

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE LASHAWN GRAY,

Defendant-Appellant.

UNPUBLISHED

July 1, 2008

No. 276292

Kalamazoo Circuit Court

LC No. 05-002269-FC

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant Deandre Lashawn Gray appeals as of right his convictions for one count of armed robbery, MCL 750.529; one count of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v); one count of second-degree retail fraud, MCL 750.356d; one count of possession of a firearm by a felon, MCL 750.224f; and two counts of being in possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 20 to 40 years' imprisonment for armed robbery, 58 months to 40 years' imprisonment for possession of a firearm by a felon, 34 months to 15 years' imprisonment for possession of less than 25 grams of cocaine, and 314 days in jail for second-degree retail fraud, and consecutive terms of two years' imprisonment for each of the convictions for possession of a firearm during the commission of a felony. Defendant was given credit for serving 314 days in jail, which was applied toward his sentence for second-degree retail fraud. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to raise or preserve an insanity or temporary insanity defense. Because no *Ginther*¹ hearing was held, our review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Ineffective assistance of counsel is ultimately a question of law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) that the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 311-312; 688 NW2d 308 (2004); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77; *Dixon, supra*.

Insanity is an affirmative defense to a criminal prosecution, the presentation of which is governed by MCL 768.21a, which requires proof that "as a result of mental illness . . . or as a result of being mentally retarded" the defendant "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). A defendant may have a temporary insanity defense due to involuntary intoxication "when the chemical effects of drugs or alcohol render the defendant temporarily insane." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). However, a person cannot be legally insane solely because he is under the influence of voluntarily consumed alcohol or controlled substances. MCL 768.21a(2). The defendant has the burden of proving the defense. MCL 768.21a(3). And, counsel's failure to properly prepare a meritorious insanity defense constitutes a denial of effective assistance of counsel, if that failure deprived the defendant of a reasonably likely chance of acquittal. *People v Hunt*, 170 Mich App 1, 13-14; 427 NW2d 907 (1988).

Nothing in the record supports any assertion that defendant was temporarily insane when he committed the instant offenses. Defendant merely speculates that his history of substance abuse "could have" resulted in a form of involuntary intoxication, where defendant lacked the capacity to refrain from ingesting controlled substances, which could be considered insanity. It was defendant's burden to establish the necessary factual predicate of his claim, *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and he has completely failed to do so. Further, defendant fails to present any evidence that his substance abuse interfered with his ability to appreciate the wrongfulness of his conduct or to conform his behavior to the law. Simply put, defendant has not shown the existence of a meritorious insanity defense. Therefore, he has not shown that his trial counsel's failure to offer or investigate the defense fell below prevailing professional norms, nor that his counsel's performance affected the outcome of trial. *Toma, supra* at 302.

Defendant next asserts that the trial court committed numerous sentencing errors. First, he claims that the trial court committed plain error by failing to articulate the reasons that defendant's sentences were proportionate to his crimes. This assertion lacks merit. Certainly, a trial court is required to articulate its reasons for imposing a sentence on the record at the time of sentencing. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). However, this articulation requirement is satisfied where, as here, the trial court expressly relies on the sentencing guidelines as the basis for imposing sentence. *Id.* 312-313. And, sentences within

the applicable guidelines range are presumed proportionate. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006).

Next, defendant argues that the trial court committed plain error by failing to depart downward from the recommended minimum range under the sentencing guidelines, because defendant's substance abuse problem mitigated his culpability for the instant offenses. Under the legislative sentencing guidelines, a trial court may depart from the statutory minimum range only when substantial and compelling reasons exist to do so. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 437-438 n 10; 636 NW2d 127 (2001). A substantial and compelling reason to depart from the guidelines "exists only in exceptional cases;" it must be an "objective and verifiable" reason that keenly or irresistibly grabs the attention of this Court and is "of considerable worth in deciding the length of a sentence." *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003). Defendant did not argue to the trial court that his substance abuse justified a downward departure. Further, defendant's alleged substance abuse problem is neither a particularly compelling reason to justify a sentence below the guidelines nor a condition that exists only in exceptional cases.

Next, defendant argues that the trial court failed to sentence him with accurate information, because it did so without ordering a mental health report, which defendant asserts could have demonstrated his rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10); *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). However, the trial court is not required to obtain a current mental health report before issuing a sentence. The relevant portion of MCR 6.425 provides:

(A) Presentence Report; Contents. Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

* * *

(5) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,

Defendant did not allege at the sentencing hearing that his sentence should have been mitigated because of his medical or substance abuse history, or because of any mental illness or psychological condition. And, no mental health concern was raised or supported by the record evidence. Therefore, the trial court did not have reason to order a current mental health report for defendant before sentencing. When a defendant is sentenced within the recommended minimum sentence range under the legislative guidelines, as defendant was here, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant's challenges to his sentence lack merit.

Defendant next argues that the trial court violated his Sixth Amendment right to a jury trial by sentencing him based upon facts not found beyond a reasonable doubt by a jury. It is a violation of the Sixth Amendment for a trial court to increase a defendant's sentence beyond the

maximum sentence permitted by law on the basis of facts, other than a prior conviction, found by the court rather than the jury. US Const, Am VI; *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998). However, contrary to defendant's arguments, Michigan's sentencing scheme is not affected by the ruling in *Blakely, supra*, because it is an indeterminate scheme in which a trial court sets the minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Therefore, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* In addition, a defendant's prior record may be determined by a sentencing judge, without submitting the issue of prior convictions to a jury, without violating of the Fifth, Sixth or Fourteenth Amendments. *Almendarez-Torres, supra* at 230.

Defendant next argues that the trial court committed plain error by not granting him credit for the time he served in jail awaiting trial. Defendant did not object to the trial court's limited application of jail credit, and, therefore, we review this unpreserved issue for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A convicted defendant who served time in jail before sentencing is entitled to credit for time served against the sentence imposed pursuant to MCL 769.11b, if, and only if, he was held because he was denied or was unable to furnish bond. In the instant case, defendant did not initially serve time in jail because of an inability or denial of bond; rather, he was held on a parole detainer. "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. *People v Stewart*, 203 Mich App 432, 433-434; 513 NW2d 147 (1994); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). In this case, defendant did not initially serve time in jail because of an inability to pay or denial of bond; rather, he was held on a parole detainer. Therefore, he was not entitled to credit against any of his new sentences. *Stewart, supra* at 434.

Defendant next argues in his supplemental brief that he was denied the effective assistance of counsel by his trial counsel's failure to object to the prosecutor's attempt to introduce defendant's criminal history. Ineffective assistance of counsel is ultimately a question of law, which we review de novo. *LeBlanc, supra* at 579.

Defense counsel stipulated that defendant was convicted of a specified felony that prevented him from being allowed to lawfully possess a weapon. A defense attorney is allowed to stipulate to a particular element of a charge or to issues of proof, but may not stipulate to facts that are the "functional equivalent" of a guilty plea. *People v Fisher*, 119 Mich App 445, 447; 326 NW2d 537 (1982). Defendant was charged with being a felon in possession of a firearm. An element of that charge is defendant's status as a convicted felon. MCL 750.224f; *People v Tice*, 220 Mich App 47, 53; 558 NW2d 245 (1996). Defendant's trial counsel may have reasonably believed that stipulating that defendant had been convicted of a specified felony would minimize any potential prejudice to defendant. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Decisions about what evidence to present and whether to call or

question witnesses are generally matters of trial strategy, and this Court will not second-guess strategic decisions with the benefit of hindsight. *Dixon, supra*.

Defendant next argues that his trial counsel unreasonably introduced evidence of defendant's previous controlled substance abuse. However, the record clearly indicates that defendant's trial counsel made a strategic decision to use defendant's alleged substance abuse addiction to explain why defendant confessed to a crime he allegedly did not commit. We do not second guess trial counsel's strategic decisions with the benefit of hindsight. *Dixon, supra*.

Defendant also argues that he was deprived of his right to the effective assistance of counsel, and his Sixth Amendment right to confront his accuser, when the prosecutor introduced, without objection, evidence of an anonymous telephone call implicating defendant. Generally, a defendant's claim that evidence violated his right to confront the witnesses against him is reviewed de novo on appeal. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). However, because defendant failed to object, we review for plain error. *Carines, supra*. During the prosecutor's direct-examination of a police officer, the following exchange occurred:

Q. Okay. Did [defendant] make any other statements to you on that occasion?

A. . . . [Defendant] also admitted to me –I asked him if he was the PlayStation bandit – PlayStation 2 bandit because [the victim] had given me information about an anonymous call that he received saying that the person responsible for this case was the PlayStation 2 bandit. But I hadn't investigated that yet before I contacted [defendant]. He did tell me that he was the PlayStation 2 bandit.

The Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” US Const, Am VI. The Michigan Constitution also guarantees the same right. Const 1963, art 1, § 20. In *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court determined that the Confrontation Clause bars the admission of testimonial statements of witnesses absent from trial, unless the declaring witness is unavailable and the defendant had a prior opportunity to cross-examine the declaring witness. However, this rule does not apply to nontestimonial statements; it is limited to out-of-court testimonial statements offered to establish the truth of the matter asserted, and to “testimonial statements” made by a witness. *Davis v Washington*, 547 US 813, 823; 126 S Ct 2266; 165 L Ed 2d 224 (2006). A statement is testimonial when made as a formal declaration to government officers for the purpose of establishing a fact; such statements include affidavits, depositions, prior testimony, and confessions. *Crawford, supra* at 51-52. The tip given to the victim in this case, about which the police officer testified, was not testimonial, because it was not given to a law enforcement agent, but rather to the victim and, and there is nothing to suggest that the tipster was likely to believe that his tip would be used in a subsequent prosecution. Furthermore, even were we to conclude that the statement was testimonial, defendant has not shown that it resulted in prejudice to him. Two people identified defendant at trial as the assailant, one of those two people was able to select defendant's photograph in an array after the incident, and defendant confessed to the instant offenses twice. Therefore, defendant cannot establish that the brief reference to the tipster's statement was outcome determinative, and reversal is not warranted. *People v*

Lukity, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Murray*, 234 Mich App 46, 63-64; 593 NW2d 690 (1999); *People v Lewis*, 168 Mich App 255, 266-267; 423 NW2d 637 (1988).

Defendant next argues that he was denied his due process right to a fair trial by substantial prosecutorial misconduct. Generally, we review claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, because the alleged error was not preserved by a contemporaneous objection and request for a curative instruction, appellate review is for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To avoid forfeiture under the plain error rule, three requirements must be met; (1) an error must have occurred; (2) the error must have been plain; and (3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of lower court proceedings. *Carines, supra* at 763-764. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 774. No error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *Watson, supra; People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant argues that the prosecutor committed misconduct by referring to defendant as a "drug addict" during his opening statement. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). While a prosecutor must avoid inflaming the prejudices of the jury, he need not phrase his statements in the blandest possible terms. *Id.* At trial, the references to defendant's use of controlled substances were used to show a possible motive for defendant's robbery. However, regardless whether the prosecutor's references to defendant's controlled substance use were improper, defendant does not show that admission of the testimony resulted in a miscarriage of justice. Defendant did not object at trial, and this Court will not find a miscarriage of justice if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Watson, supra*. More importantly, there was overwhelming evidence implicating defendant in the instant offenses and associating defendant with drug use. There was no plain error requiring reversal.

Defendant next argues that the prosecutor impermissibly disclosed prior bad acts of defendant when he elicited the above-mentioned testimony that defendant was known as the "Playstation 2 Bandit." Even if the challenged evidence was improperly admitted, considering the overwhelming evidence implicating defendant in the instant offenses, defendant cannot show that its admission resulted in a miscarriage of justice. Further, the trial court could have, if requested by defendant, provided a limiting instruction to the jury, consistent with MRE 105. *Id.*

Defendant finally argues that the prosecutor committed misconduct by informing the jury, during his opening statement, that a police officer would testify that defendant was "on probation so a parole hold was orally issued for [defendant's] arrest." In light of the fact that in his opening statement defendant's trial counsel used defendant's parole status to explain why defendant confessed to crimes he allegedly did not commit, and in light of the overwhelming

evidence against defendant, we are not persuaded that a miscarriage of justice occurred. There was no prosecutorial misconduct requiring reversal.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette