

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HARRY BRIGGMAN,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 192700

Oakland Circuit Court

LC No. 95-137687-FC

Before: Doctoroff, P.J., and Reilly and Allen*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. He was sentenced to seven to twenty years' imprisonment and now appeals as of right. We affirm.

Defendant first argues that his due process rights were violated when the trial court failed to sua sponte instruct the jury on the lesser included offenses of unarmed robbery, attempted armed robbery, felonious assault, larceny from the person, and assault and battery. Because defendant failed to preserve this claim below, we review the issue for manifest injustice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

In the present case, the additional lesser included offenses were inconsistent with defendant's theory of the case. Defendant consistently argued throughout the trial that an armed robbery had, in fact, occurred, but that defendant was not the perpetrator of the crime. Defendant cannot now claim error where the instruction would have been inconsistent with the evidence and with defendant's theory of the case. *People v Heflin*, 434 Mich 482, 499; 456 NW2d 10 (1990). Furthermore, defendant conceded at trial that an armed robbery did occur. Therefore, the factors that distinguish the greater and lesser offenses were undisputed and instructions on the lesser offenses were not warranted by the evidence. *People v Bailey*, 451 Mich 657, 671; 549 NW2d 325 (1996).

Next, defendant argues that his due process rights were violated when the trial court allowed the addition of two witnesses after jury selection, but before the start of trial. This Court reviews a trial

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

court's decision to allow the late endorsement of a witness for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

A prosecutor's endorsement of a witness is permitted at any time by leave of court and for good cause shown. MCL 767.40a(4); MSA 28.980(1)(4). Herein, good cause was demonstrated by the prosecution because the need for the testimony of the witnesses had only recently developed as a result of the court's suppression of defendant's statements to the police. Therefore, we find that the trial court did not abuse its discretion allowing the witnesses to testify at trial. In any event, in light of the strong evidence of guilt presented by the testimony of several other witnesses, we also find that any error in permitting these two witnesses to testify was harmless. *People v Mateo*, 453 Mich 203, 207; 551 NW2d 891 (1996).

Defendant next argues he was denied effective assistance by trial counsel's failure to object to the jury instructions and failure to object to the addition of two witnesses. We disagree. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was objectively unreasonable, and (2) that the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).; *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Defendant has failed to overcome the presumption that he was afforded effective assistance of counsel at trial. *Mitchell, supra*. A review of the record indicates that defense counsel did object to the late addition of two witnesses. Once the trial court ruled on the issue, defense counsel interviewed the witnesses before they were to testify and cross-examined the witnesses consistent with defendant's theory of the case that defendant was not the perpetrator of the crime. Nothing in the record indicates that defense counsel's performance in regard to this issue was objectively unreasonable. Finally, although defendant did not object to the jury instructions, a review of the record clearly shows this decision to be one of trial strategy. This Court has refused to substitute its judgment for that of counsel in matters of trial strategy. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Therefore, we find that defendant has failed to overcome the presumption that he was afforded effective assistance of counsel at trial. *Mitchell, supra*, 454 Mich 156.

Defendant's final argument is that he has a due process right to be sentenced on the basis of accurate information and that this right was violated when the trial court erroneously calculated his guideline score for OV 7. Defendant is not entitled to resentencing on this basis. Appellate relief is not available for claims of error based on alleged misinterpretation or misapplication of the scoring guidelines. *Mitchell, supra* at 176; *People v Peerenboom*, 224 Mich App 195, 201; 568 NW2d 153 (1997).

Moreover, we find that defendant's sentence is proportionate. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Although defendant has no prior criminal record, the crime was particularly brutal. Defendant struck the victim on the head twice, took her purse, and then attempted to run her over with his car as he fled.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly
/s/ Glenn S. Allen, Jr.