

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 28, 2012

v

DARRAN SAMUEL HUGGINS,

Defendant-Appellant.

No. 302585
Ingham Circuit Court
LC No. 10-000388-FC

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and felony firearm, MCL 750.227. We affirm.

As Michael Smedley and Shawn Dodd exited the back door of their apartment building that leads to a parking lot, they noticed four or five men standing by the door, including Joseph Christian. Seconds after they heard one of the men say “that’s them,” Smedley was struck on his head, directed to kneel, and give up his money—which amounted to \$101.00.¹ A gun was pointed at Smedley’s head. Smedley was then told to get up and “let’s go see what your buddy’s got.” As Smedley got up from his knees, he looked defendant “dead in the face.” “Without a doubt,” he was robbed by defendant whose face was clearly exposed.

Dodd had not at first realized what happened to Smedley, but as he was getting in the passenger side of a vehicle, he looked up and saw Smedley “in front of the car with a gun to his head” and Smedley was giving defendant money. Defendant then approached Dodd and asked him if he had any money and Dodd denied having any money. After defendant rummaged around in the trunk of the vehicle that Dodd was sitting in, defendant pointed a gun at Dodd’s

¹ Smedley, who shared an apartment with Dodd, testified that earlier that day Dodd had told Clarence Harris, whose apartment in the same building was a frequent hangout for people, that he was due that day to receive money and Dodd even told Harris what time he was going to pick the money up. Dodd confirmed that he had told Harris earlier that day about the money and that Harris had several people visiting him at the time.

head and told him to get out of the vehicle and that they were going to Dodd's apartment for the money. Dodd knew it was defendant because it is "hard to forget somebody that puts a gun between your eyes." As Dodd and defendant were walking toward the apartment building, defendant was walking backward in front of Dodd, facing him, and had the gun touching Dodd's forehead, right between his eyes. Eventually Dodd was able to grab the gun away from defendant. He threw the gun and then began running down the street with defendant chasing him. Dodd was able to flag down a passing vehicle and ask for help, which was given.

From the safety of the Good Samaritan's vehicle, Dodd watched a red Blazer owned by Joseph Christian leave the parking lot of the apartment building. The Good Samaritan testified that he saw a white vehicle, like a Crown Victoria, also leave the parking lot of the apartment building, "spinning tires." Officer Jeffrey Winarski testified that, on the date of the robbery, he initiated a traffic stop on a red Blazer that matched the description of a vehicle of interest in the armed robbery. Joseph Christian and Thomas Mask were in that vehicle. And defendant admitted that he drove a white Crown Victoria.

At trial, defendant claimed he was innocent of the charges. Defendant admitted that he was at Harris' apartment the day of the robbery and that several people were there, including Christian and Mask. But, defendant testified, he left shortly before the robbery took place and did not know anything about the robbery. Although endorsed as witnesses, neither Harris nor Mask testified at trial; thus, defendant requested the missing witness jury instruction, CJI2d 5.12. The court denied the request for the instruction, concluding that the prosecutor acted with due diligence to secure the witnesses. The jury returned a guilty verdict and this appeal followed.

Defendant first argues that the trial court reversibly erred in denying his request for the missing witness jury instruction, CJI2d 5.12, because Harris and Mask were listed as witnesses by the prosecution and due diligence was not exercised to secure their appearance. We disagree.

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). However, we review the trial court's decision regarding whether the instruction applied to the facts of the case for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). "[I]f an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003), citing *Riddle*, 467 Mich at 124-125.

When a witness is endorsed by the prosecutor under MCL 767.40a(3), the prosecutor must exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The test for due diligence is one of reasonableness, "whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court's determination of due diligence is reviewed for an abuse of discretion. *Eccles*, 260 Mich App at

389. When the prosecution fails to produce an endorsed witness without proper excuse, the missing witness instruction, CJI2d 5.12, may be appropriate. *Perez*, 469 Mich at 420; *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). The instruction provides that a jury may infer that a missing witness' testimony would have been unfavorable to the prosecution. *Id.* at 293. Whether CJI2d 5.12 is appropriate depends on the facts of the particular case and the trial court's determination in that regard is reviewed for an abuse of discretion. *Eccles*, 260 Mich App at 389.

Here, the prosecution failed to comply with MCL 767.40a(4), which permits the prosecution to remove a witness from its witness list "upon leave of the court and for good cause shown or by stipulation of the parties." *Perez*, 469 Mich at 420-421. Because Harris and Mask were listed on the prosecution's witness list, the prosecution was required to exercise due diligence to produce those witnesses. In support of the prosecution's claim that due diligence was exercised to produce these witnesses, a detective testified that he used "all efforts available" to locate Harris but Harris could not be located. Mask, however, was located and he was incarcerated in a federal prison in Chicago. A writ was not sent in his regard, however, because it was not likely that the federal penitentiary would permit his attendance, even by court order. On appeal, defendant has presented no evidence to contradict these claims. And defense counsel admitted to the trial court that a private investigator was hired, with court funds, and the investigator failed to locate the witnesses. In light of the facts, the trial court's conclusion that the prosecution exercised due diligence to procure the testimony of Harris and Mask did not constitute an abuse of discretion. See *Eccles*, 260 Mich App at 389. And the trial court did not abuse its discretion when it denied defendant's request for the missing witness instruction. See *id.*

Further, even if the missing witness instruction was applicable, reversal is not warranted because defendant did not establish that the error resulted in a miscarriage of justice. See *Riddle*, 467 Mich at 124; *McKinney*, 285 Mich App at 163. At trial, defendant claimed that he did not commit the crimes. Here, defendant does not assert that Harris or Mask would provide any testimony to establish that he was actually innocent. In fact, from the evidence of record it appears that both Harris and Mask had some involvement in the robbery. Thus, even if they were produced as a witness, they probably would have asserted their Fifth Amendment right not to testify. In any case, after review of the nature of the error in light of the weight and strength of the evidence, it does not appear more probable than not that the failure to provide the instruction was outcome determinative. See *Riddle*, 467 Mich at 125; *McKinney*, 258 Mich App at 163.

Next, defendant argues that the trial court incorrectly scored offense variable (OV) 14 at 10 points. We disagree.

This Court reviews scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Where a minimum sentence falls within the appropriate guidelines sentence range, this Court shall affirm the sentence unless there is an error in scoring or inaccurate information was relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010). Generally, when scoring the guidelines, "[a] sentencing court has

discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence.” *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

Here, OV 14 was scored at ten points on the ground that defendant was a leader in a multiple offender situation. See MCL 777.44(1)(a). When scoring OV 14, the “entire criminal transaction should be considered.” MCL 777.44(2)(a). When three or more offenders are involved, more than one offender may be determined to have been a leader. MCL 777.44(2)(b). In this case, there were at least four persons involved in this criminal transaction. However, defendant was the clear aggressor who personally pursued and confronted both Smedley and Dodd, demanding their money while pointing a gun at their heads. The record evidence clearly supported the trial court’s scoring of OV 14 at ten points.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello