

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS TRICE, a/k/a TRAVIS SCOTT, a/k/a
JOHN WRIGHT, a/k/a TRAVIS EUGENE
VINES,

Defendant-Appellant.

UNPUBLISHED

June 26, 2003

No. 235920

Wayne Circuit Court

LC No. 00-009642-01

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He now appeals and we affirm.

Defendant was charged with two counts of armed robbery, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, and felony-firearm in connection with a robbery and shooting at a gas station. At trial the evidence showed that two men, one of whom was defendant, approached Artize McCurry at a gas station, displayed weapons, and demanded money. Defendant shot McCurry twice as McCurry attempted to retrieve his money from his pocket. Defendant approached McCurry's vehicle and took a purse belonging to Michelle Martin. As defendant and the other man left the scene they fired shots and wounded McCurry a third time. McCurry and Martin testified unequivocally that defendant shot McCurry and took Martin's purse. The jury found defendant guilty of two counts of armed robbery, assault with intent to do great bodily harm less than murder as a lesser included offense of assault with intent to commit murder, felon in possession of a firearm, and felony-firearm.

The applicable statutory sentencing guidelines as calculated by the probation agent recommended a minimum term range of 171 to 285 months for the convictions of armed robbery. At sentencing the trial court granted the prosecutor's request to score Offense Variable 7, MCL 777.37, aggravated physical abuse, at fifty points rather than at zero points on the ground that McCurry was terrorized or treated with excessive brutality during the incident. The trial court denied defendant's request to score OV 14, MCL 777.44, offender's role, at zero points rather than at ten points on the ground that he was not a leader in the incident. The

revised sentencing guidelines recommended a minimum term range of 171 to 356 months for armed robbery. The trial court sentenced defendant to concurrent terms of twenty-eight to fifty years for armed robbery, six and one-half to ten years for assault with intent to commit great bodily harm less than murder, and two and one-half to five years for possession of a firearm by a felon, and to a consecutive two-year term for felony-firearm. Defendant received credit for 293 days served in jail. The minimum terms for armed robbery and assault with intent to do great bodily harm less than murder were within the revised guidelines.

At the time of defendant's offense, the scoring of OV 7 at fifty points was appropriate based on a finding that the victim was treated with "terrorism, sadism, torture, or excessive brutality."¹ Offense Variable 7 defined "terrorism" as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a).

The scoring of OV 14 at ten points is appropriate based on a finding that the defendant was a "leader in a multiple offender situation." In determining the proper scoring for OV 14, the circumstances surrounding the "entire criminal transaction should be considered." MCL 777.44(2)(a).

Defendant argues that the trial court erred in scoring OV 7 at fifty points and in scoring OV 14 at ten points, and that he is entitled to resentencing on his convictions of armed robbery and assault with intent to do great bodily harm less than murder.² He asserts that no evidence supported a finding that McCurry was subjected to terrorism or excessive brutality, or that he acted as the leader in the incident. We disagree and affirm defendant's sentences. In calculating the sentencing guidelines, the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Contrary to defendant's assertion, the trial court did not score the guidelines based on the original charge of assault with intent to commit murder. The trial court scored the guidelines for all of defendant's conviction offenses, with the most serious conviction offense being armed robbery. The evidence showed that defendant shot McCurry twice as McCurry was cooperating and attempting to retrieve his money from his pocket. The fact that McCurry was shot and seriously injured during the incident had been considered in scoring other Offense Variables; however, the trial court properly considered this evidence in the context of scoring OV 7. The evidence supported the trial court's finding that defendant's act of shooting McCurry was not necessary to accomplish the armed robbery, but was done to increase his fear and anxiety, and supported the scoring of OV 7 at fifty points. *Id.* The evidence that defendant shot McCurry twice and took Martin's purse supported the scoring of OV 14 at ten points. *Id.* Defendant's

¹ 2002 PA 137, effective April 22, 2002, deleted "terrorism" from the list of behaviors in MCL 777.37 that warrant a score of fifty points for OV 7. Terrorism is now defined in OV 20, MCL 777.49a, to include behaviors associated with the use of or the threat to use biological, chemical, or radioactive devices or substances, or incendiary or explosive devices. The prior version of MCL 777.37 applies in this case. See MCL 769.34(2).

² Defendant does not challenge his sentences for his other convictions.

minimum terms for the convictions of armed robbery and assault with intent to do great bodily harm less than murder were within the guidelines as properly scored by the trial court. Defendant is not entitled to resentencing on these convictions. MCL 769.34(10).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

During voir dire a potential juror stated that she had been the victim of a robbery five years earlier, and that defendant resembled the person who robbed her. She was excused for cause. Defendant argues that trial counsel rendered ineffective assistance by failing to request that an entirely new panel be assembled or that the trial court caution the other potential jurors to disregard this person's statement. We disagree. Defendant did not preserve this issue by moving in the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), or for a new trial. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Therefore, our review is limited to the facts on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Trial counsel's decision to avoid calling further attention to the potential juror's remark by requesting that the panel be replaced or that the trial court give a cautionary instruction constituted trial strategy. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The trial court instructed the jury both before and after evidence was introduced that it could consider only properly admitted evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Furthermore, McCurry and Martin testified unequivocally that defendant shot McCurry and took Martin's purse. The evidence against defendant was overwhelming. Defendant has not shown the existence of prejudice in that he has not shown that but for counsel's errors, the result of the proceedings would have been different. *Carbin, supra*. Defendant has not overcome the presumption that counsel rendered effective assistance. *Rockey, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette