

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 3, 2013

v

MARCUS ELLIOT KING,

No. 306480
Oakland Circuit Court
LC No. 2011-236933-FC

Defendant-Appellant.

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529; possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b; and entry into a building without owner's permission, MCL 750.115. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 18 to 40 years for the armed robbery conviction, two years for the felony firearm conviction, and 90 days, with jail credit of 272 days, for the entry without permission conviction. We affirm but remand for the trial court to clarify defendant's responsibility to reimburse the county for court-appointed trial and appellate attorney fees.

Jessica Shoemaker ended her waitressing shift at a Coney Island restaurant on the afternoon of December 31, 2010, and, with her cash tips in hand, entered her vehicle in the parking lot. Defendant approached her vehicle and asked for two or three dollars, which she gave him in change. Defendant then reached in Jessica's window and took all of her tip money from her lap. When he saw Jessica's phone in her hand, he pointed a gun at her and told her "don't even think about it." Defendant then tried to enter the vehicle, but was unable to do so. Jessica called her employer, who was still inside the restaurant and, as he and two customers exited the restaurant and approached defendant, defendant fired two shots in the air then left the parking lot. The police located defendant hiding in the garage of a nearby home shortly thereafter.

Defendant's arguments are based primarily on a deprivation of his due process, equal protection, and other protected rights under the United States and Michigan Constitutions and ineffective assistance of counsel grounds. Defendant did not object at the trial court to the constitutional issues raised on appeal. Therefore, these issues were not preserved. Although generally unpreserved issues may not be reviewed on appeal, appellate review may be appropriate when a significant constitutional issue is involved. *People v Rodriguez*, 251 Mich

App 10, 27; 650 NW2d 96 (2002). Claims of unpreserved constitutional error are reviewed under the “plain error” standard of review. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009); *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999). The error must have occurred, it must be plain, and the plain error must have affected substantial rights. *Borgne*, 483 Mich at 196-197.

Where claims of ineffective assistance of counsel have not been preserved, this Court’s review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). An ineffective assistance of counsel claim is “a mixed question of fact and constitutional law.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). A trial court’s findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.*

I. SCORING OF OFFENSE VARIABLE (OV) 4

Defendant first contends that the trial court erred in scoring OV 4 (psychological injury) at 10 points. We disagree.

A sentencing court has discretion in determining the number of points to be scored, and scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). MCL 777.34(1)(a) requires the trial court to score 10 points when “[s]erious psychological injury requiring professional treatment occurred to a victim.” “[T]he fact that treatment is not sought is not conclusive when scoring the variable.” *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). A victim’s expression of fearfulness can be sufficient to satisfy the statute. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

In this case, the victim, Jessica, testified that defendant showed her a gun, then pointed it at her while robbing her. Jessica stated that she was scared when she saw the gun. She called her employer because she was afraid, and her employer testified that he heard Jessica screaming and crying, stating “Get away from me. Stop.” Jessica was able to get away and was shaking and upset and wanted to get home to her daughter. When she was interviewed for purposes of the presentence report, Jessica stated that she had been very fearful since the robbery.

Based on the above, there is no question that the victim in this case, a young woman who had just left her shift as a waitress and was going home to her daughter, was fearful both during the incident and afterward. She had been very trusting, rolling down her window to help out an individual whom she believed was in need, only to be robbed at gunpoint. The case law is clear that the trial court need not find that treatment is sought and that the victim’s expression of fearfulness was sufficient in this case to satisfy the statute.

Defendant also argues that trial counsel rendered ineffective assistance in failing to object to the scoring of OV 4 at the sentencing hearing. In order to show that he was denied the effective assistance of counsel under either the state or federal constitution, a defendant must show that counsel’s performance was deficient and that such deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884(2001), citing *Strickland v*

Washington, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “To demonstrate prejudice the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *Carbin*, 463 Mich at 600.

Here, we found that OV 4 was correctly scored and “counsel is not required to make a groundless objection at sentencing.” *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Therefore, defendant was not denied the effective assistance of counsel with respect to the scoring of OV 4.

II. PROPORTIONALITY OF SENTENCE

Defendant next contends that his sentence is disproportionate and thus violates the guarantee against cruel and/or unusual punishment set forth in the United States and Michigan Constitutions. US Cons, Am VIII; Const 1963, art 1, § 16. The sentencing guidelines provided for a minimum sentence of 135 months to 450 months (approximately 11 to 37 years) for defendant’s conviction, as a fourth habitual offender, of armed robbery. Defendant received a minimum sentence of 18 years on this conviction. Defendant argues that he should have been sentenced at the lower end of his minimum sentence range to account for his personal circumstances, and that the failure to do so created a disproportionate sentence in violation of his constitutional rights. This Court disagrees.

Under the sentencing guidelines, a minimum sentence within the appropriate guidelines range is not reviewable by this Court absent a factual or constitutional error. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). Defendant’s arguments that his sentence is disproportionate because he was remorseful, because he appeared to be mentally unstable, and because the trial court did not order an evaluation of his rehabilitative potential is without merit. Defendant had been found competent to stand trial, had an extensive criminal record including nine prior felonies and nine misdemeanors and was on parole at the time of the instant offense. This conduct demonstrates that defendant was unable to conform his conduct to the requirements of the law. The trial court did not plainly impose on defendant a disproportionate sentence.

Defendant’s argument that the trial court failed to assess his rehabilitative potential through substance abuse and psychiatric treatment is rejected. MCR 6.425(A)(1)(e) requires a probation officer to include in the presentence report a description of defendant’s medical history, substance abuse history, and if applicable, a current psychiatric report. A presentence report is presumed to be accurate, and the trial court may rely on the report unless effectively challenged by defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant did not challenge the accuracy of the presentence report below or on appeal, and he failed to show that the trial court relied on *inaccurate* information when it sentenced him.

Defendant’s argument that the sentence he received for the armed robbery conviction violated his constitutional rights as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is also rejected. The trial court’s scoring was supported by the evidence, and *Blakely* does not affect Michigan’s sentencing scheme. See *People v Drohan*, 475 Mich 140, 159-162, 164; 715 NW2d 778 (2006).

We find defendant's argument regarding the Federal Sentencing Guidelines is without merit because he was not sentenced under the federal guidelines. We similarly find defendant's argument that trial counsel rendered ineffective assistance for failing to object to the sentence defendant received without merit. Defendant's sentence was within the appropriately scored guidelines and counsel was not required to make a groundless objection at sentencing. *Rodriguez*, 212 Mich App at 356.

III. CREDIT FOR TIME SERVED

Defendant next argues that the trial court deprived him of his due process rights when it failed to and/or refused to grant him jail credit against his felony firearm sentence. Defendant further contends that counsel was ineffective for failing to object to the trial court's error in this regard. We disagree.

A defendant is entitled to credit for time spent in jail before a sentence is imposed pursuant to MCL 769.11b. However a defendant is not entitled to credit for time served while in jail for an unrelated offense. *People v Idziak*, 484 Mich 549, 560; 773 NW2d 616 (2009). When "the defendant has served time not as a result of his inability to post bond for the offense for which he seeks credit, but because of his incarceration for another offense, [MCL 769.11b] is simply not applicable." *Id.* at 561, quoting *People v Adkins*, 433 Mich 732, 751; 449 NW2d 400 (1989). Accordingly, when a parolee commits a new crime while on parole, the time he or she spends in jail awaiting sentence for the new crime is credited against the paroled crime. *Idziak*, 484 Mich at 572; MCL 791.238(2). Defendant was on parole when he was arrested for the current offenses. Therefore, the trial court did not err when it denied defendant jail credit against his new prison sentences for the time served while awaiting trial on the current offenses.

Again, we reject defendant's argument that trial counsel rendered ineffective assistance for failing to object because defense counsel was not required to make a groundless objection at sentencing. *Rodriguez*, 212 Mich App at 356.

IV. SUFFICIENCY OF THE EVIDENCE TO SUPPORT ARMED ROBBERY

Defendant next contends that there was insufficient evidence to support his conviction of armed robbery. Defendant's trial attorney conceded during his arguments that defendant did in fact commit larceny from a person. Defendant contends, however, that there was insufficient evidence that he used a gun in the commission of the larceny from a person. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "When reviewing a claim that the evidence presented was insufficient to support the defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime." *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

The elements of armed robbery are (1) the defendant was engaged in the course of committing a larceny of any money or other property, (2) the defendant used force or violence against a person who was present or assaulted or put the person in fear, and (3) the defendant, in the course of committing the larceny, possessed a real or feigned dangerous weapon or

represented that he or she possessed a dangerous weapon. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). Here, at least four witnesses, including the victim, testified to observing defendant with a gun. All four witnesses also testified that defendant stated that he had a gun. Reviewing the evidence in a light most favorable to the prosecution, there is no question that a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of armed robbery. *Kissner*, 292 Mich App at 533-534.

V. DEFENDANT'S REQUEST FOR NEW COUNSEL

Defendant next claims that the trial court deprived him of his constitutional right to the effective assistance of counsel when it denied his request to replace trial counsel. We disagree.

Both the United States and Michigan Constitutions provide that the accused shall have the right to counsel for his defense, US Const, Am VI; Const 1963, art 1, § 20, and this guaranteed right encompasses a defendant's right to effective assistance of counsel. *People v Aceval*, 282 Mich App 379, 385-386; 764 NW2d 285 (2009). An indigent defendant is entitled to the appointment of effective counsel, but he does not have the right to have counsel of his choosing appointed. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). As stated in *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991):

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.

At the preliminary examination, defendant requested new appointed counsel, arguing that his counsel had not come to see him and had not communicated with his family. The district court judge indicated that defendant had been at the Forensic Center for a psychiatric evaluation, that there had not been an opportunity for his attorney to see him, and that the attorney was not required to communicate with his family. Defendant did not iterate a difference of opinion between him and trial counsel regarding trial tactics and did not establish any good cause for substitution of counsel. The trial court did not abuse its discretion when it denied defendant's request for new counsel.

VI. REIMBURSEMENT OF ATTORNEY FEES

Finally, defendant contends that the trial court deprived defendant of his constitutional rights when it ordered him to reimburse the county for his appointed attorney fees without first holding a hearing to determine his ability to pay. Because there is some confusion on this issue, we remand for clarification of defendant's responsibility to reimburse the county for court-appointed attorney fees.

A circuit court judge generally "has authority to order a criminal defendant to make restitution to the county of the costs of the defendant's appointed counsel from funds belonging

to the defendant. . . ” *People v Nowicki*, 213 Mich App 383, 387; 539 NW2d 590 (1995). The imposition of such restitution is also provided for in MCL 769.1k. As stated in *People v Jackson*, 483 Mich 271, 298; 769 NW2d 630 (2009), a trial court is not “required to assess a convicted defendant's ability to pay before imposing a fee for a court-appointed attorney. The ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay. This ability-to-pay assessment is initially obviated under MCL 769.1l, in relation to imprisoned defendants, because the procedure in this provision creates a presumption that the prisoner is not indigent.”

At the sentencing hearing in the instant matter, the trial court waived reimbursement for attorney fees incurred during defendant’s trial and sentence. However, a subsequent order, entered October 10, 2011, required the Michigan Department of Corrections to review defendant’s ability to pay trial and appellate attorney fees “in accordance with *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009).” It appears that this order was entered after defendant petitioned for appointed appellate counsel. As requested by the prosecutor on appeal, we remand this issue to the circuit court for clarification of defendant’s responsibility to reimburse the county for court-appointed attorney fees.

Defendant’s convictions and sentences are affirmed. However, we remand to the trial court to clarify defendant’s responsibility to reimburse the county for the fees of his court appointed trial and appellate attorneys. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro