

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEE SIMMONS,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 288047

Berrien Circuit Court

LC No. 2007-406365-FH

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); assault with intent to do great bodily harm less than murder, MCL 750.84; and misdemeanor aggravated assault (domestic violence), MCL 750.81a. Defendant was sentenced to 72 to 240 months' imprisonment for first-degree home invasion, and 48 to 120 months' imprisonment for his assault with intent to do great bodily harm less than murder conviction. The sentences are to be served consecutively. Defendant was also sentenced to 173 days for misdemeanor aggravated assault, which was satisfied by time served. He appeals as of right. We affirm.

First, defendant argues that a discovery order and his due process rights were violated when the prosecution failed to disclose a letter written by defendant that was used to impeach defendant at trial. There is no general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). However, pursuant to MCR 6.201(B)(3), “[u]pon request, the prosecuting attorney must provide each defendant . . . any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial.” Additionally, due process requires disclosure of evidence in the prosecutor’s possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Due process is also violated when defendant makes a timely discovery request and material favorable to the defense is suppressed. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). To establish a violation of a defendant’s due process right to discovery, a defendant must show:

- (1) that the state possessed evidence favorable to the defendant;
- (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence;
- (3) that the prosecution suppressed the favorable evidence;
- and (4) that had the evidence been disclosed to the defense, a reasonable

probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998). After a close review of the record, we find no evidence to support defendant's claim that the prosecution failed to comply with any discovery order or the mandates of due process. Before the trial court, the prosecution stated that the challenged letter was referred to in a police report provided to defendant and that defense counsel "had full notice of what the letter said." Defendant did not dispute the prosecution's representation, and defendant does not claim it was false on appeal. Further, nothing in the record supports that defendant requested discovery or a discovery order requiring disclosure of the letter was entered. Moreover, the letter was not exculpatory and no reasonable probability exists that if the letter was further disclosed in some fashion, the outcome of trial would have been different. Thus, there was no due process violation.

Defendant next contends there was insufficient evidence to justify a score of 15 points for offense variable (OV) 8, MCL 777.38(1), victim asportation or captivity, because the victim was not asported to a place of greater danger during the incident. MCL 777.38(1)(a) permits a trial court to score OV 8 at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Because evidence at trial established that the female victim was taken from the first floor of the house to the basement, where there were more limited means of escape, and because both victims were held captive in the basement beyond the time necessary to complete the offenses, the trial court properly scored OV 8 at 15 points.

Defendant also complains that OV 10 was misscored at five points because there was no evidence defendant exploited the victims with his size. MCL 777.40(1)(c) permits the trial court to score OV 10 at five points if the "offender exploited a victim by his or her difference in size or strength, or both . . ." Exploit is defined as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). This Court will uphold a trial court's scoring of a sentencing guidelines variable if there exists any evidence to support it. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). After a close review of the record, we hold that there was sufficient evidence contained within the record to demonstrate that defendant exploited the victims with his superior size and strength during the assaults.

Defendant further alleges that the trial court abused its discretion when it imposed consecutive sentences for his home invasion and assault with intent to do great bodily harm less than murder convictions because the order constituted a sentencing departure. We disagree. MCL 750.110a(8) provides, "[t]he court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Because defendant was convicted of first-degree home invasion and because defendant does not contest that the assault conviction did not arise from the same transaction as the home invasion, the trial court was within its discretion to sentence defendant to consecutive sentences. MCL 750.110a(8); *People v Hill*, 221 Mich App 391, 394; 561 NW2d 862 (1997) ("The home invasion statute permits consecutive sentencing when another felony occurs during home invasion.").

Although permitted by statute, defendant argues that the trial court nevertheless abused its discretion when it sentenced defendant to consecutive sentences because the consecutive sentences were a departure that was based on an offense characteristic that was already taken into account when determining the sentence. Defendant cites to MCL 769.34(3)(b), as cited in *People v Babcock*, 469 Mich 247, 258 n 12; 666 NW2d 231 (2003), to support his argument. 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.

In the present case, it is uncontested that defendant's sentences were within the recommended minimum sentence range under the legislative guidelines. Defendant cites no case law nor does such exist to support defendant's contention that consecutive sentences under MCL 750.110a(8) constitute a departure subject to the terms of MCL 769.34(3)(b). Although defendant will have an overall longer period of incarceration, the penalties for the individual offenses remain within the properly calculated minimum sentencing guidelines range. Because the trial court did not depart from the minimum sentencing recommendation, we affirm the trial court's sentences for each offense and hold that the trial court did not abuse its discretion when it imposed consecutive sentences. MCL 769.34(10); MCL 750.110a(8); *Hill, supra* at 394.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens