

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ROSENTHAL,

Defendant-Appellant.

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UNPUBLISHED  
September 20, 1996

No. 171414  
LC No. 93-002432

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ALAN HOWARD,

Defendant-Appellant.

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No. 171419  
LC No. 93-002432

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY RUFFIN,

Defendant-Appellant.

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No. 171430  
LC No. 93-002432

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

Before: Sawyer, P.J., and Neff and R.D. Gotham,\* JJ.

PER CURIAM.

Defendant Rosenthal was convicted, following a bench trial, of four counts of armed robbery, MCL 750.529; MSA 28.797, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty- to forty-year terms on each armed robbery conviction, twenty to forty years on the assault conviction, and to the mandatory consecutive two-year term on the felony-firearm conviction. Defendant Howard was convicted, following a bench trial, of four counts of armed robbery and one count of assault with intent to rob while armed. He was sentenced to fifteen to thirty years in prison on each of the armed robbery convictions and to ten to twenty years in prison on the assault conviction. Defendant Ruffin was convicted, following a jury trial, of first-degree murder, MCL 750.316; MSA 28.548, four counts of armed robbery, assault with intent to rob while armed, and felony-firearm. He was sentenced to life in prison on the murder conviction, fifty to one hundred years in prison on each of the armed robbery convictions, fifty to one hundred years on the assault conviction, and to the mandatory two-year term on the felony-firearm conviction. Each of the defendants now appeals and we affirm.

Turning to the issues raised by defendant Rosenthal, he first argues that the trial court erred in accepting the prosecutor's changes to the scoring of the guidelines. We disagree. First, it is not entirely clear from the trial court's comments at sentencing whether it was accepting the prosecutor's changes to the scoring, or whether it merely disagreed with the recommendation of the guidelines. The trial court stated that "the guidelines are not scored properly considering the gravity of this offense," and then proceeded to impose the sentence. That comment could be interpreted as either a disagreement with the scoring or with the recommendation.

In any event, the guidelines as originally scored placed defendant at Prior Record Level C and Offense Severity Level III. An additional ten points would be required on the Prior Record Variables to increase from Level C to Level D and an additional four points would be required on the Offense Variables to increase from Level III to Level IV. The prosecutor identified PRV 7 as inadequately scored at zero points. PRV 7 deals with concurrent felonies and the prosecutor argued that it should be scored at twenty rather than zero because of the concurrent felonies of which defendant was convicted. Because defendant was convicted of two or more concurrent felonies, a score of twenty points would be appropriate. As for the Offense Variable scores, the prosecutor identifies two erroneous scores, either of which would be adequate to provide the additional points to raise defendant's score from Level III to Level IV. Both OV 1 and OV 2 were erroneously scored because defendant was subject to being scored for the conduct of his codefendants. Therefore, if the trial court's comments are viewed as accepting the prosecutor's changes to the scoring, the record supports those changes. See *People v Williams*, 188 Mich App 54; 469 NW2d 4 (1991).

In the alternative, if the trial court's comments are viewed as not accepting a changed scoring, but merely as a departure from the guidelines, we are satisfied that the sentence imposed is proportionate to this offense and this offender. *People v Milbourn*, 435 Mich App 630; 461 NW2d 1 (1990).

Turning to the issues raised by defendant Howard, he first argues that the trial court erred in denying his motion to suppress his statements. We disagree. Resolution of this issue is dependent on whether the police or defendant is found to be more credible. The trial court found the police witnesses to be credible. We cannot say that that finding was clearly erroneous.

Next, defendant argues that the search warrant was invalid because the affidavit failed to show affirmative allegations to support probable cause. Defendant, however, failed to preserve this issue for appeal by moving to suppress in the trial court. *People v Jackson*, 213 Mich App 245; 539 NW2d 758 (1995).

Defendant next argues that he is entitled to a new trial because the prosecutor failed to produce evidence in support of comments made during the opening statement. However, defendant failed to preserve this issue for appeal by making the appropriate objection in the trial court. *People v Austin*, 209 Mich App 564; 531 NW2d 811 (1995).

Next, we turn to the issues raised by defendant Ruffin. First, defendant argues that the trial court gave erroneous instructions on first- and second-degree murder and on assault with intent to rob while armed. Defendant, however, has failed to preserve these issues for appeal by objecting to the jury instructions at trial. *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737 (1993). Indeed, defendant expressed satisfaction with the instructions as given.

Defendant next argues that he was denied a fair trial when he was not permitted to introduce evidence concerning statements made by the interrogating officer regarding how much time defendant faced in prison and discussions about a polygraph examination. We disagree. First, with respect to the issue of the sentence defendant was facing, even if relevant to the issue of the credibility of defendant's confession, any error was harmless because the question was, in fact, answered before the objection was made. Furthermore, defendant was otherwise permitted to fully explore the circumstances surrounding the giving of his statement. With respect to the polygraph issue, there was no error because evidence of a polygraph examination may not be used to assess witness credibility. See *People v Mechigian*, 168 Mich App 609; 425 NW2d 199 (1988).

Next, defendant argues that his confession should have been suppressed because there was a delay in his arraignment. The trial court found that the delay was not designed to induce defendant's confession nor did it play a factor in defendant's decision to make a statement. In fact, most of the delay occurred after defendant made his final statement. We are not persuaded that the trial court clearly erred in its findings.

Finally, defendant argues that the line-up conducted was unduly suggestive. We disagree. The witness testified that he identified defendant in the lineup based upon facial features he recognized. The trial court held that the lineup was not suggestive and that the witness identified defendant because he recognized defendant as one of the perpetrators, not because of any suggestiveness in the lineup. There is no basis to conclude that the trial court erred in that determination.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Roy D. Gotham