

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLORIA MARIE AGUILAR,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 261725

Kalamazoo Circuit Court

LC No. 04-001484-FH

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of first-degree home invasion, MCL 750.110a(2), and unarmed robbery, MCL 750.530. Because we conclude that defendant was not deprived of the effective assistance of counsel, nor did the trial court err in denying defendant's motion for directed verdict, or in its imposition of sentence, we affirm. In affirming, we also hold that defendant was not deprived of her due process and equal protection rights by virtue of the admission of unsworn testimony.

Defendant was charged with home invasion, unarmed robbery, and possession of a controlled substance in connection with property that was taken from Adrian Timmer's home. The prosecution presented testimony that Mr. Timmer befriended defendant and occasionally gave her money or bought her items when she requested them. Mr. Timmer indicated that at one point he told defendant she was not welcome at his home, but that defendant nevertheless showed up, pushing her way into his home. Defendant thereafter assaulted Mr. Timmer and took money and prescription drugs from his home. A jury ultimately convicted defendant of the home invasion and unarmed robbery charges and defendant was sentenced as a fourth habitual offender to 20 to 40 years and 15 to 40 years, respectively.

I. Ineffective Assistance

Defendant first argues on appeal that her counsel was ineffective for failing to raise and preserve an insanity or temporary insanity defense. We disagree.

Claims of ineffective assistance of counsel involve a mixed question of law and fact. The trial court must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court's factual findings

for clear error, and the trial court's constitutional determinations are reviewed de novo. *Id.* If, as here, a claim of ineffective assistance of counsel is not preceded by an evidentiary hearing or a motion for new trial before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that counsel did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the point where the defendant was deprived of a fair trial and a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.*

Defendant's claim of ineffective assistance is based upon trial counsel's failure to have her evaluated for insanity/temporary insanity by a medical professional. Defendant contends that her history of substance abuse, her diagnosis of depression, and her past suicide attempts should have prompted an evaluation. However, an insanity defense would have been entirely inconsistent with the defense presented at trial. Defense counsel's strategy exploited the inconsistencies between Mr. Timmer's story and defendant's, in order to support the defense theory that defendant did not commit the crimes charged. An insanity defense, on the other hand, is an affirmative defense used to avoid or reduce criminal responsibility. *People v Carpenter*, 464 Mich 223, 237-238; 627 NW2d 276 (2001), reh den 465 Mich 1201 (2001). By use of that defense, the defendant does not deny his criminal conduct but denies responsibility for that conduct. While defendant could have presented inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), reh den 454 Mich 1220 (1997), doing so would have weakened the chosen defense at trial. Additionally, the chosen defense provided the possibility of acquittal, while the insanity defense would have merely provided an excuse for admitted criminal conduct.

Defense counsel's decision to pursue an innocence defense appears to be a matter of professional judgment as to trial strategy. Decisions regarding what evidence to present are matters of trial strategy, which this Court will not review with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Additionally, this Court will not reverse where the failure to raise an insanity defense is a question of trial strategy. *People v Lotter*, 103 Mich App 386; 302 NW2d 879 (1981).

More importantly, on the record before this Court, there is no evidence to support the validity of an insanity defense. In order to prevail on an insanity defense, a defendant is required to show by a preponderance of the evidence that "as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked 'substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirement of the law.'" *Carpenter, supra*, 464 Mich 230-231, quoting MCL 768.21a(1). Nothing about defendant's past suggests that she lacked the substantial capacity to appreciate the wrongfulness of her conduct or conform to the law. To support that her insanity defense was viable, defendant simply notes that her PSIR indicates that she attempted suicide

twice in the past, and has been depressed for most of her life. However, these are self-reported and there is no indication defendant ever received formal mental health treatment for depression.

Finally, defendant's depression does not support the existence of legal insanity. The fact that a defendant suffers from a mental illness or retardation, which does not reach the insanity threshold, is insufficient to support an insanity defense. *Carpenter, supra*, 464 Mich 226. This Court has recognized that a defendant may have a partial defense based on insanity 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), lv den 442 Mich 884 (1993). However, voluntary intoxication is not grounds for an absolute defense based on insanity. *Id.* Defendant has failed to present any evidence that she was involuntarily under the influence of drugs or alcohol on July 20, 2004. The record, then, does not support that a potentially viable insanity defense existed which should have been investigated by defense counsel.

II. Admission of Evidence

Defendant next argues that she was deprived of her due process and equal protection rights by virtue of the trial court's allowance of unsworn testimony and other bad acts evidence. We disagree.

Because defendant did not object to either allegation of error at trial, this issue is unpreserved. We review unpreserved alleged constitutional issues for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture of a constitutional right under the plain error rule, three requirements must be met: 1) an error must have occurred, 2) the error was clear or obvious, and 3) the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*

MRE 603 provides:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

It is undisputed that Mr. Zimmer was not sworn in as a witness when he took the witness stand. It appears from the record that the trial court intended to have Mr. Zimmer sworn in, but became somewhat distracted as Mr. Zimmer took the stand, warning him to be careful as he entered the witness box, and instructing him on the use of the microphone. The prosecution then launched into questioning Mr. Zimmer without the benefit of an oath or affirmation as to the truthfulness of his statements, and neither the prosecution nor the defense commented on this issue at trial. The trial then proceeded as though Mr. Zimmer had been sworn.

Our Supreme Court first addressed an issue concerning sworn witness testimony in *Mattetal v Hall*, 288 Mich 200; 284 NW 698 (1939). In that case, the plaintiff brought the case on behalf of Eliza Dunning, an elderly woman who was allegedly mentally incompetent, in order to set aside a real estate transaction between Dunning and the defendants. *Id.* at 203-206. At a

hearing, the plaintiff testified that Dunning was 83 years old and weak, and therefore, she was unable to travel to the courtroom. *Id.* at 206. However, upon plaintiff counsel's suggestion, he, the trial court, the court reporter, the plaintiff, and the defendants' counsel traveled to view the property in question and to interview Dunning. *Id.* Dunning gave an unsworn statement at the interview. The defendant's counsel indicated that he did not object to the trip, but he questioned the value of Dunning's testimony on the grounds that she was declared insane. *Id.* at 206-207. The defendant later objected to the trial court's reliance on her statement. Our Supreme Court stated:

Witnesses should give their testimony under oath. But, there was a waiver of the provisions of the law. And where the provisions of the law are waived in the conduct of a trial, they cannot afterwards be set up by way of objection to any step taken upon the footing of such waiver.

* * *

Defendants had a right to insist upon Mrs. Dunning being sworn. It fairly appears that defendants' counsel waived the administration of an oath to Mrs. Dunning as a condition precedent to her testifying. He could at the time of the interview have insisted upon her being sworn. Not having done so, but having consented to her examination by the trial court without the administration of an oath, defendants are now estopped from questioning the admissibility of her testimony. To permit defendants here to repudiate what they acquiesced in in [sic] the trial court would not only be prejudicial to plaintiff but work a fraud on the court. [*Id.* at 207-208].

More recently, this Court decided *People v Knox*, 115 Mich App 508; 321 NW2d 713 (1982), wherein the defendant's probation was revoked and he was sentenced for his original convictions, after he failed to return to the halfway house where he was required to stay during the first year of his employment. *Id.* at 510-511. The defendant claimed that his probation revocation should be reversed because the two probation officers who testified against him did not take an oath before testifying. *Id.* at 511. This Court stated,

The Revised Judicature Act of 1961 mandates that witnesses in court proceedings take an oath or make an affirmation that their testimony will be true. MCL 600.1432; MSA 27A.1432, MCL 600.1434; MSA 27A.1434. See, also, MRE 603. In this case, however, defense counsel did not object to the failure of the trial court to insist upon an oath or affirmation. Accordingly, this issue is not preserved for appeal. *People v Kemmis*, 153 Mich 117, 118; 116 NW 554 (1908); *Mettetal v Hall*, 288 Mich 200, 207-208; 284 NW2d 698 (1939). [*Id.*]

We find the same holds true here. As previously noted, there was no objection or comment made with respect to the failure to swear Mr. Timmer as a witness. Pursuant to *Mattetal* and *Knox*, then, any claim of error premised upon the failure is forfeited.

Moreover, this Court notes that despite the irregularity, defendant, through her trial counsel, had the opportunity to, and did, fully cross-examine and recross-examine Mr. Timmer at trial. Additionally, if defendant objected to the trial court's failure to administer an oath to Mr. Timmer at trial, the trial court could have corrected its mistake by administering an oath to Mr.

Timmer and having him testify again. As defense counsel, the prosecutor, nor the trial court realized that Mr. Timmer was not sworn before he testified, this occurrence did not change the way in which the trial was conducted, and there is no indication that Mr. Timmer would have testified differently if an oath was administered to him before he testified. Likewise, there is no indication that Mr. Timmer provided untruthful testimony. In fact, his testimony was generally corroborated by the other witnesses at trial, and by defendant as well, as she admitted to entering Mr. Timmer's home and bedroom on the morning of July 20, 2004, but contested the circumstances surrounding her presence. Trial proceeded as if the oath was given, and it was not until the appeal that the problem was noted. Defendant thus cannot demonstrate that the plain and obvious error by the trial court in not administering an oath affected the outcome of trial.¹

Defendant also challenges the admission of Detective Szekely's testimony that, after he described the incident in the present case to another detective, that detective opined that it "sounds a lot like Gloria Aguilar who has been a suspect in several larceny cases." Defendant argues that this testimony was inadmissible under MRE 404(b), which prohibits the introduction of evidence of other crimes, wrongs, or acts of an individual to prove a propensity to commit such acts. However, other bad-acts evidence may be admissible for other purposes under MRE 404(b)(1), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Here, the challenged evidence was introduced for the proper purpose of demonstrating how Detective Szekely identified defendant as "Marie Rodriguez." Because Mr. Timmer knew defendant as "Marie Rodriguez," testimony concerning defendant's use of another name, which happened to be her true name, was necessary to demonstrate that defendant was the person that Mr. Timmer knew as "Marie Rodriguez." Once Detective Szekely arrived at the conclusion that "Marie Rodriguez" and "Gloria Aguilar" were the same person, he put together a six-person photographic lineup of recently arrested people of similar age and features, including defendant, for Mr. Timmer to view. Mr. Timmer immediately selected defendant as the person who came into his house and robbed him. This testimony was admissible for the proper purpose of demonstrating how defendant's identity as the suspect in the present case was established. See *People v Pointer*, 133 Mich App 313, 315; 349 NW2d 174 (1984), (upholding the introduction of

¹ Defendant has not raised a claim of ineffective assistance of counsel, with respect to defense counsel's lack of objection to the trial court's failure to administer an oath to Mr. Timmer, in her statement of questions presented, as required by MCR 7.212(C)(5). Thus, this Court may consider this portion of this issue abandoned. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

testimony about the defendant's arrest for a different crime, for the limited purpose of establishing the defendant's identity as the perpetrator of the charged crime.).

Furthermore, on this record, there is no reason to assume that the jury used the evidence for an unduly prejudicial purpose, such as improper character evidence, rather than as evidence bearing on identity. The trial court read two limiting instructions to the jury pursuant to MRE 105, including one which immediately followed Detective Szekely's testimony:

Members of the jury, you just heard some evidence about a prior arrest or arrests involving the defendant. And that evidence is not substantive evidence and you may not use it to determine any facts or you may not infer that because she's been arrested before that there's any probability or this impacts on the presumption of innocence. But as you may recall, there was a name and then a link to this defendant under a different name, so that evidence came in only to show you why this detective was looking at this particular defendant and why he showed this picture to this gentleman who testified earlier, and for no other purpose.

A jury is presumed to follow the trial court's limited use instruction. *People v Frazier (After Remand)*, 446 Mich 539, 542; 521 NW2d 291 (1994). Because the evidence was relevant and its probative value was not substantially outweighed by unfair prejudice, we find no error.

III. Sufficiency of Evidence

Defendant next argues that her motion for directed verdict should have been granted because there was insufficient evidence to convict her of first-degree home invasion. We disagree.

This Court reviews sufficiency of the evidence claims de novo. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court reviews the evidence presented in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court employs a similar standard in reviewing a trial court's decision on a motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993), lv den 445 Mich 857 (1994), cert den 527 US 1040; 119 S Ct 2403; 144 L Ed 2d 802 (1999).

In order to establish first-degree home invasion, the prosecution must establish that defendant, while armed with a dangerous weapon or while another person is lawfully present in the dwelling, either (1) broke and entered a dwelling or entered a dwelling without permission with the intent to commit a felony, larceny, or assault, or (2) broke and entered a dwelling or entered a dwelling without permission and while entering, present in, or leaving the dwelling, committed a felony, larceny, or assault. MCL 750.110a(2). According to defendant, the prosecution failed to establish that she entered Mr. Timmer's home without permission.

This Court first notes that to the extent defendant's argument depends upon her challenge to Mr. Timmer's testimony, this issue was previously discussed and defendant's argument as to the same found to be without merit (see section II). Mr. Timmer's testimony is thus considered here.

The evidence presented supports a conclusion that defendant entered Mr. Timmer's home without permission on July 20, 2004. Mr. Timmer testified that he helped defendant, financially or otherwise, six or seven times following their initial meeting in the spring of 2003. However, Timmer stopped helping defendant in December 2003, because he believed that defendant defrauded him. At that time, he told defendant to stop coming to his home and asking him for help. Nonetheless, defendant went to Timmer's house in January 2004, March 2004, and April 2004, and rang his doorbell. Timmer did not answer his door.

On July 20, 2004, at 7:45 a.m., Mr. Timmer was home alone when he heard a knock on the side door, and heard someone open the "cat" door and call out "Adrian." He thought Doris Roe was at the door, so he got up to answer it. Mr. Timmer was recovering from recent surgery, so was weak and had a hard time getting up. Mr. Timmer unlatched the chain on the door, and unlocked the door, but he did not open it. The person on the other side opened the door and walked in. Timmer saw that the person was defendant and told her to leave. Defendant sat down and asked him for money. Mr. Timmer then told defendant that he did not have any money and did not want her at his house. Officer Milton also testified that Mr. Timmer told him that, when he discovered that defendant was the person at the door, he told her that she was not welcome there. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational juror to find that defendant entered Timmer's home without permission.

Defendant also contends that the prosecution failed to establish that she was armed with a dangerous weapon. MCL 750.110a(2) does not, however, require that a defendant be armed with a dangerous weapon in order to be convicted of first-degree home invasion. Rather, the prosecution must prove either that the defendant was armed with a dangerous weapon or that another person was lawfully present in the dwelling at the time of the offense. MCL 750.110a(2)(a)-(b). The evidence clearly demonstrated that Mr. Timmer was lawfully present in his home at the time of the offense. Given that sufficient evidence to convict defendant of first-degree home invasion was presented during trial, the trial court appropriately denied defendant's motion for directed verdict.

IV. Sentencing

Defendant lastly argues on appeal that the sentence imposed upon her was in violation of the United States and Michigan constitutions. Defendant claims entitlement to resentencing due to the trial court's failure to consider and give proper weight to key facts about her background and the offenses at issue. We disagree.

This Court reviews unpreserved issues of alleged constitutional error under the plain error standard. *People v Carines*, supra. Here, defendant's sentences are within the applicable guidelines range. When a defendant is sentenced within the recommended minimum sentence range under the legislative guidelines, 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).

Because her sentences are within the applicable guidelines range, they are presumed proportionate, and therefore, defendant's argument that her sentences constitute cruel and unusual punishment necessarily fails. *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003), lv den 469 Mich 1045 (2004). Further, despite defendant's claim that her mental illness and drug addiction entitled her to a downward departure, she has demonstrated nothing exceptional about these circumstances that would support a departure. A trial court may depart from the sentencing guidelines for substantial and compelling reasons. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). Only reasons that are objective and verifiable and "keenly" or "irresistibly" grab the court's attention will justify a departure. *Id.* Even if defendant's drug and mental problems were objective and verifiable, they do not keenly or irresistibly grab attention and warrant a downward departure. Indeed, defendants in criminal matters are not infrequently addicted to some drug or another.

Finally, defendant's argument that her sentences violated the rule of law set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is without merit. Defendant argues that under *Blakely*, the facts supporting her sentence must either be admitted by defendant or determined by a jury. However, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court confirmed that the rule of law announced in *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. The Court stated, "we reaffirm our statement from *Claypool*, *supra* at 730 n 14, that 'the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment.'" *Id.* at 164. It reasoned,

Under Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. MCL 769.8(1). . . . As 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.*].

Blakely being inapplicable, defendant's reliance upon the same is misplaced.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto