

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG DAVID ERVING,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 261899

Wayne Circuit Court

LC No. 04-008199-01

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of two counts of unarmed robbery, MCL 750.530, and the court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a prison term of twelve to twenty years on each count. Defendant appeals as of right. We affirm defendant's convictions and remand for resentencing and for correction of the presentencing information report (PSIR).

Defendant first contends that the trial court erred by giving a jury instruction on unarmed robbery and that defense counsel was ineffective for failing to object to the instruction. After the jury was sent to deliberate, the trial court specifically asked each attorney if they had any objection to the instructions given. Defense counsel did not object to the instructions as given and affirmatively denied having any objection to the instructions. By approving the instructions, defense counsel waived appellate review of the issue. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Apparent error that is waived is extinguished. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant asserts his counsel was ineffective for failing to object to the jury instruction. He contends that no rational view of the evidence would support a charge of unarmed robbery given the testimony of all three witnesses that defendant was armed with a handgun. All three witnesses indicated defendant had possession of a handgun. While none of the witnesses indicated seeing the handgun either prior to, or during, defendant's demand for and their relinquishment of monies, all agreed that defendant was armed. Defendant was alleged to have the handgun during the entire interaction with the victim that was allegedly sexually assaulted, subsequent to the actual commission of the larceny.

To establish a claim of ineffective assistance of counsel, it must be shown that (a) counsel's performance was below an objective standard of reasonableness under prevailing

professional norms, (b) there is a reasonable probability that, but for counsel's error, the results of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (c) the resulting proceeding was fundamentally unreliable or unfair, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish a meritorious claim for ineffective assistance of counsel, defendant must demonstrate that the unarmed robbery instruction was improper. A jury instruction on a necessarily lesser-included offense is proper if the charged greater offense requires a jury to find a disputed factual element that is not part of the lesser-included offense and it is supported by a rational view of the evidence. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Because unarmed robbery is a necessarily lesser-included offense of armed robbery, the issue to be determined is whether a rational view of the evidence supported provision of the instruction to the jury. *Reese, supra* at 447.

This Court will neither substitute its judgment for that of counsel regarding matters of trial strategy nor make an assessment of an attorney's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Although defendant contends his primary defense was based on misidentification, he fails to acknowledge that defense counsel also emphasized the inability of the prosecutor to produce the alleged weapon used and repeatedly suggested to the jury that various aspects of the victims' version of events were inconsistent and completely, or at least in part, fabricated. During the course of trial, defense counsel questioned one of the victims regarding the discrepancy between his trial testimony and statement to police regarding when a gun was first observed in defendant's possession and challenged the overall veracity of the witness regarding details of the events. Defense counsel emphasized, through questioning of witnesses, inconsistencies regarding the type of weapon observed. During closing, defense counsel argued his "theory" that the teenagers had fabricated the events in order to insulate themselves from problems for being out past curfew. Counsel emphasized the absence of any gun in evidence and the inability of the sexual assault victim to verify the location of the gun during her alleged assault, implying that the witnesses "are lying about what happened and what got them there."

Clearly, part of counsel's tactic was to bring into question the veracity of the witnesses regarding aspects of the events, with particular emphasis on the presence of a weapon. Defense counsel may have accepted the instruction on unarmed robbery believing that inclusion of lesser-included offense as an option to the jury could protect defendant from being convicted on the more serious charges. *Cornell, supra* at 351. In addition, the failure to conduct a *Ginther*¹ hearing precludes this Court from determining that, but for counsel's failure to object to the disputed instruction, the result of the proceeding would have been different. Defendant pursued, as a theory at trial, that the witnesses were not truthful regarding the alleged events, with emphasis on the inability to consistently identify the alleged weapon or to produce it. Because the jury's verdict demonstrated a rejection of the teenagers' testimony and an acceptance of defendant's theory, it cannot be determined either that any instructional error occurred or that inclusion of disputed instruction by the trial court was outcome determinative or resulted in the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

conviction of an innocent person. As such, defendant's claim of ineffective assistance of counsel is without merit.

Defendant asserts that he is entitled to resentencing because the trial court improperly scored offense variables (OV) 3 and 10. This Court reviews issues pertaining to the proper scoring of sentencing guideline variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Defendant argues that both OV 3 and OV 10 should be scored at zero. The prosecutor agrees that OV 3 should be reduced, but only from a score of ten to five, but maintains that OV 10 was properly scored.

MCL 777.33 pertains to physical injuries to victims. The term "requiring medical treatment" is defined as "the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). Testimony indicated that the sexual assault victim was observed with various bruises and abrasions. The actual dispute is whether these bruises and abrasions "required medical treatment." Based on the absence of any testimony that the victim's injuries required or received any treatment, scoring of OV 3 should have been five points in accordance with MCL 777.33(1)(e), reducing the total OV score obtained to 30.

MCL 777.40 describes scoring requirements for OV 10. Notably, "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 722.40(2). "Vulnerability" is described as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 722.40(3)(c). The term "exploit" is defined as the "means to manipulate a victim for selfish or unethical purposes." MCL 722.403(3)(b).

At sentencing the parties disputed the scoring of OV 10. Ultimately, the trial court attributed a score of five to this variable. The prosecutor's basis for seeking the scoring level was "the size difference involving the Defendant and the victim of the sexual assault." While a physical description of defendant was provided, the trial record fails to provide sufficient information regarding a description of the victim to either confirm or dispute the scoring on this variable. This Court assumes, based on the ability of the trial court to observe the respective sizes of defendant and the victim during the course of trial, that a disparity existed justifying the reduced scoring. In addition, the trial court's indication of "generosity" in scoring denoted the age disparity between defendant, at 38 years of age, and the victim, who was reported to be 15 years of age at the time of the alleged events. Based on these factors, we cannot conclude that the trial court abused its discretion in scoring OV 10.

Based on the rescoring of OV 3, the range for the offenses is reduced from 50 to 200 months as used in sentencing, to 43 to 172 months. MCL 777.64. Defendant's sentence of 120 months remains within the revised guidelines. A sentence that is within the guidelines range must be affirmed, except where there is an error in scoring or inaccurate information is relied on to determine the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). The scoring error changes the guidelines recommended range. Statements by the trial court at sentencing indicate that the court may not have imposed the same sentence had the proper range been used. Specifically, the trial court noted in sentencing defendant that the sentence imposed was "on the minimum end" of the guidelines range. Because the guidelines range is altered, and it appears the trial court would not necessarily impose the same sentence

upon correction of the guidelines range, defendant is entitled to resentencing. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

Defendant also contends he is entitled to resentencing based on the trial court's violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and contends his counsel's failure to object to the scoring imposed constituted ineffective assistance of counsel. *Hornsby*, *supra* at 468. This Court's review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *Rodriguez*, *supra* at 38. Defendant argues the trial court erred by applying facts that were not determined by the jury, in violation of *Blakely*, as evidenced by the incorrect scoring of OV 3 and OV 10. But *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). Consequently, defendant's argument lacks merit.

Defendant also raises an issue pertaining to ineffective assistance of counsel, but fails to discuss, cite to law, or elaborate on this claim in reference to this issue. A party may not merely assert an error and leave it to this Court to search for authority to sustain or reject his position, *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), nor may he give issues cursory treatment with little or no citation of supporting authority, *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Defendant erroneously indicates, in his statement of the issue, that counsel failed to object. To the contrary, defense counsel enumerated several objections during sentencing to the scoring of the referenced offense variables. Hence, defendant has failed to establish a factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, if defendant raises this issue on the basis of counsel failing to provide an objection, specifically based on *Blakely*, to the trial court's scoring of the statutory sentencing guidelines, defense counsel cannot be deemed to be ineffective for failing to make a meritless or futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant contends this Court must remand to effectuate corrections required to the presentence information report. This Court reviews a sentencing court's response to a claim of inaccuracies in a defendant's PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

At sentencing, defendant's counsel took issue with information contained in the PSIR that did not coincide with the jury's decision to acquit defendant on charges stemming from the sexual assault allegations. The trial court ordered references to the sexual assault deleted from the report. Unfortunately, the report remained uncorrected. Based on the trial court's determination that the challenged information was not substantiated, defendant is entitled to have the inaccurate information stricken from the report. MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Hoyt*, 185 Mich App 531, 534; 462 NW2d 793 (1990).

Defendant's convictions are affirmed and the case is remanded to the trial for resentencing and for correction of the PSIR. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot