

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYLE ALEXANDER YBARRA,

Defendant-Appellant.

UNPUBLISHED

December 13, 2011

No. 301243

Jackson Circuit Court

LC No. 09-005864-FC

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Kyle Alexander Ybarra appeals as of right his jury trial conviction of two counts of armed robbery,¹ and one count of conspiracy to commit armed robbery.² Ybarra was sentenced to three concurrent terms of eight to 20 years in prison with 114 days credit. We affirm.

On August 1, 2009, Devon Glenn, Jr. and Georval Pennington robbed Buddy's Mini Mart Gas Station in Jackson, Michigan. Before the robbery, Ybarra spoke with Glenn and Pennington about the robbery, knew that they had what appeared to be a firearm, scouted the place and told them how many people were in the gas station, and dropped Glenn and Pennington off to commit the robbery. Ybarra then waited in his car across the street from Buddy's Mini Mart to drive Glenn and Pennington away after the robbery.

During the robbery, either Glenn or Pennington held an Airsoft sawed off shotgun that appeared to be a real gun. The store clerk and his friend were then physically struck by one or both men. Glenn and Pennington took cash from the store and then ran across the street to where Ybarra was waiting in his car. While crossing the street, Glenn and Pennington were nearly hit by an Expedition. The Expedition turned around, and either Glenn or Pennington pointed the gun inside the Expedition at the driver and the front seat passenger. The driver of the Expedition, who was an off duty police officer, then pulled out a handgun. Glenn and Pennington ran away, and the off duty police officer fired one round at the ground near the man

¹ MCL 750.529.

² MCL 750.157a; MCL 750.529.

who pointed the gun at him. Ybarra then drove away at a high rate of speed and the Expedition followed. A high speed chase ensued until the police stopped Ybarra's car.

On appeal, Ybarra first argues that there was insufficient evidence to support two convictions of armed robbery. We disagree.

“[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.”³ Ybarra's sole argument is that he could not be convicted of armed robbery of the store clerk's friend because nothing was taken from the friend and Ybarra had no greater interest in the store's property than the robbers did. Ybarra's argument, however, is premised on statutory language that is no longer in effect. The elements of armed robbery after the 2004 amendment are based on the statutes for robbery⁴ and armed robbery⁵ being read together.⁶ Armed robbery has occurred if: (1) “[a] person who, in the course of committing a larceny . . . uses force or violence against any person who is present, or who assaults or puts the person in fear,”⁷ and (2) the individual “possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe that the article is a dangerous weapon.”⁸ “[T]he crime of armed robbery . . . also encompasses attempts to commit that offense.”⁹ Therefore, based on the statutory interpretation, a completed larceny is not necessary to meet the required elements of armed robbery.¹⁰

The elements of armed robbery are met for both the store clerk and his friend. Ybarra's conspirators, in the course of committing a larceny at the store, struck the store clerk and possessed what appeared to be a dangerous weapon. Similarly, Ybarra's conspirators struck the clerk's friend and possessed what appeared to be a dangerous weapon in the course of committing a larceny. As such, there was sufficient evidence for a rational jury to find that two counts of armed robbery were proven beyond a reasonable doubt.

Ybarra also contends that he was denied effective assistance of counsel when defense counsel: (1) failed to challenge one of the armed robbery counts, (2) failed to provide Ybarra with information regarding the sentencing consequences of accepting and rejecting the proposed

³ *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992).

⁴ MCL 750.530.

⁵ MCL 750.529.

⁶ *People v Williams*, 288 Mich App 67, 73; 792 NW2d 384 (2010).

⁷ MCL 750.530; See also *Williams*, 288 Mich App 72.

⁸ MCL 750.529; See also *Williams*, 288 Mich App 73.

⁹ *Id.* at 74.

¹⁰ *Id.* at 82.

plea agreement, (3) pursued an unreasonable trial strategy, and (4) failed to object to the scoring of sentencing guidelines. We disagree.

There was no evidentiary hearing regarding ineffective assistance of counsel so this Court's review is limited to mistakes apparent on the record.¹¹ To establish a claim of ineffective assistance of counsel, Ybarra "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial."¹² There is a strong presumption that defense counsel's actions were a sound trial strategy.¹³

First, defense counsel was not ineffective when he failed to challenge one of the two counts of armed robbery as the evidence supports two counts of armed robbery. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion."¹⁴

Second, Ybarra asserts that defense counsel was ineffective by failing to give him information on the sentencing consequences of accepting and rejecting a plea agreement. Generally, failure to inform a defendant of sentencing consequences if convicted at trial as opposed to those of accepting a guilty plea can be the basis of an ineffective assistance of counsel claim.¹⁵ Here, defense counsel was not ineffective as there is nothing in the record to show that defense counsel failed to inform Ybarra of the sentencing consequences. Because Ybarra has not established the factual predicate for his claim,¹⁶ he has not shown that trial counsel's representation fell below an objective standard of reasonableness.¹⁷

Third, defense counsel was not ineffective when he asked the jury to find Ybarra guilty of conspiracy to commit armed robbery, but not guilty of two counts of armed robbery. Because Ybarra was 16 years old at the time of the offense, a conviction for conspiracy to commit armed robbery would not have required him to be sentenced as an adult, unlike a conviction for armed robbery. Even if there were other strategies, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight."¹⁸ Therefore, Ybarra is unable to show that defense counsel's representation fell below an objective standard of reasonableness. Even if counsel fell below an objective standard of reasonableness, Ybarra cannot establish that but for counsel's conduct, the

¹¹ *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

¹² *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

¹³ *Id.*

¹⁴ *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

¹⁵ *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010).

¹⁶ *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

¹⁷ *Toma*, 462 Mich at 302.

¹⁸ *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

result of the trial would have been different.¹⁹ The evidence against Ybarra was overwhelming, as his conspirators, the robbery victims and the occupants of the Expedition all testified against him. As such, Ybarra was not denied effective assistance of counsel.²⁰

Fourth, Ybarra asserts that defense counsel was ineffective because he failed to make appropriate objections to the scoring of the offense variables. As will be discussed below, there was no error in the scoring of the offense variables, so defense counsel was not ineffective in failing to object.²¹

Finally, Ybarra argues that resentencing is required because offense variables (OVs) 12, 13, and 19 were improperly scored. We disagree. When a scoring issue is unpreserved, as OV 12 and OV 13 are here, this Court's review is for plain error affecting a defendant's substantial rights.²² The scoring of OV 19 was preserved. While the "interpretation and application of the statutory sentencing guidelines" are reviewed de novo,²³ a trial court's scoring decision is reviewed for an abuse of discretion.²⁴ When there is any support for a scoring decision, that decision will be upheld.²⁵ "Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence."²⁶

OV 12 is properly scored at five points if "[t]wo contemporaneous felonious criminal acts involving other crimes were committed,"²⁷ or if "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed."²⁸ A felonious criminal act is contemporaneous if the criminal act occurred within 24 hours of the sentencing offense and the criminal act has not and will not result in a separate conviction.²⁹ When there is a conspiracy, "each conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all conspirators."³⁰ In this case, Glenn and Pennington pointed the gun at the occupants of the Expedition while fleeing Buddy's Mini Mart but before reaching Ybarra's car. This

¹⁹ *Id.* at 58-59.

²⁰ *Toma*, 462 Mich at 302.

²¹ *Riley*, 468 Mich at 142.

²² *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

²³ *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

²⁴ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

²⁵ *Id.*

²⁶ *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

²⁷ MCL 777.42(1)(e).

²⁸ MCL 777.42(1)(d).

²⁹ MCL 777.42(2)(a)(i) and (ii).

³⁰ *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997).

comprises a felonious assault³¹ that did not result in a separate conviction.³² Ybarra is responsible for the felonious assault as a conspirator because the assault took place during flight from the armed robbery.³³ Thus, there is evidence in the record to support scoring OV 12 five points and the trial court did not err.³⁴

OV 13 is properly scored at 25 points if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.”³⁵ In scoring this variable, all crimes committed within a five year period are considered, including the sentencing offense and without regard to whether the offense resulted in a conviction.³⁶ Ybarra again argues that he should not have been convicted of two counts of armed robbery, and without the second armed robbery conviction, there were not three crimes against a person to be scored. As discussed above, Ybarra was properly convicted of two counts of armed robbery, so OV 13 was properly scored.

Last, OV 19 is properly scored at ten points if “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.”³⁷ “The investigation of crime is critical to the administration of justice.”³⁸ The record shows that Ybarra provided officers with different stories regarding what happened and his involvement in the armed robbery. Such false information constituted interference with the administration of justice.³⁹ As there was evidence to support scoring OV 19 at ten points, there was no abuse of discretion by the trial court in

³¹ MCL 750.82.

³² MCL 777.42(2).

³³ MCL 750.530; *Grant*, 455 Mich at 236.

³⁴ *Kimble*, 470 Mich at 312.

³⁵ MCL 777.43(1)(c).

³⁶ MCL 777.43(2)(a).

³⁷ MCL 777.49(c).

³⁸ *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

³⁹ *Id.*

doing so.⁴⁰ Since Ybarra's sentencing variables were properly scored, he is not entitled to resentencing.⁴¹

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

⁴⁰ *Hornsby*, 251 Mich App at 468.

⁴¹ *Id.*