

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 9, 2013

v

DENISE ANN REVERS,

Defendant-Appellant.

No. 308989
Macomb Circuit Court
LC No. 2011-001842-FH

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Denise Ann Revers of first-degree home invasion in violation of MCL 750.110a(2). Defendant and her husband, Edward Revers, broke into the home of defendant's ex-boyfriend, James Giganic, in the early morning hours of February 28, 2010, and stole several clothing items as well as electronic equipment. No one actually saw defendant during the home invasion but the prosecution presented extensive circumstantial evidence from which the jury could determine beyond a reasonable doubt that defendant was involved in the offense. Defendant's sentencing challenges also fail as there was evidence to support the court's offense-variable scoring decisions and defendant's sentence falls within the appropriate minimum sentencing guidelines range. We affirm.

I. BACKGROUND

The prosecution alleged that defendant and Revers broke into Giganic's home in the early morning hours of February 28, 2010. Giganic was at work during the home invasion but his live-in girlfriend, Shari Luke, and his roommate, Lance Wilson, were both home and asleep. Luke awoke when she heard noises downstairs. Upon investigation, Luke saw shadows in the living room, assumed it was Wilson and returned to bed. Wilson awoke when he heard someone shut his laptop computer that was sitting on his bedside table. Wilson chased the person out of the room and the perpetrator ran downstairs and out of the house. Wilson saw only the person's shadowy silhouette, but estimated that the person was six feet tall and 180 to 200 pounds. Giganic later discovered that an intruder had pried open the home's doorwall. The responding officer discovered several tracks leading from a nearby parking lot to the back of the home, suggesting either that one intruder made several trips between a vehicle and the house or that more than one intruder was involved in the offense.

Two days after the home invasion, defendant took five leather jackets, a vest, and a laptop computer to the home of her daughter, Lisa Marie Vitale. Vitale testified that defendant told her that she and Revers had broken into Giganic's home and stole several items and that two people were home during the offense. Defendant wanted to give Vitale one jacket from the burglary as recompense for Revers breaking into Vitale's home on another occasion. Vitale testified that defendant was vengeful in the years following her break-up with Giganic and that defendant often spoke of trying to steal Giganic's motorcycle.¹ Defendant subsequently visited the home of her other daughter, Candace Parsons. Parsons also testified that defendant told her that she and Revers had broken into Giganic's house and stole several items. Defendant also tried to give stolen items to Parsons. Based on police reports made by Vitale and Parsons, an investigating detective visited defendant's home and discovered the remainder of the items stolen from Giganic's house.

Defendant testified on her own behalf and claimed that Revers committed the home invasion alone. Defendant admitted to possessing the items stolen from Giganic's home, but claimed that her husband acted without her assistance in the burglary and then instructed her to transfer the stolen items to her daughters.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues on appeal that the evidence was insufficient to support her conviction. We review a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). A prosecutor need not present direct evidence of a defendant's guilt. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted). Defendant does not dispute that the prosecution presented sufficient evidence to establish a home invasion, but argues that there was insufficient evidence to identify her as a perpetrator. Identity is an essential element in all criminal prosecutions. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

The prosecution presented sufficient evidence from which the jury could conclude that she was involved in the home invasion. Giganic and Vitale testified that defendant had previously threatened to seek revenge against Giganic. After the home invasion, defendant admitted her involvement to her two daughters and offered each leather jackets stolen from Giganic's home. The jury was free to judge the credibility of these witnesses and could have determined defendant's guilt on that evidence alone. *People v Mardlin*, 487 Mich 609, 626; 790 NW2d 607 (2010) ("The jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and making credibility determinations.").

¹ Giganic also testified that defendant reacted poorly to their break-up, repeatedly attempting to reconcile with him and then threatening him with violence.

Moreover, investigating officers found the items stolen from Giganic's home inside defendant's residence. And although the only person seen inside Giganic's house during the home invasion did not match defendant's physical description, there was evidence suggesting that more than one perpetrator was at the scene. Viewed in a light most favorable to the prosecution, the evidence sufficed to establish defendant's identity as a perpetrator beyond a reasonable doubt.

III. SCORING OF THE SENTENCING GUIDELINES

Defendant argues that resentencing is required because the trial court erred in scoring offense variables 4 and 9 of the sentencing guidelines. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (quotation marks and citations omitted). "A trial court determines the sentencing guidelines variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "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) (quotation marks and citation omitted).

The trial court scored 10 points for OV 4, reflecting that "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1). Ten points are scored "if the serious psychological injury may require professional treatment," but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). In his victim's impact statement, Giganic indicated that defendant had threatened him on several prior occasions. Giganic "had trouble sleeping and experienced recurring nightmares." Since the break-in, Giganic "was even more traumatized." At the sentencing hearing, Giganic testified that he had lived in fear of defendant for years and felt "incredibly disturbed facing defendant in court." Wilson indicated in his impact statement that "he was upset" but had "not sought counseling." Wilson did state, however, that he "now carries a weapon with him as he does not want to be a victim again." Luke also indicated that "this offense had a great impact on her sense of security," "she no longer felt safe in her own home and experienced nightmares and trouble sleeping." This evidence supports that at least Giganic and Luke suffered psychological injuries requiring professional treatment, even though they had not sought out such treatment.

The trial court also scored 10 points for OV 9 because "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). The trial court found that Luke and Wilson, who were inside the home during the home invasion, were in danger of physical injury. Defendant's contention that neither was actually placed in danger is ridiculous. Defendant broke into her ex-boyfriend's home in the middle of the night because of her longstanding grudge against him. Luke investigated when she heard noises downstairs and could have met with the intruders at any time. Wilson actually chased a perpetrator from his bedroom, another close encounter that could have ended in violence. Although neither Luke nor Wilson was harmed during the offense, their presence inside the house during a break-in in the middle of the night created the potential for a volatile confrontation and placed them in danger of physical injury. Accordingly, the trial court did not err in scoring 10 points for either OV 4 or OV 9.

IV. SENTENCE

Defendant argues that resentencing is required because the trial court did not give adequate weight to her substance abuse history and her family support and therefore improperly failed to depart downward from the minimum sentencing guidelines range. Defendant also suggests that the information provided to the court regarding her substance abuse history was inaccurate. As defendant's sentence "is within the appropriate guidelines sentence range," we are bound to affirm that sentence, unless defendant can point to inaccurate information relied upon by the court. MCL 769.34(10). Defendant failed to preserve her claims by challenging the accuracy of any information at sentencing or by requesting a downwardly departing sentence. MCR 6.429(C); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Accordingly, "our review is limited to plain error affecting defendant's substantial rights." *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012).

The record does not support defendant's claim that the trial court was unaware of her substance abuse history. Defendant's presentence report (PSIR) contained a summary of that history, indicating that defendant reported "using cocaine heavily in the late 1990's but was recently using 'every blue moon.'" The report further stated that defendant completed residential substance abuse treatment in 2004 and 2007, and completed outpatient substance abuse treatment in 2005. Moreover, contrary to defendant's assertion, the Department of Corrections was not required to assess her substance-abuse "rehabilitative potential" before recommending a home invasion sentence to the court.

Defendant also claims that her strong family support establishes a ground for a downward departure from the sentencing guidelines range. Yet, the testimony at defendant's trial revealed that her own daughters reported her offense to the police, that defendant had stolen from her children in the past and that defendant's drug use had negatively impacted her relationships with family members. Further, the Department of Corrections provided the trial court with a copy of a presentence report prepared in September 2011 for a prior conviction, providing:

Negatively speaking, the defendant lacks any family support. This writer has made contact with the defendant's mother as well as her daughters, who stated they have estranged themselves from the defendant due to her criminal involvement and drug abuse.

There simply is no record indication that defendant has strong family support that could serve as a mitigating factor when considering the proportionality of her sentence.

Defendant briefly asserts in her appellate brief that this Court could review her sentencing challenge "on ineffective assistance of counsel grounds." Defendant does not analyze her ineffective assistance claim. "An appellant may not merely announce [her] position and leave it to this Court to discover and rationalize the basis for [her] claims[.]" *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, there is no merit to defendant's arguments that her substance abuse and family support justified a downward departure from the guidelines range. Defense counsel was not ineffective for failing to present a meritless argument. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher