STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ANTHONY LOURIA,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 187717
LC No. 94-002227-FH

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

Defendant appeals by right his jury convictions for two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of assault with a deadly weapon, MCL 750.82; MSA 28.277, first-degree home invasion, MCL 750.110(a)(2); MSA 28.305(a)(2), and the commission of a felony while in possession of a firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty years for the armed robbery counts, thirty-two months to four years for the assault counts, one hundred sixty months to twenty years for home invasion, and two years for felony-firearm. We affirm defendant's convictions. We reverse defendant's armed robbery sentences and remand for resentencing. Defendant's other sentences are affirmed.

Defendant first argues that the trial court abused its discretion by admitting DNA evidence. Defendant asserts that the prosecutor failed to establish that the DNA was analyzed pursuant to generally accepted laboratory procedures. We disagree. Contrary to defendant's claim, the expert witness who supervised the DNA analysis testified that she was actively involved in analyzing the DNA and that the laboratory applied rigorous scientific procedures, including several controls that would alert her of any problem in the analysis. Cf. *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995); *People v Adams*, 195 Mich App 267, 277; 489 NW2d 192 (1992). Furthermore, we disagree with defendant's argument that the report detailing the results of the expert's DNA analysis was inadmissible hearsay. The report was data on which an expert based an opinion and is, therefore, admissible under MRE 703. Nevertheless, even if there was evidentiary error, the error, if any, would be harmless because the evidence against defendant was overwhelming. MCR 2.613; MCL 769.26;

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

MSA 28.1096; *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

Defendant failed to preserve his objection to the trial court's instruction to the jury not to take notes or ask questions. See *People v Wesley*, 148 Mich App 758, 760-761; 384 NW2d 783 (1985), aff'd 428 Mich 708; 411 NW2d 159 (1987). Given that the trial was only three days long and was not particularly complex, this instruction neither prejudiced defendant nor resulted in a miscarriage of justice. See, generally, *People v Young*, 146 Mich App 337, 340; 379 NW2d 491 (1985).

Defendant further contends that there was insufficient evidence of a "breaking" to support his conviction for home invasion. However, MCL 750.110(a)(2); MSA 28.305(a)(2) does not necessarily require a breaking. Instead, the crime requires *either* a breaking and entering *or* an entering without permission. MCL 750.110a(2); MSA 28.305(a)(2). Contrary to defendant's assertions, this distinction was reflected in the charging documents, which stated that defendant "did break and enter, or enter." In any event, there was sufficient evidence to conclude that defendant committed a breaking. A breaking occurs with the slightest force or the breaking of an interior portion of a building. *People v Clark*, 88 Mich App 88, 91-92; 276 NW2d 567 (1979). Here, defendant used considerable force to move one of the victims from the doorway so that defendant could gain entry to the house. Further, a bedroom door was broken down to pursue the other victim. Thus, defendant's argument is without merit.

Defendant relies on *People v Stevens*, 409 Mich 564; 297 NW2d 120 (1980), for the proposition that the prosecutor had the burden to establish that the gun defendant used was operable. This reliance is misplaced. *People v Prather*, 121 Mich App 324, 329; 328 NW2d 556 (1982). Requiring a prosecutor to establish a gun's operability as a prima facie element of felonious assault overextends *Stevens*, particularly where, as here, defendant also used the gun as a club. Therefore, the use of a dangerous weapon element was satisfied and defendant's felonious assault convictions were supported with sufficient evidence.

Next, defendant directs our attention to *People v Yarbrough*, 107 Mich App 332; 309 NW2d 602 (1981), for his argument that his convictions for both armed robbery and felonious assault violate his right to be protected against double jeopardy. Defendant's convictions do not fall within *Yarbrough's* holding though, because the offenses occurred at different times. After completing the robbery, defendant tied up his victims with duct tape and told them that he would shoot them if they tried to escape too soon. In other words, the assaults occurred after the robbery was complete. Therefore, defendant's right against double jeopardy was not violated. *People v Johnson*, 94 Mich App 388, 390-391; 288 NW2d 436 (1979).

Finally, we address defendant's arguments regarding his sentences. Defendant was sentenced within the guidelines and fails to rebut the resulting presumption of proportionality. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Defendant, who has a serious and lengthy criminal record, assaulted, battered, terrorized, tied up, and robbed an older couple in their home. Defendant involved a youngster, ostensibly against his will, in the crime. These crimes were serious, violent, and

dangerous and the sentences imposed are proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Based on this conclusion, defendant's sentences do not constitute cruel and unusual punishment. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Further, the sentencing court commented on the seriousness of the offenses, the impact on the victims, and defendant's criminal history, thus satisfying the requirement that a court articulate the criteria considered and the reasons for the sentences imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Additionally, it is apparent from the sentencing court's comments and the parties' arguments that the sentencing court based defendant's sentences on the sentencing guidelines. This, in itself, is sufficient to satisfy the articulation requirement. *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992).

However, we reverse defendant's armed robbery sentences and remand for resentencing because the sentences violate the indeterminate sentencing statute, MCL 769.9; MSA 28.1081. The original judgment of sentence, entered on July 19, 1995, violated this statute because the sentencing court sentenced defendant to twenty years to life in violation of the statute's mandate that a court "shall not impose a sentence in which a maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." *Id*. In attempting to remedy this defect, the trial court ordered that defendant's armed robbery sentence would be a minimum of twenty years. However, the sentencing court failed to set forth defendant's maximum sentence. This amended sentence also runs afoul of the indeterminate sentencing statute, which requires the court to "fix both the minimum and the maximum" for a term of years sentence. Because the court's sentences failed to set a maximum, we vacate defendant's armed robbery sentences and remand for resentencing.

Defendant's convictions are affirmed. We reverse and remand for resentencing on defendant's armed robbery sentences. Defendant's other sentences are affirmed. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry