since it was relevant to defendant's theory that it was Jordan, and not defendant, who committed the crimes. See *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

Defendant argues that the trial court improperly relied on evidence of the pending habitual offender charges. We disagree. Jordan testified without objection that defendant had asked him, "Why don't you take the rap for me on this armed robbery, you don't have a record." Although the trial court mentioned the pending charge in making its findings of fact, it immediately corrected itself. Rather than relying on the pending charge, the trial court properly considered evidence of defendant's prior conviction for uttering and publishing in assessing defendant's credibility. The trial court did not err.

Docket no. 176795

Defendant argues that the trial court reversibly erred in failing to grant his motion to quash. We disagree. Defendant moved to quash the supplemental information based on a prior counselless conviction. In support of his claim, defendant presented the trial court with the transcript of the prior proceeding which did not indicate the presence of counsel.

However, in the prior case, defendant signed an advice of rights form which specifically advised him of his right to an attorney. At the arraignment hearing, the trial court asked defendant if he had read the form listing his rights and if he had any questions. Defendant's collateral attack on this conviction must fail. See *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994); *People v Ingram*, 439 Mich 288, 299; 484 NW2d 241 (1992); *People v Haywood*, 209 Mich App 217, 231; 530 NW2d

497 (1995). Defendant's argument that the counsellless conviction should not have been considered during sentencing must fail for the same reason.

Finally, defendant argues that he was sentenced on the basis of inaccurately scored guidelines. We disagree. First, this issue was abandoned since defendant did not cite any authority which forbids the trial court from rescoreing guidelines. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any case, there was record evidence to support the scorings that the victim was struck by a weapon, and treated with excessive brutality. Resentencing is not required. *People v Hernandez*, 443 Mich 1, 21; 503 NW2d 629 (1993).

Affirmed.

/s/ Gary R. McDonald

/s/ Myron H. Wahls

/s/ Donald B. Leiber

¹ *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).