

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELL DANTE FRANK,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 265415

Kalamazoo Circuit Court

LC No. 05-000087-FC

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316, conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a; armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of life imprisonment for his felony murder conviction and to 375 months to 70 years’ imprisonment for both the armed robbery and conspiracy to commit armed robbery convictions. Those concurrent sentences are consecutive to defendant’s two-year sentence for his felony-firearm conviction. Defendant appeals as of right. We affirm, but remand so the trial court can amend the judgment to reflect that the time served in jail should be credited toward defendant’s felony firearm sentence.

Defendant’s convictions stem from the armed robbery of a bowling alley, which left one employee dead. On January 9, 2005, defendant and one other man entered Harpo Lanes Bowling Alley in the morning with the intent to rob it. The perpetrators learned from an employee of the bowling alley that on Sunday morning the safe would be full of cash and not many employees would be working. Upon entering the establishment, defendant and his coconspirator rounded up the employees, including another coconspirator who helped them plan the robbery, and tied them together in the office. When exiting the bowling alley another employee confronted the two robbers and was subsequently shot.

On appeal, defendant first argues that he was denied the effective assistance of counsel because his attorney failed to raise or preserve the defense of insanity or temporary insanity. Our review is limited to mistakes apparent on the record because no evidentiary hearing was held. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant has a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The attorney’s performance must have been “objectively unreasonable in light of prevailing professional norms,” and “but for the

attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). This Court will not second-guess trial strategy with the benefit of hindsight. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002).

An individual is legally insane if, as a result of mental illness or mental retardation, that person lacks substantial capacity either to appreciate the nature and quality of the wrongfulness of his conduct or to conform his conduct to the requirements of the law. *People v Jackson*, 245 Mich App 17, 21; 627 NW2d 11 (2001). Counsel's decision not to raise an insanity defense was a matter of trial strategy and did not constitute ineffective assistance of counsel. Defendant consistently denied being the person who shot the victim, but an insanity defense would have necessitated his admission to the jury that he either shot or intended the shooting death, but should not be held criminally responsible for it. Although a defendant may present inconsistent defenses, see *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), doing so in this case would have significantly weakened the chosen defense, which, given the victim's initial denial of being present when the murder occurred, was a wholly reasonable strategy. The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Moreover, trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). There is nothing in the record to support that defendant, as a result of mental illness or retardation, lacked capacity to appreciate the nature and quality of the wrongfulness of his conduct or to conform his conduct to the law. The evidence indicates that the robbery was carefully planned, using employee information to find the easiest and most beneficial time and manner to execute it. Further, when the robbery was completed, defendant repeatedly told the coconspirator employee to not say anything, which supports that he knew his actions were wrong.

Defendant also asserts that he was denied his equal protection and due process rights by the scoring of offense variable (OV) 12, MCL 777.42, at 25 points. We review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported the particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Twenty-five points is scored for OV 12 when three or more contemporaneous felonious criminal acts involving crimes against a person are committed. MCL 777.42(1)(a). MCL 777.42(2)(a) provides that "[a] felonious criminal act is contemporaneous if both of the following exist: (i) [t]he act occurred within 24 hours of the sentencing offense, [and] (ii) [t]he act has not and will not result in a separate conviction." If those two conditions are met, the trial court should score the variable at 25 points. Here, at the time of the armed robbery and shooting, defendant committed two additional, uncharged counts of assault and one uncharged count of armed robbery. Defendant tied up two employees and told them they would not be harmed if they cooperated. He was holding a gun at both employees. He thus assaulted both employees. Additionally, defendant personally robbed one of the employees in addition to the robbery of the bowling alley itself. Therefore, defendant committed three unprosecuted crimes against a person within the same 24-hour period, allowing OV 12 to be correctly scored 25 points.

Defendant also asserts that he should not have been scored under both prior record variable (PRV) 7 and OV 12 because the same conduct was counted twice against him in scoring those variables. We disagree. PRV 7 scores subsequent or concurrent felony convictions. MCL 777.57. OV 12 scores criminal acts that *will not lead to convictions*. MCL 777.42(1)(a). Consequently, the variables evaluate two separate concerns, and OV 12 was assessed correctly.¹

For his next argument, defendant maintains that the trial court violated the United States and Michigan constitutions in sentencing him to 375 months to 70 years' imprisonment for his conspiracy and armed robbery convictions. He maintains that the sentences were not proportionate and that a downward departure from the sentencing guidelines was required. We disagree. We review unpreserved sentencing issues for plain error affecting a defendant's substantial rights. *McLaughlin, supra* at 670. Defendant argues that the sentences imposed are disproportionate because mitigating circumstances were presented that warranted a downward departure from the minimum recommended sentencing guidelines range. Downward departures are permitted if the court has a "substantial and compelling reason" for the departure. *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004). The Supreme Court has determined this language to mean that there must be an "objective and verifiable" reason that 'keenly' or 'irresistibly' grabs our attention; is of 'considerable worth' in deciding [the appropriate sentence]; and 'exists only in exceptional cases.'" *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003) quoting *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995). Here, defendant was sentenced within the presumptively proportionate guidelines range, and we find that he has failed to present any substantial and compelling reasons for a downward departure. The sentence imposed is proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Because defendant's minimum sentence was within the guidelines range and there was no substantial and compelling reason for departure, we affirm. MCL 769.34(10).

Affirmed and remanded.² We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis

¹ We reject defendant's argument that he was sentenced on the basis of judicial fact-finding, which violates the rules set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). The rules of law articulated in these cases has no applicability to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006).

² We remand this case to the trial court solely for the ministerial task of correcting the Judgment of Sentence to reflect that defendant's jail credit for time served should be applied against the felony-firearm charge. MCL 750.227b(2); *People v Watts*, 186 Mich App 686, 687; 464 NW2d 715 (1991).