

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT D. BENTON,

Defendant-Appellant.

UNPUBLISHED

January 24, 1997

No. 181127

Oakland Circuit Court

LC No. 94-131816

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, armed robbery, MCL 750.529; MSA 28.797, possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2), two counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b; MSA 28.424(2), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Each of defendant's sentences were vacated except for the habitual offender conviction for which he received life imprisonment. Defendant now appeals as of right. We affirm.

On the afternoon of February 9, 1994, Dorothy Desmond was approached in a parking lot by a man she later identified as defendant. Defendant pointed a gun at Desmond, demanded her money and told her not to make any noise. Desmond fell when defendant grabbed her. Defendant began dragging her away from her car, when a witness leaving a nearby building approached the scene and began shouting. Thereafter, defendant fled to the parking lot of another building.

Shortly thereafter defendant approached Analya Callendar, who was in her car in the second parking lot. He showed Callendar a gun and told her to "[p]ut the keys in the ignition and move over." Callendar refused to comply with defendant's demands. She began to scream and took money from her wallet to give to defendant. He hit her on her face and head with the gun and tried to take her

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

wedding band. Defendant got out of Callendar's car and ran. Defendant's gun was found near Callendar's car.

On appeal defendant first claims his convictions should be reversed because the on-the-scene lineup conducted by the police shortly after he was apprehended was deficient. However, defendant's failure to object to the on-the-scene identification testimony at trial, limits our review to whether the testimony was decisive of the outcome of the trial or otherwise prejudicial to defendant. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). We find the testimony was properly admitted because there was not very strong evidence defendant was the culprit before the lineup, *People v Turner*, 120 Mich App 23; 328 NW2d 5 (1982). However we also conclude, even if improperly admitted, any testimony regarding the on-the-scene identification was not decisive of the outcome of the trial or prejudicial to defendant in light of the later identification of defendant at the formal lineup by a witness who was not present at the on-the-scene lineup.

Next, defendant contends the trial court erred in failing to grant his motion for severance of the charges relating to the two assaults. We review the trial court's denial of a defendant's motion for severance for an abuse of discretion. *People v McCray*, 210 Mich App 9; 533 NW2d 359 (1995). MCR 6.120(B) provides counts may be joined if they share a series of connected acts or constitute part of a single scheme or plan. See *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977); *People v Terry Miller*, 165 Mich App 32; 418 NW2d 668 (1987). We find defendant's acts were sufficiently connected to classify them as a series of acts constituting a single scheme or plan. Defendant waited for his first victim to complete her dental appointment then assaulted her with a sawed-off shotgun. After fleeing the scene he proceeded to rob and assault his second victim apparently with hopes of fleeing in her vehicle rather than on foot. The trial court did not abuse its discretion in denying defendant's motion for severance.

Defendant next claims the prosecution's failure to call certain endorsed and res gestae witnesses denied him a fair trial. Defendant has not properly preserved this issue for our review because he did not object or move for a new trial on this basis. *People v Simpson*, 207 Mich App 560; 526 NW2d 33 (1994). We decline to address the issue because we find no manifest injustice occurred. *People v Cheatam*, 135 Mich App 620; 354 NW2d 282 (1984).

Defendant also contends his sentence is disproportionate. We disagree. This Court reviews a trial court's imposition of the defendant's sentence for an abuse of discretion. *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). A sentence must be proportionate to the seriousness of the offense and the background of the offender. *People v Milbourn*, 435 Mich 635; 461 NW2d 1 (1990).

Defendant was sentenced as an habitual offender. Although the defendant was sentenced within the guidelines recommended sentence, the guidelines do not apply to habitual offenders, *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). Defendant has not provided any unusual

circumstances that show the sentence to be disproportionate in light of his habitual offender status and the violent nature of the instant offenses. *People v Piotrowski*, 211 Mich App 527; 536 NW2d 293 (1995). The court did not abuse its discretion in sentencing him to life imprisonment.

Finally we reject the claims raised by defendant in his supplemental brief. Defendant has failed to overcome the presumption he was afforded effective assistance of counsel. *People v Armendarez*, 188 Mich App 61; 468 NW2d 893 (1991). Moreover, even assuming defendant's counsel's performance was deficient in any of the areas suggested by defendant, defendant failed to show prejudice resulting from the allegedly deficient conduct. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). We also reject defendant's claim he was denied his right to a fair trial because he was "forced" to wear a red wrist band during trial. No objection was made below, nor does defendant assert he ever requested the band be removed.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak