STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR DEMON McGOUGHY,

Defendant-Appellant.

UNPUBLISHED
February 11, 1997

No. 188246
Jackson Circuit Court
LC No. 95-071730-FC

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2). Defendant was subsequently sentenced to concurrent terms of fifteen to thirty years of imprisonment for the armed robbery conviction, 3-1/3 to 5 years for the possession of a short-barreled shotgun conviction, to be served consecutively to the two-year mandatory sentence for felony-firearm. Defendant appeals as of right. We affirm his convictions, but remand for the limited purpose of correcting the judgment of sentence to reflect that the sentence for possession of a short-barreled shotgun is to run concurrently with the sentence for felony-firearm.

I

Defendant first argues that the assistance of his trial counsel was ineffective. Because defendant failed to move for a new trial or for an evidentiary hearing, this Court's review is limited to errors apparent on the record below. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

Contrary to defendant's assertion, an attorney's failure to move for a hearing on the voluntariness of a statement does not automatically equate to ineffective assistance. *People v Means (On Remand)*, 97 Mich App 641, 647-648 n 1; 296 NW2d 14 (1980). If the accused only challenges

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

the accuracy of the statement in question, it remains the province of the jury to make this determination. *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981). Our review of the record below convinces us that defendant merely challenged the accuracy of the statement that he had given the police. Because defendant merely challenged the accuracy of the written report, a motion to suppress on voluntariness grounds would have been futile. *Id*. Defendant's counsel did not have an obligation to bring such a futile motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, the assistance of defendant's trial counsel was not ineffective on this ground.

Alternatively, defendant asserts that his trial counsel's assistance was ineffective because he failed to object to the introduction of inadmissible testimony pertaining to the effect that the robbery had on the victim. Evidence is admissible if it is helpful in throwing light on any material point. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). In this case, the evidence was relevant to sentencing, but we fail to see how it was relevant to the issue of defendant's guilt. Notwithstanding this observation, no prejudice can be found because the matter was tried before the court, so it is presumed that the trial court ignored the inadmissible evidence. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Because no prejudice can be found, defendant's argument must fail. *People v Pickens*, 446 Mich 298, 333; 521 NW2d 797 (1994).

II

Defendant next takes issue with the prosecutor's questioning of the victim on how the robbery affected him. However, defendant failed to object below to the prosecutor's questioning. Thus, this Court will review the issue to see whether a miscarriage of justice occurred. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). Our review of the record below shows that no miscarriage of justice occurred.

III

Defendant next argues that the trial court improperly scored Offense Variable 2 (OV 2) (physical attack and/or injury) at twenty-five points (bodily injury and/or subjected to terrorism). The trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

First, defendant asserts that OV 2 was improperly scored at twenty-five points because the alleged terrorism occurred after the robbery was completed. However, a robbery is not completed until the perpetrator has escaped to a point of temporary safety. *People v Newcomb*, 190 Mich App 424, 430-431; 476 NW2d 749 (1991). Defendant admits on appeal that he pointed the shotgun at the victim while making his escape, so the crime was not completed. Accordingly, we conclude that the trial court properly scored OV 2 at twenty-five points.

Alternatively, defendant argues that the trial court misscored OV 2 because the act of pointing a shotgun at a person does not constitute terrorism. OV 2 is scored at twenty-five points when the victim is exposed to terrorism. Michigan Sentencing Guidelines (2d ed), p 99. The guidelines define the term "terrorism" to mean "conduct that is designed to increase substantially the fear and anxiety that the

victim suffers during the offense." Contrary to defendant's assertion on appeal, the conduct does not have to render the victim terror-stricken. *People v Kreger*, 214 Mich App 549, 552; 543 NW2d 55 (1995). Our review of the record shows that the victim testified that defendant's actions of chasing him down the street with the shotgun pointed at him terrified him because he thought defendant was going to kill him even though he had complied with defendant's orders. Accordingly, evidence exists to justify the trial court's scoring on this offense variable.

IV

Defendant argues last that the trial court improperly determined that his sentence for possession of a short-barreled shotgun would run consecutively to his sentence for felony-firearm. We must agree in this regard because the felony-firearm charge was based on the charge of armed robbery or assault with intent to rob while armed as charged by the prosecution. The charge of possession of a short-barreled shotgun was not the basis of the felony-firearm conviction. Because the possession of a short-barreled shotgun conviction was not the underlying basis for the felony-firearm conviction, the sentences for these two convictions cannot properly run consecutively. MCL 750.227b(2); MSA 28.424(2)(2); *People v Hunter*, 141 Mich App 225, 233; 367 NW2d 70 (1985).

Although this Court in *Hunter* remanded for resentencing, we see no need to remand for a full resentencing in this case. Defendant has not attacked the propriety of his sentence for armed robbery and the armed robbery sentence properly runs consecutively to the sentence for felony-firearm. Therefore, we remand for the limited purpose of allowing the trial court to correct the judgment of sentence to reflect that the sentence for possession of a short-barreled shotgun is to run concurrently to the sentence for felony-firearm.

Defendant's convictions are affirmed, but remanded for proceedings consistent with this opinion. No further jurisdiction is retained.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper