

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAR SIRRON STERLING,

Defendant-Appellant.

UNPUBLISHED

June 14, 2005

No. 254339

Kent Circuit Court

LC No. 03-002825-FC

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction for armed robbery, MCL 750.529. He was sentenced to eighteen to eighty years' imprisonment for his conviction. We affirm.

Defendant was charged with murder arising out of an armed robbery in which the victim was killed. The prosecutor's theory was that defendant and another man set out to rob the victim, and that during the course of that robbery the other man shot and killed the victim. Defendant asserted that he and the other man met the victim to buy marijuana and that the other man, then, robbed and killed the victim without any participation by defendant.

Defendant argues that offense variables (OV) 1, 3, and 12, were incorrectly scored given that the jury acquitted him of murder. Defendant did not object to the scoring of the guidelines at his sentencing, in a motion for resentencing, or in his motion for a remand, thus, the issues are not properly preserved. However, to the extent defendant argues that the scoring errors resulted in a sentence outside the appropriate guidelines range, they may be reviewed for plain error that affected his substantial rights. *People v Kimble*, 470 Mich 305, 310-314; 684 NW2d 669 (2004). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).

MCL 777.33 provides that OV 3 is to be scored one hundred points if "a victim was killed"; that is if "death results from the commission of a crime." The statute does not indicate that such scoring is appropriate *only* if a victim is killed by *the defendant*. It is undisputed that the victim was killed during the course of the armed robbery for which defendant was convicted. The evidence supported the trial court's scoring of OV 3 at one hundred points because the victim's death resulted from a crime, but homicide was not the sentencing offense. MCL

777.33(2)(b); *Hornsby*, *supra*. Thus, we find no plain error affecting defendant's substantial rights with regard to the scoring of OV 3.

Similarly, OV 1 is to be scored at twenty-five points if "a firearm was discharged at or toward a human being." MCL 777.31(1)(a). There is no dispute that a firearm was discharged at the victim during the course of the robbery, even if the person firing was not defendant. Thus, there was evidence to support the scoring of OV 1, and we find no plain error affecting defendant's substantial rights.

Also, OV 12 is to be scored at five points if two felonious criminal acts involving other crimes (other than against a person) were committed within twenty-four hours of the sentencing offense, which have not and will not result in a separate conviction. MCL 777.42(1)(d), (e) and (2)(a). A score of five points was amply supported by defendant's own testimony that he possessed and sold crack cocaine and possessed marijuana in the twenty-four hours before and after the offense. Thus, there was evidence to support the scoring of OV 12, and we find no plain error affecting defendant's substantial rights.

Defendant also argues that the trial court's scoring of OVs 1, 3 and 12 violated his constitutional rights based on *Blakely v Washington*, 542 US ___, 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has held that *Blakely* is inapplicable to Michigan's guideline scoring system, which determines recommended minimum sentence ranges. *People v Claypool*, 470 Mich 715, 730, n 14; 666 NW2d 664 (2004); see also, *People v Morson*, 471 Mich 1201; 683 NW2d 678 (2004).

Defendant further argues that the comments of the trial court support that it sentenced defendant based on his committing murder. However, we find nothing in the court's comments indicating that it sentenced defendant based on murder, but, rather, it recognized that someone died during the commission of defendant's robbery.

Finally, defendant argues that his trial counsel was ineffective for failing to object to the scoring of OVs 1, 3 and 12. We disagree. Because, the evidence presented at trial supported the trial court's scoring of OVs 1, 3, and 12, any objection by defendant's counsel to the scoring of those variables would have been futile. An attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). There is no showing defense counsel's failure to object prejudiced defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly