

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEDRICK DAWUD MCKALPAIN,

Defendant-Appellant.

UNPUBLISHED

October 11, 2007

No. 270209

Oakland Circuit Court

LC No. 2006-206564-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEDRICK DAWUD MCKALPAIN,

Defendant-Appellant.

No. 270210

Oakland Circuit Court

LC No. 2006-206455-FH

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In LC No. 2006-206564-FC, defendant was convicted by a jury of unarmed robbery, MCL 750.530. In LC No. 2006-206455-FH, defendant was convicted, following a bench trial, of stealing or retaining a financial transaction device without consent, MCL 750.157n(1), and larceny in a building, MCL 750.360. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 30 years' imprisonment for the robbery conviction, and 2 to 15 years each for the larceny and theft of a financial transaction device convictions, all sentences to be served concurrently with each other, but consecutive to the remaining portion of a sentence for an offense for which defendant was on parole when he committed the instant offenses. Defendant has separately appealed as of right his convictions and sentences in each case. We affirm.

I. Basic Facts

Defendant's unarmed robbery conviction arises from the robbery of a 7-11 store. According to the store clerk, defendant ordered him to open two cash drawers while pointing straight at the clerk with something from under his coat. The clerk believed that defendant was

armed and complied with defendant's command. Defendant stole all the money from the cash drawers. He thereafter escorted the clerk to the store's mop room and threatened to kill him if he alerted the police. Defendant then fled the scene. Defendant was identified by the clerk in a photographic lineup, there was video surveillance footage from store cameras showing defendant entering and exiting the store around the time of the robbery, and defendant confessed to police that he committed the robbery, although asserting that no weapon was actually used.

Defendant's convictions for larceny in a building and stealing or retaining a financial transaction device arise from an incident in which he stole a purse and used a Target store gift card that he found in the purse to buy goods. In the bench trial, the parties stipulated to defendant's participation in the theft and his unauthorized use of the gift card; however, defendant unsuccessfully maintained that the gift card did not constitute a financial transaction device for purposes of the statute.

II. Effective Assistance of Counsel

Defendant first argues that trial counsel was ineffective in the robbery case because counsel did not move to suppress a videotaped police interview in which defendant confessed to the robbery. Defendant maintains that the confession was not voluntarily made and that portions of the interview contained references to other bad acts committed by defendant and his criminal history.

Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*¹ hearing, our review is limited to mistakes apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Whether a defendant has been denied the right to effective assistance of counsel is a mixed question of fact and constitutional law that this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court concisely expressed the basic principles involving a claim of ineffective assistance of counsel, stating:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the

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

proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A. Voluntariness

“A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.” *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A confession or waiver of a defendant’s constitutional rights must be made without intimidation, coercion, or deception, and it must be the product of the defendant’s essentially free and unconstrained choice. *Akins, supra* at 564.

In this case, defendant merely asserts that the record is silent with regard to whether the voluntariness requirement was satisfied. However, a silent record does not support a claim of ineffective assistance of counsel; rather, it is incumbent on defendant to establish factual support for his claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Here, there is no basis in the record for concluding that defendant’s custodial statement was not voluntarily made. On the contrary, a review of defendant’s videotaped police interview discloses that defendant told the interrogating officer that he understood that he was waiving his rights and that he agreed to give a statement. There is nothing in the videotape suggesting that defendant’s statement was involuntary. Because a defense attorney is not required to make futile motions, *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003), counsel was not ineffective for failing to move for suppression of defendant’s statement.

B. References to Other Bad Acts

Defendant also argues that defense counsel was ineffective for failing to object to portions of the videotaped interview in which defendant referred to his plan to buy marijuana with the stolen money and in which there were references to defendant’s criminal history. The record discloses that defense counsel indeed objected to the admission of defendant’s police interview before trial because of the references to other bad acts. The trial court indicated that it would address the matter later. At trial, the prosecutor stated that he intended to play only “brief portions” of the interview for the jury, without any objection by defense counsel. The videotape was admitted at trial. A copy of the videotape was provided on appeal, but it consists of defendant’s entire police interview. Although it is apparent from the record that only a brief portion of the videotape was played for the jury, it is not apparent from either the trial transcript or the videotape which specific portions were actually played. However, the prosecutor commented at trial that the statements on the videotape were difficult to hear, so he questioned the interrogating officer about the statements that were played for the jury. The officer testified that the videotape accurately reflected defendant’s statements that he committed a robbery, that he entered the store twice, the first time to look around and the second time to do the robbery, and that, although he did not have a gun, he might have had a pen or something to that effect. There was no reference to defendant’s unrelated bad acts or criminal history during the prosecutor’s questioning.

On this record, we conclude that defendant has failed to show that defense counsel was ineffective. First, the record discloses that defense counsel moved to exclude the videotaped interview because of the objectionable material, but did not object at trial after the prosecutor agreed to play only “brief portions.” Second, the videotaped interview was approximately 48 minutes long, but only four minutes of the interview were played at trial. Third, the prosecutor questioned the interrogating officer about the portions of the interview that were played at trial, and there is no reference to defendant’s other bad acts or criminal history during this questioning. In light of this record, we find no basis for concluding that the objectionable portions of the interview were actually played for the jury and, accordingly, we reject defendant’s claim of ineffective assistance of counsel in connection with this issue.

III. Offense Variable 8

Defendant argues that the trial court erroneously scored 15 points for offense variable (OV) 8 when scoring the sentencing guidelines for his unarmed robbery conviction. We review a trial court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). A trial court’s scoring decision is not clearly erroneous and will be upheld if there is any evidence in the record to support it. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003).

Fifteen points are to be scored for OV 8 if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). The trial court found that the store clerk was moved to a place of greater danger when defendant escorted him to the mop room because the victim could no longer be seen by persons entering the store and the store’s surveillance cameras were not trained on that room. There was record evidence to support a score of 15 points relative to OV 8. After being moved to the mop room, the clerk was no longer in a position where he was visible to either the public or customers entering the store, thereby reducing the likelihood of assistance and increasing the danger to the clerk. Although defendant emphasizes that the victim was never harmed, MCL 777.38(1)(a) only requires that the victim be asported to a place of greater danger, regardless of whether the danger was realized. The trial court did not err in scoring 15 points for OV 8.

Defendant also argues that the trial court violated his constitutional rights by relying on facts not found by the jury to support its scoring of OV 8. In support of this argument, defendant relies on *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). However, our Supreme Court has held that these decisions do not apply to Michigan’s indeterminate sentencing scheme, in which a defendant’s maximum sentence is fixed by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006). Therefore, defendant’s argument is without merit.

IV. Proportionality

Defendant challenges the proportionality of his sentences. Because defendant’s minimum sentences are within the applicable sentencing guidelines ranges as enhanced for a

fourth-felony habitual offender, this Court must affirm those sentences unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information. MCL 769.34(10); *People v Osantowski*, 274 Mich App 593, 619; 736 NW2d 289 (2007). We previously rejected defendant's claim of a scoring error. Although defendant also asserts that the trial court relied on inaccurate information in the presentence report, he did not challenge the accuracy of the presentence report at sentencing and has not identified any inaccurate information on appeal, thus precluding relief under the plain error standard of review. *People v Endres*, 269 Mich App 414, 422; 711 NW2d 398 (2006). Accordingly, we affirm defendant's minimum sentences.

Defendant also argues that his enhanced maximum sentences are excessive and thus not proportionate. The principle of proportionality requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense committed by the defendant and the defendant's history and record. *People v Babcock*, 469 Mich 247, 254; 666 NW2d 231 (2003). Defendant's lengthy criminal record, and the fact that he committed the instant offenses while on parole for another offense, demonstrate that he is unable to conform his conduct to the law. Additionally, the nature of defendant's act in expressly threatening the store clerk with death absent compliance was egregious. Although defendant asserts that he has strong family support and that he would benefit from intensive substance abuse and psychiatric treatment, these claims are not supported by the record. Furthermore, they are not sufficient to establish that defendant's sentences, minimums and maximums, are disproportionate, especially in light of defendant's lengthy criminal record.

We also find no merit to defendant's argument that the trial court failed to articulate its reasons for imposing a sentence of 10 to 30 years for the unarmed robbery conviction. The trial court commented that its sentencing decision was based on defendant's lengthy criminal history, the increasingly assaultive nature of his offenses, and his history of substance abuse. The court's statements were sufficient to satisfy any articulation requirement. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Defendant's argument that the trial court failed to consider his rehabilitative potential is without merit. Defendant's lengthy criminal history belies any claim of a strong rehabilitative potential.

Defendant also argues that his sentences constitute cruel and unusual punishment. This argument is without merit because it is well established that a proportionate sentence is not cruel and unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

V. Sentence Credit

Defendant argues that the trial court erred by failing to award him sentence credit pursuant to MCL 769.11b. "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), citing MCL 791.238(2). While a parole detainee convicted of a new offense is entitled to credit for time served as a detainee, the credit may only be applied to the sentence for which parole was granted. *Seiders, supra* at 705. Defendant was on parole when he committed the instant offenses. Therefore, he was not entitled to credit against his new sentences, and the trial court did not err by failing to award sentence credit.

VI. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction for stealing or retaining a financial transaction device because a gift card is not a financial transaction device within the meaning of MCL 750.157n(1).

This issue involves the construction of a statute. “The fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature.” *People v Venticinque*, 459 Mich 90, 99; 586 NW2d 732 (1998). If the statute’s language is clear and unambiguous, this Court must enforce the language as written because it reflects the Legislature’s intent as expressed. *Id.* at 99-100. “Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.” *Phillips v Jordan*, 241 Mich App 17, 22 n 1; 614 NW2d 183 (2000). It is necessary to consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *People v Waltonen*, 272 Mich App 678, 684-685; 728 NW2d 881 (2006). This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Id.* at 685. If a term is not expressly defined in the statute, this Court may consult dictionary definitions in order to construe the term “in accordance with [its] ordinary and generally accepted meaning[.]” *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

MCL 750.157n(1) provides:

A person who steals, knowingly takes, or knowingly removes a financial transaction device from the person or possession of a deviceholder, or who knowingly retains, knowingly possesses, knowingly secretes, or knowingly uses a financial transaction device without the consent of the deviceholder, is guilty of a felony.

MCL 750.157m provides the following pertinent definitions:

(b) “*Deposit account*” includes share, deposit, member, and savings accounts of financial institutions.

(c) “*Credit account*” means the account through which a business organization or financial institution *allows a person or organization to obtain goods, property, services, or any other thing of value on credit.*

* * *

(e) “Financial institution” means a bank, savings and loan association, or credit union, and includes a corporation wholly owned by a financial institution or by the holding company parent of a financial institution.

(f) “Financial transaction device” means any of the following:

(i) An electronic funds transfer card.

(ii) A credit card.

(iii) A debit card.

(iv) A point-of-sale card.

(v) Any instrument, device, card, plate, code, account number, personal identification number, or a record or copy of a code, account number, or personal identification number *or other means of access to a credit account or deposit account . . .* that can be used alone or in conjunction with another access device, for any of the following purposes:

(A) Obtaining money, cash refund or credit account credit, goods, services, or any other thing of value. [Emphasis added.]

The trial court determined that a gift card constitutes an “instrument, device [or] card” that provides access to a credit account, because the purchaser of a gift card obtains a credit balance from a business organization (i.e., the seller) in order to enable the recipient of the gift card to obtain goods or services. We find it unnecessary to determine whether the trial court erred in its reasoning because, even if the reasoning was incorrect, we conclude that the gift card qualified as a point-of-sale card, MCL 750.157m(f)(iv), within the meaning of the statute. Although defendant argues that a gift card cannot qualify as a “point-of-sale card” because “point-of-sale card” is not defined in the statute, the plain and ordinary meaning of this term refers to a card that may be used to purchase goods and services at the point of sale. See *Random House Webster’s College Dictionary* (2001) (defining “point of purchase” as “a retail outlet, mail-order house, or other place where an item can be purchased”). Furthermore, we believe that an argument could be made that a gift card qualifies as a debit card, although not in the traditional sense.

Defendant stipulated that he stole a purse containing a gift card and that he used the gift card to buy goods without the owner’s consent. Therefore, the evidence was sufficient to support defendant’s conviction of stealing or retaining a financial transaction device without consent.

VII. Defendant’s Standard 4 Brief

Defendant filed a *pro se* Standard 4 brief, but does not articulate any argument in his brief. He merely states that he confessed to committing unarmed robbery and requests a new trial without raising any issues. Because no substantive issue is raised, there is nothing for us to consider.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette