

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ODIES ARDAY MURRAY,

Defendant-Appellant.

UNPUBLISHED

December 29, 2009

No. 286577

Kalamazoo Circuit Court

LC No. 2007-001517-FC

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to commit murder, MCL 750.83; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and 19 to 40 years' imprisonment for assault with intent to murder conviction, to run consecutively to two concurrent terms of two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant's convictions arise from the August 27, 2007 shooting that killed Tyres Sykes and left Walter Rivera in a vegetative state. The victims were shot after Martell Ballard and Sykes got the better of defendant during a series of altercations. After Sykes and others started laughing at defendant and making fun of him for being beaten in the altercations, defendant threatened the men and left the scene. Later, Ballard saw a man matching defendant's description cutting through the back yard and heading toward the front of a house where the other men were "hanging out." Ballard did not see the man's face because he was wearing a black "hoodie." However, the man was wearing the same black shorts and shoes that defendant was wearing earlier, and he was the same height and had the same build as defendant. The man did not say anything. He walked directly to Sykes, pulled out a large handgun and shot Sykes in the jaw. He also shot Rivera, who suffered wounds to his back and neck.

A few months later, Jeremy Anderson was apprehended by police following a traffic stop, during which the murder weapon was discovered underneath Anderson's seat. Anderson testified at trial that, a couple of days after the shooting, defendant asked him to hold the gun; later, defendant told Anderson that he used the gun to shoot Sykes and Walter, remarking that he shot Sykes in the mouth so that Sykes could not talk any more and that he shot Rivera because he did not like him.

Defendant first argues that the trial court erred by denying his motion for a directed verdict at the close of the prosecution's proofs. We disagree.

“When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The court must consider the evidence presented up to the time the motion for a directed verdict was made. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). And, it may not determine the weight of the evidence or the credibility of the witnesses, even if the testimony was inconsistent or vague; questions of witness credibility are left to the trier of fact. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998).

To secure a conviction of first-degree premeditated murder, the prosecution must prove beyond a reasonable doubt that the killing was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). To show premeditation and deliberation, “some time span between [the] initial homicidal intent and ultimate action is necessary.” *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), quoting *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). To secure a conviction of assault with intent to murder, the prosecutor must prove the following three elements: “1) an assault, 2) with an actual intent to kill, 3) which, if successful, would make the killing murder.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The elements of felony-firearm are that: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Defendant does not dispute that the prosecutor provided sufficient evidence on all of the specific elements of the charged offenses. Rather, defendant argues that the prosecutor failed to provide evidence identifying him as the perpetrator. We disagree.

The prosecution provided sufficient evidence of defendant's identity as the perpetrator to support the trial court's decision to deny the motion for a directed verdict. Defendant's identity could have been established through circumstantial evidence alone. See *People v Sullivan*, 290 Mich 414, 418-419; 287 NW 567 (1939). Here, there was evidence that defendant threatened to kill the men after he lost fights with Ballard and Sykes and everyone was laughing at him. Ballard, the only witness to the shooting, described the clothing and shoes that the shooter was wearing as matching exactly what defendant was wearing hours earlier except for the addition of a black “hoodie.” Ballard also testified that the shooter's build and height matched defendant's build and height. In addition, Anderson testified that he received the handgun that was used to commit the shootings from defendant, and that defendant admitted to shooting Sykes and Rivera. Moreover, the prosecution presented evidence of defendant's motive for shooting Sykes and Walter, and when the proofs are circumstantial, “evidence of motive is particularly relevant.” *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). This evidence viewed in a light most favorable to the prosecution was sufficient to establish that defendant was the perpetrator. Therefore, the trial court appropriately denied defendant's motion for a directed verdict.

Defendant next asserts that his trial counsel was ineffective in failing to preserve and present an insanity or temporary insanity defense. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. Ordinarily, a trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the instant matter, however, the trial court was not presented with and did not rule on defendant's claim. Therefore, this Court is left to its own review of the facts contained in the record in evaluating defendant's assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different and that counsel's errors rendered the proceedings fundamentally unfair and unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). That is, defendant must establish that his counsel's performance was deficient and that this deficient performance was prejudicial to defendant. *People v Corteway*, 212 Mich App 442, 444; 538 NW2d 60 (1995).

Presentation of an insanity defense would have been entirely inconsistent with defendant's assertions that he was not the perpetrator. While defendant could have presented inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), defense counsel's determination to pursue an innocence defense alone was a matter of professional judgment as to trial strategy, which this Court will not second-guess. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). Additionally, there is no indication in the record that defendant could have established the requisite elements of an insanity defense. Defendant maintains that his history of substance abuse may have resulted in a form of involuntary intoxication that could be considered insanity. However, defendant testified that he did not use drugs on the day of the shooting, and there is no evidence that defendant was intoxicated at the time of the incident. More importantly, defendant has not argued that an independent medical examination would show that he was legally insane, i.e. lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or conform it to the requirements of the law. MCL 768.21a(1). To the contrary, defendant's actions surrounding the shooting reveal that he appreciated the nature and quality or the wrongfulness of his conduct. Defendant approached Sykes, Rivera, and Ballard with a black hoodie concealing his face, and after he shot Sykes and Rivera, he fled the area and remained several miles away until he was arrested. There being no basis in the record for the assertion of an insanity or temporary insanity defense, defense counsel was not ineffective for failing to raise or preserve these meritless defenses. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant takes issue with the length of his sentence for assault to commit murder (AWIM) conviction, asserting several errors. Reviewing each of these errors in turn, we conclude that defendant is not entitled to resentencing. Defendant's AWIM sentence was within the appropriate guidelines range.¹ Thus, this Court is required to affirm that sentence absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

Defendant first argues that the trial court erred by scoring offense variable (OV) 5 at 15 points. OV 5 addresses "psychological injury to member of victim's family," MCL 777.35(1), and the trial court should score fifteen points for this OV if there is serious psychological injury to the victim's family that requires professional treatment. MCL 777.35(1)(a). In general, there is no requirement that the victim actually receive psychological treatment. MCL 777.35(2).

To preserve an issue regarding the trial court's scoring of OVs, defendant must raise the issue at sentencing. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). In this case, defense counsel did not object to the scoring of OV 5, but left it to the trial court's discretion based on comments regarding the effect of the shooting on Rivera's mother. An unpreserved objection to the scoring of offense variables is reviewed for plain error. *Id.*

A sentencing court has discretion in determining the number of points to be scored for each offense if record evidence adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). "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), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). An error in scoring the sentencing guidelines that does not affect the total OV score enough to change the recommended minimum sentence range under the legislative guidelines is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1994).

There was evidence in the record to support the trial court's finding that Rivera's mother suffered a serious psychological injury as a result of defendant's conduct in shooting her son. Although Rivera's mother did not state that she sought psychological treatment, she advised the court that, since the incident, she has had "no light" and that she does not feel like she will ever be all right again. In addition, she described the pain she feels when she goes to the nursing home every day to attend to her son in a vegetative state. We find this to be sufficient evidence to uphold the trial court scoring of OV 5 at 15 points. *Hornsby*, 251 Mich App at 468.²

¹ Of course, defendant was required to be sentenced to life in prison without the possibility of parole for the first-degree murder conviction and to two years' imprisonment for each felony-firearm conviction. The sentences for those convictions are not at issue. The recommended minimum sentence range was 171 to 285 months for defendant's AWIM conviction. Defendant's sentence of 19 to 40 years' (or 228 to 480 months) for this conviction was plainly within this range.

² We note that our Supreme Court's decision in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), could arguably impact the analysis of this issue. See *id.* at 137 (Corrigan, J., (continued...))

Moreover, even if OV 5 was improperly scored and the 15 points were removed, defendant's grid scoring would not change and the recommended minimum sentence range would remain the same. Therefore, resentencing would not be required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003); *Johnson*, 202 Mich App at 290.

Defendant next argues that the trial court failed to properly consider mitigating factors when imposing his sentence. However, defendant fails to identify what mitigating factors the trial court failed to consider. Therefore, this issue is abandoned.

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).]

That said, our review of the record indicates that defendant presented the trial court with mitigating factors including his continued assertions of innocence and that his family was going through hardships. The record also reflects that the trial court considered these factors in fashioning defendant's sentence. Additionally, mitigating and aggravating factors are already taken into account when scoring the sentencing guidelines. *People v Sargent*, 481 Mich 346, 348-349; 750 NW2d 161 (2008). No relief is warranted.

Defendant argues further that the trial court erred by failing to explain why the sentence imposed was proportionate to the offense.³ A trial court must either select a minimum sentence within the guidelines range, or it must state "substantial and compelling" reasons to justify the sentence. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). "[I]f the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines," then the trial court is not required to articulate any additional reasons for the sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Because defendant's minimum sentence was based on the sentencing guidelines, the trial court was under no obligation to further state its reasons for the sentence. *People v Broden*, 428 Mich 343, 353-354; 408 NW2d 789 (1987); *Conley*, 270 Mich App at 313. Additionally, a minimum sentence

(...continued)

dissenting). However, since such a *McGraw* based argument was not raised by defendant and since the holding of the majority in *McGraw* has nothing to do with OV 5, we will not consider that decision except to note that the psychological harm to the victim's family here arose simply as a result of the actions defendant took in killing the victim, not from any of defendant's actions following the offense.

³ Defendant cites *Lemons*, 454 Mich at 245 for the proposition that the sentencing court must state why the sentence is proportional. However, *Lemons* involved the proportionality of a sentence imposed under the former judicial sentencing guidelines, *id.* at 255-260, and thus, it does not apply to this case. MCL 769.34(1).

within the sentencing guidelines, as in this case, is presumed proportional. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Because of this presumption, the trial court was not required to state why the sentence was proportional.

Defendant also argues that his strong family support and his substance abuse should have been mitigating factors considered by the trial court. However, defendant provides no evidentiary support to demonstrate that he actually has strong family support. Contrary to his assertion, defendant's PSIR reveals that at the time of defendant's first juvenile conviction he had been a neglect ward of the court since 2002. It also notes that defendant has minimal contact with his mother and his father, who is in prison. Although he has three brothers and one sister, it appears they live with his mother. Moreover, defendant's PSIR reveals that he was involved in three previous criminal incidents resulting in numerous convictions and that he was being sentenced for three crimes in addition to the assault with intent to murder conviction for the incident in the case. Thus, despite his claimed familial support, defendant continued to commit crimes, and, therefore, he has shown nothing of mitigation value arising from his alleged strong family support.

Further, we note that the trial court reviewed defendant's PSIR, which included defendant's substance abuse history, before sentencing. Thus, the information was presented to the court before sentencing. Where a defendant is sentenced in reliance on the statutory recommended minimum sentence, and there is no evidence, as in this case, that the trial court failed to consider relevant mitigating factors in sentencing, there is no abuse of discretion in deciding not to depart from the statutorily mandated minimum sentence range. *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000). In addition, we note that a trial court may depart from the sentencing guidelines only for a substantial and compelling reason, which is objective and variable, which keenly and irresistibly grabs the court's attention, and which is of considerable worth in deciding the length of a sentence. *Babcock*, 469 Mich at 257. Such circumstances exist only in exceptional cases, *id.*, and substance abuse is not a circumstance that exists only in exceptional cases.

Defendant next asserts that the trial court erred by failing to conduct an assessment under MCR 6.425(A)(5) to determine defendant's rehabilitative potential, and thus, that his sentence was based on inaccurate information. MCR 6.425 requires a probation officer to conduct an investigation and complete a presentence report before a sentencing hearing. This presentence report "must be succinct" and, "depending on the circumstances," must include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." MCR 6.425(A)(5). In the instant case, the trial court was provided with a presentence report that noted defendant's medical conditions and his substance abuse history. Contrary to defendant's argument, the plain language of MCR 6.425(A)(5) does not require an examination of defendant's rehabilitative potential. All required information was included, and therefore, defendant's claim is meritless.

Defendant also argues that his AWIM sentence was disproportionate to the offense, thus constituting cruel and/or unusual punishment in violation of the federal and state constitutions. However, "a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *Powell*, 278 Mich App at 323 (citations omitted). Because defendant's minimum sentence was within the sentencing

guidelines, the sentence is presumptively proportionate, and therefore, the sentence does not amount to cruel and unusual punishment. *Id.*

Lastly, defendant argues that the trial court's scoring of the sentencing guidelines variables violated the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme wherein a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, "[a]s 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.* Defendant received a sentence within the statutory maximum. Therefore, the trial court's scoring of the offense variables was appropriate. *Id.*

We affirm.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Christopher M. Murray