

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH PERNELL DEBOSE,

Defendant-Appellant.

UNPUBLISHED

June 24, 2003

No. 237897

Kent Circuit Court

LC No. 00-010420-FH

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to rob while armed, MCL 750.89, and carrying a concealed weapon, MCL 750.227. He was sentenced to concurrent terms of 150 to 480 months on the assault conviction and 29 to 60 months on the concealed weapons conviction. Defendant appeals as of right. We affirm but remand for correction of the presentence investigation report. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

I. FACTS

On July 17, 1999, a man who posed as a customer accosted the owner of a newly-opened used furniture store at knifepoint. The owner was told to get down on the floor and was then blocked in with a file cabinet. The owner could not identify defendant in a photographic array or in a physical lineup after the incident. The owner first identified defendant at the preliminary examination. At trial, the owner recognized that defendant was the man he “picked out” at the preliminary exam. Emanuel Butler, who received favorable treatment on a pending charge, testified that defendant admitted responsibility for the robbery. Defendant claimed that Butler did it and presented two witnesses who said Butler had admitted as much. Two people who shared a cell with Butler testified for the defense claiming that Butler drove the car while another man committed the robbery. The cellmates further testified that Butler planned to name the defendant as the perpetrator. However, defendant’s fingerprints matched prints found on the file cabinet. Defendant claims that he had been in the store a few days earlier and innocently touched some items, however, the store owner testified that defendant was the first African American male that had ever been in his store. Moreover, defendant claims that fingerprint

evidence alone is not enough to establish guilt. Defendant questions the scientific validity of the fingerprint examination.

II. STANDARDS OF REVIEW

This Court reviews a challenge to the sufficiency of the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime have been established. *People v. Sartor*, 235 Mich App 614, 618; 599 NW2d 532 (1999).

When defendant moves for an evidentiary hearing or a new trial, this Court reviews the record for apparent error to determine if trial counsel's performance fell below an objective standard of reasonableness such that a different outcome would have occurred. *People v. Plummer*, 229 Mich App 292, 308; 581 NW2d 753 (1998).

When defendant failed to object to a sentencing issue, the review is for plain error affecting a substantial right. *People v. McGuffy*, 251 Mich App 155, 165-166, 649 NW2d 801 (2000).

II. ANALYSIS

A. Sufficiency of Evidence to Convict Defendant

Defendant first argues that the evidence was insufficient to establish that he was the perpetrator. Defendant argues that Butler had credibility problems because he was a drug user with a criminal record and he was only testifying for a lesser sentence. Furthermore, the store owner did not identify defendant until the preliminary examination and the defendant offered an explanation as to how his fingerprints got on the items. In reviewing the sufficiency of evidence, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992). It was for the jury to evaluate Butler's credibility and the store owner's initial failures to identify defendant. Moreover, the prosecutor was not required to negate every reasonable theory of innocence, but only had to prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provided. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Thus, it was also for the jury to decide whether defendant's explanation of the fingerprint evidence was credible. When the evidentiary conflicts are resolved in the prosecution's favor, a rational trier of fact could have found guilt beyond a reasonable doubt. *Wolfe, supra* at 514.

B. Request for an Evidentiary Hearing

Defendant next requests a remand for an evidentiary hearing on why his trial counsel failed to call LaShawn Lewis, an alibi witness. However, the record shows that trial counsel personally served Lewis with a subpoena. Further, she was cooperating with defense counsel, showed up at trial on the day before she was needed to testify, and no one expected that there would be a problem with her appearing when needed. When she did not appear as anticipated, the court offered to issue a material witness warrant. Counsel declined, indicating that she might intensify her efforts at hiding if the police were pursuing her and that defendant's family might

have better luck finding her. There is no indication that trial counsel did anything that could be characterized as ineffective assistance or that anything else would be brought out if this Court remanded for a hearing. When Lewis failed to appear, counsel, defendant and defendant's family made a well-reasoned decision under the circumstances to look for her themselves rather than involve the police. There is no indication that this decision was a mistake, let alone that it fell below an objective standard of reasonableness. See *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. Scoring of Offense Variables and Erroneous Presentence Report

Defendant's next argument is that Offense Variable (OV) 1 was erroneously scored. OV 1 is the aggravated use of a weapon. Five points are assigned when a weapon is displayed or implied. MCL 777.31(e). Defendant argues that since no points should be scored if the crime is felonious assault or armed robbery, it follows that no points should be scored for assault with intent to commit armed robbery. Since defendant has not established that he was precluded from challenging the scoring of the guidelines below on this ground, and there is nothing to suggest that this could not have been discovered before sentencing, review is for plain error affecting a substantial right. *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002); *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002). Since the Legislature clearly did distinguish between these crimes, there was no plain error.

Defendant next argues that there was no evidence in the record to support a score for a serious psychological injury in calculating OV 4. OV 4 requires that ten points be scored when serious psychological injury requiring medical treatment occurred to the victim. MCL 777.34(1)(a). The reference to the victim's psychological state in the presentence investigation report was sufficient.

Finally, the presentence investigation report erroneously indicates that defendant had a juvenile record. At sentencing, counsel indicated that the report erroneously attributed the juvenile record of defendant's brother to defendant. The trial court acknowledged at sentencing that this should be corrected. While the basic information report indicates that defendant had no juvenile adjudications, both the September 12, 2001 and the July 17, 2001 presentence investigation reports make erroneous references to them. Defendant is entitled to have these references stricken.

Affirmed but remanded with instructions to strike all references to juvenile adjudications in the presentence investigation reports. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Bill Schuette