STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 1997
v	Nos. 193865; 193866; 193867 Recorder's Court
DONALD JEROME CHATMAN, Defendant-Appellant.	LC Nos. 95-005008; 95-005007; 95-00348

Before: Markey, P.J, and Jansen and White, JJ.

PER CURIAM.

In docket no. 193865, defendant appeals as of right his convictions for armed robbery, MCL 750.529; MSA 28.797, and for possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b; MSA 28.424(2). He was sentenced to 10 to 25 years' imprisonment for the armed robbery as enhanced by the habitual offender statute, MCL 769.11, MSA 28.1083, and two years' imprisonment for the felony firearm. In docket no. 193866, defendant appeals as of right his convictions for armed robbery, MCL 750.529; MSA 28.797, and felony firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to 10 to 25 years' imprisonment for the armed robbery as enhanced by the habitual offender statute, MCL 769.11; MSA 28.1083, and two years' imprisonment for the felony firearm. In docket no. 193867, defendant appeals as of right his conviction for armed robbery, MCL 750.529; MSA 28.797. He was sentenced to 12 to 25 years' imprisonment as enhanced by the habitual offender statute, MCL 769.12; MSA 28.1084. We affirm defendant's convictions but remand for correction of the judgments of sentence.

Defendant's convictions arose out of three separate robberies committed over two days. All the charges were tried together in a single bench trial. Defendant was convicted of robbing a Speedway Gas Station, an Arbor Drugstore, and a Kentucky Fried Chicken restaurant.

Defendant first asserts that his trial attorney failed to provide him with effective assistance of counsel. We disagree.

A defendant who asserts a denial of effective assistance of counsel must show that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial with a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 305; 521 NW2d 797 (1994). A defendant, in order to establish ineffective assistance of counsel, must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant claims that counsel's performance was deficient in two of his cases. In docket no.193865, the Speedway robbery, a video tape of the incident was played for the court. When it was played, the prosecutor asked the court to pay attention to the glasses worn by the perpetrator. And, during closing argument, the prosecutor's alluded to the glasses, stating that they were the same glasses that defendant was wearing in court. Defendant asserts, however, that the glasses he wore in court were actually given to him by the Wayne County Jail after he was arrested, and that defense counsel was ineffective in failing to present evidence that would have established that the glasses were given to defendant after his arrest and could not be associated with the robbery.

In finding defendant guilty of the Speedway robbery, the trial court stated: "[T]here's no doubt in this Court's mind it was this Defendant and I'm not relying on the tape. I can't tell. It did appear to be the Defendant, but I'm not relying on the tape itself, but the testimony of the witnesses." Since the trial court did not rely on the video tape, it can not be said that had counsel presented evidence that the glasses were given to defendant after his arrest, the verdict would have been different. Therefore, defendant was not prejudiced by counsel's failure to present evidence that his glasses were given to him at the jail, after the crimes had taken place.

In docket no. 193866, the Arbor Drugs robbery, defendant argues that trial counsel's performance was deficient based on his failure to ask defendant's alibi witnesses about defendant's hair at the time of the robbery. Defense counsel cross-examined the victim about the robber's hair. She stated that the robber's hair was "real short." When counsel asked her to describe defendant's hair in court that day, she said he was bald. Defendant asserts that counsel should have established though defense witnesses that defendant was bald the day before the robbery, and that he therefore could not have been the person who robbed the Arbor Drugstore.

The decision whether to call witnesses is a matter of trial strategy, and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531,537-538; 462 NW2d 793 (1990). Defendant's substantial defense is that he was not the person who robbed the Arbor Drugstore. The victim identified defendant at a line up after the incident and she positively identified defendant in court. The fact that defense counsel did not question the alibi witnesses about defendant's hair could have been trial strategy. Further, even if defendant could establish at an evidentiary hearing that he was bald the day before the robberies, in light of the evidence presented at trial, we are satisfied that the outcome of the trial

would still be the same. Therefore, defendant has failed to establish that he was denied effective assistance of counsel.

The next issue concerns the video tape of the Speedway robbery. It appears that the tape was played for the court at a fast rate of speed. Defendant did not object when the tape was played, but now claims that he was denied due process and a fair trial because of the speed of the tape. We disagree.

The tape of the robbery was relevant and admissible pursuant to MRE 402, and was more probative than prejudicial under MRE 403. The speed at which the tape was played made it difficult to discern whether the person who was depicted was or was not defendant; the speed was thus equally prejudicial to defendant and the prosecution. Had defendant wished to have the tape played at regular speed or in slow motion, defendant could have requested this at trial. The problems with the tape went to the weight of the evidence and not its admissibility. Furthermore, it is clear that the trial court did not rely on the tape when it rendered its verdict.

In docket no. 193867, the Kentucky Fried Chicken robbery, defendant argues that the trial court committed error when it calculated the sentence guidelines range.

A cognizable claim on appeal exists only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. Appellate courts are not to interpret the guidelines or to score and rescore the variables to determine if they were correctly applied. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). In the instant case, defendant presents no cognizable claim on appeal.

In docket nos. 193865 and 193866, defendant claims that the trial court did not sufficiently articulate reasons for its sentence. We disagree.

A court's statement that it is relying on the sentencing guidelines or a statutorily required minimum satisfies the articulation requirement. *People v Lawson*, 192 Mich App 76, 77; 489 NW2d 147 (1992). The trial court, prior to sentencing defendant on all three cases, stated the guidelines range for armed robbery. A trial court only needs to state once that it is relying on the guidelines when sentencing for multiple offenses. It would serve no useful purpose for the trial court to state multiple times that it is following the guidelines in imposing sentence. The trial court sufficiently articulated its reasons for the sentences imposed as to all three armed robbery offenses.

Lastly, it appears that while defendant was sentenced correctly, the judgments of sentence erroneously reflect that the underlying sentences were vacated and that defendant was convicted as an habitual offender. Further, in docket no. 193866, the date the sentence begins was erroneously reflected as January 17, 1995, and in docket nos. 193865 and 193866, the judgments of sentence erroneously reflect that the sentences for the felony firearm convictions were vacated. Additionally, the judgments of sentence in docket nos. 193865 and 193866 should be corrected to reflect that the sentences for felony firearm are to be served consecutively with and prior to the sentences for armed robbery.

Defendant's convictions and sentences are affirmed. However, we remand for correction of the judgments of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White