

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES D. LEWIS,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 242231
Oakland Circuit Court
LC No. 01-181755-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFTON D. LEWIS,

Defendant-Appellant.

No. 242232
Oakland Circuit Court
LC No. 01-181756-FC

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

In these consolidated cases, defendants appeal their bench trial convictions for armed robbery, MCL 750.529. The trial court sentenced defendant Charles Lewis to eight to twenty years in prison and sentenced defendant Clifton Lewis to eleven to thirty years in prison. For the reasons set forth below, we affirm.

I. Sufficiency of the Evidence

Defendants contend, erroneously, that the prosecutor presented insufficient evidence to convict them of armed robbery. “When reviewing a claim of insufficient evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Defendants rely primarily on *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002), and *People v Scruggs*, 256 Mich App 303; 662 NW2d 849 (2003). Both of the opinions were issued after defendants' convictions and neither is controlling here.

In *Randolph*, our Supreme Court rejected the "transactional approach" to robbery. *Randolph, supra* at 532. The Supreme Court stated that robbery requires the use of force, violence, or fear either before the larcenous taking or simultaneous to it. *Id.* at 546. In *Scruggs*, this Court relied on *Randolph* and held that the Supreme Court's rejection of the transactional approach to robbery also applies to armed robbery. *Scruggs, supra* at 309-310. This Court held that the use of a weapon in an armed robbery must occur before or contemporaneous with the taking. *Id.* at 310.

Defendants claim that the trial court reversibly erred by relying on the transactional approach to convict them because their use of the weapon (a lawnmower) occurred after the larcenous taking, not before or during the taking as required by MCL 750.529. In *Randolph* and *Scruggs*, a clear and distinct break in time occurred between the larcenous taking and the use of force; in both cases, the defendants did not use force until after they left the store from which they committed the larcenous taking. *Randolph, supra* at 534-535; *Scruggs, supra*, at 310. Here, there was no break in the action and defendants' assault on the victim was not only brutal, but continuous. The victim managed to slip from defendants' grasp for a moment, but he only made it a few feet before defendants continued their vicious attack. During this continuous assault, defendants committed a larcenous taking and used a weapon, the lawnmower. This is sufficient evidence to satisfy the elements of armed robbery. MCL 750.529; *Randolph, supra* at 532; *Scruggs, supra* at 309-310.¹

Because the evidence shows that defendants committed a larcenous taking contemporaneously with the use of a weapon, sufficient evidence existed to convict defendants of armed robbery. MCL 750.529; *Randolph, supra* at 537-539; *Scruggs, supra* at 309-310.

II. Sentencing

Defendant Charles Lewis raises two additional issues. He contends, incorrectly, that the trial court abused its discretion by sentencing him to eight to twenty years in prison because he was entitled to an additional downward departure. Contrary to defendant's apparent assertion that departure is mandatory in certain situations, the decision to depart is discretionary under

¹ Were we to conclude that the evidence showed two distinct assaults, sufficient evidence nonetheless supports defendants' convictions. The victim testified that he was unsure when defendants took his money and he stated that defendants may have taken it during the second part of the assault, which occurred on his neighbor's porch. The victim's change was scattered all over the porch and defendants hit the victim with the lawnmower while he was on the porch. Thus, viewing the evidence in the light most favorable to the prosecution, and resolving factual conflicts in the prosecution's favor, the trial court did not err in finding sufficient evidence to convict defendants, regardless whether the assault occurred as two separate events. MCL 750.529; *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

MCL 769.34(3)² and is reviewed for an abuse of discretion. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, departure is warranted only in exceptional situations. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Moreover, the trial court sentenced defendant *below* his guidelines range. We need not review defendant's sentence because a defendant may only appeal his sentence if it "is longer or more severe than the appropriate sentence range." MCL 769.34(7); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2001), mod in part on other grounds by *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001). Further, in light of the particularly vicious nature of the physical attack on an essentially helpless victim, we question any downward departure, but will not address this issue because the prosecutor has not appealed it.

We also note that the reasons defendant cites as additional grounds for a further downward departure are not substantial and compelling as required by MCL 769.34(3).³ Defendant's age of twenty at the time of the offense does not "keenly" or "irresistibly" grab the attention of the reviewing court, and it is not a reason of "considerable worth" in deciding the length of his sentence. *Babcock, supra* at 257-258. Further, the trial court specifically considered defendant's age at sentencing. Defendant's 'good' criminal record is also not grounds for departure.⁴ The prior record variables already consider a defendant's criminal record. See MCL 777.50 – 777.57. Defendant does not argue that the characteristic was given inadequate weight and the trial court considered this factor at sentencing. MCL 769.34(3)(b).

² MCL 769.34(3) states:

A court *may* depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [Emphasis added.]

³ As our Supreme Court stated in *Babcock, supra* at 264-265, quoting *People v Babcock I*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000):

The existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. Appellate courts should review the determination that a particular factor is objective and verifiable as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.

⁴ MCL 769.34(3)(b) states:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

We also reject defendant's assertion that his lesser involvement in the criminal act mandates departure. Offense variable 14 addresses the offender's role in the offense. MCL 777.44. Again, defendant does not argue that this characteristic was given inadequate consideration by the offense variable and it is not a basis for departure. MCL 769.34(3)(b); *Babcock, supra* at 272. Finally, defendant's assertion that his co-defendant's departure was greater than his own is not a substantial and compelling reason. Defendant received a significantly lower sentence than his co-defendant, yet he was involved in every aspect of this vicious crime. The trial court did not abuse its discretion by failing to further depart from sentencing guidelines.⁵

III. Ineffective Assistance of Counsel

Defendant also claims, erroneously, that he received ineffective assistance of counsel. Because defendant did not move for a *Ginther* hearing or a new trial, review is limited to mistakes apparent in the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

Defendant asserts that defense counsel was ineffective because he failed to move for a directed verdict or new trial and failed to object to the trial court's reliance on the transactional approach to robbery. Because the prosecutor presented ample evidence to convict defendant of armed robbery, a motion to dismiss and motion for new trial would have proven frivolous and meritless. We have long held that it is not ineffective assistance of counsel to refuse to bring meritless motions. *People v Dardin*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Counsel is also not obligated to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). For the reasons articulated above, any objection to the court's use of the transactional approach would also have been futile.

Affirmed.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter

⁵ Defendant claims that defense counsel was ineffective for failing to emphasize his lesser involvement in the crime. The record reflects that defense counsel made the argument. As discussed, however, the record indicates that defendant participated fully in the crime and any expanded argument by defense counsel on this issue would have been futile. Counsel is not ineffective for refusing to make a futile argument or advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).