

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 9, 2013

v

BOBBY FORREST WILLIAMS II,
Defendant-Appellant.

No. 307132
Genesee Circuit Court
LC No. 11-028567-FC

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery (two counts), MCL 750.529, possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced as a fourth habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for each count of armed robbery, two years for the felony firearm conviction, and 15 to 20 years' imprisonment for the felon in possession conviction. We affirm.

I. BASIC FACTS

Defendant and his cohort robbed a Speedway gas station on March 27, 2011. The two employees working at the time, Ashley Fenlon and Daniel Miller, testified that because the robbers wore masks, they could not specifically identify them. However, the incident was caught on surveillance tape, which revealed that one of the individuals wore a distinctive jacket. Finger prints were also taken from the scene and subsequently attributed to defendant. Although defendant initially denied participating in the robbery, he later confessed to his involvement.

II. SEARCH OF THE BASEMENT

Defendant first contends that he was denied his right under the Fourth Amendment to be free from unreasonable searches and seizures. We disagree. Defendant did not raise the issue in the trial court. Unpreserved claims of nonstructural constitutional error are reviewed for plain error. *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

After learning of defendant's identity through fingerprint analysis, police went to defendant's father's home to arrest defendant. While searching for defendant in the basement of the home, officers saw a jacket exactly like the distinctive jacket worn by one of the robbers. Defendant was found hiding on a shelf in a storage closet in the basement. One of the police officers left the residence to get a warrant to search the residence for additional evidence. However, before that was accomplished, defendant's father signed a "Consent to Search" form and agreed to allow the police to search the residence. The police located a cooler in the basement area in which they found other evidence of the robbery.

Defendant argues that his father could not give consent to search the basement or the cooler because defendant had a reasonable expectation of privacy in both.

The right against unreasonable searches is guaranteed by the United States and Michigan Constitutions, US Const, Am IV; Const 1963, art 1, § 11, and, generally, searches conducted without a warrant are invalid per se and the evidence seized during an invalid search is excludable at trial. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). An exception to this general rule exists where consent to search is given. *Id.* The consent exception to the warrant requirement allows search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Beydoun*, 283 Mich App. 314, 337; 770 NW2d 54 (2009). The validity of a consent depends on the totality of the circumstances, *Dagwan*, 269 Mich App at 342, and the prosecutor has the burden of proving that the person consenting was authorized to do so and did so freely. *People v Chowdhury*, 285 Mich App 509, 524; 775 NW2d 845 (2009). "Generally, that consent must come from the person whose property is being searched or from a third party who possesses common authority over the property." *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2010). The scope of a person's consent to search is determined under an objective standard; the scope is what the typical reasonable person would have understood it to be under the circumstances, *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001), and the validity of a consent is determined under the totality of the circumstances. *People v Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011).

The record reveals that defendant's father had seven children who would "come and go" from the home "when they want to." There were two beds in the basement area, a couple of couches, and some chairs. Thus, the open area of the basement was not exclusively for defendant. The cooler belonged to defendant's father who thought it was empty. Defendant did not lock the cooler and did not show by his conduct that he sought to preserve the contents of the cooler as private. See *US v Waller*, 426 F3d 838 (CA 6, 2005).

It is apparent that the jury did not believe the testimony of defendant's father that the police threatened him with jail if he did not sign the form. Detective Williams testified that he went over every aspect of the form with defendant's father, who was not threatened. The credibility of the witnesses is reserved for the finder of fact. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

The evidence demonstrated that defendant did not have a proprietary or possessory interest in the basement space or in the cooler. Defendant, therefore, did not have a legitimate expectation of privacy in the place searched or the things seized and there was no violation of the Fourth Amendment.

III. SENTENCING

A. SCORING OF OFFENSE VARIABLE 4

Defendant argues that the trial court abused its discretion in scoring Offense Variable (OV) 4 because the record did not reflect any evidence of serious psychological harm to the victims. We disagree. “The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score, and thus this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score.” *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009) (citation omitted).

The trial court assessed 10 points for psychological injury to the victim. Ten points must be assessed if the serious psychological injury may require professional treatment. MCL 777.34; *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). In *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), this Court held that the victim’s testimony that she was fearful during the encounter with the defendant was sufficient evidence to score 10 points for OV 4. Here, not only did one victim testify that she was fearful during the robbery and had great difficulty in finishing out the day, but she also gave a victim impact statement that she continued to think about the robbery all the time and was upset that the other perpetrator did not get caught. Accordingly, the trial court did not abuse its discretion in scoring 10 points under OV 4.

B. “TWO-THIRDS” RULE

Finally, defendant argues that the trial court erred in sentencing him to a minimum term in excess of two thirds of the maximum sentence on his felon in possession of a firearm conviction. We disagree.

To be a proper indeterminate sentence under Michigan’s indeterminate sentence scheme, a sentence must have an interval between the minimum and maximum terms sufficient to allow corrections authorities to exercise their jurisdiction and judgment. MCL 769.34(2)(b); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). However, *Tanner* does not apply to sentences where the statutory maximum is “life or any term of years.” *People v Floyd*, 490 Mich 901; 804 NW2d 564 (2011). A conviction for felon in possession is punishable by imprisonment “for not more than 5 years.” MCL 750.224f. However, the habitual offender statute provides that, “[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term.” MCL 769.12(b). Because felon in possession of a firearm is punishable upon first conviction by a sentence of five years, the trial court could have sentenced defendant as a fourth habitual offender to life imprisonment or to any lesser term. Accordingly, the two-thirds rule articulated in *Tanner*, 387 Mich at 683, and MCL 769.34(2)(b) does not apply.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher