STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v	No. 269363 Saginaw Circuit Court
ROBERT JAMES LOWN, Defendant-Appellant.	LC No. 05-026074-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant Robert Lown appeals as of right from his jury trial convictions of first-degree premeditated murder/first-degree felony murder (alternative theories),[1] carrying a dangerous weapon with unlawful intent,[2] two counts of carjacking,[3] armed robbery,[4] carrying a concealed weapon,[5] and three counts of possession of a firearm during the commission of a felony (felony-firearm).[6] Before the presentation of proofs, Lown pleaded guilty to one count of being a felon in possession of a firearm,[7] an additional count of felony-firearm, and to being a fourth-offense habitual offender.[8] We affirm.

I. Basic Facts And Procedural History

Officer Scott Malace of the Saginaw Township Police Department testified that on the night of November 21, 2004, he arrived at a residence that matched the general description given

[1] MCL 750.316 (life imprisonment).

[2] MCL 750.226 (76 months to 20 years).

[3] MCL 750.529a (75 to 100 years).

[4] MCL 750.529 (75 to 100 years).

[5] MCL 750.227 (76 months to 20 years).

[6] MCL 750.227b (24 months).

[7] MCL 750.224f.

[8] MCL 769.12.

by a 911 caller, and "observed a white male subject laying on the floor of the kitchen with a chair partially across his neck, what appeared to be several knives sticking in his chest and surrounded by blood on the floor." The officers determined that the victim was deceased.

Testimony adduced at trial indicated that the victim, Greg Gierke, Sr., died of blunt force head trauma and stab wounds to the chest. According to the Saginaw County medical examiner, Gierke had been stabbed nine times using two forks and seven knives. Additionally, the medical examiner testified that Gierke had been struck in the head at least 21 times by a weapon that was consistent with a bloody wrench found at the crime scene.

Katie Davidson testified that on the night of the murder she arrived at the home of Gay Lyn Dittmar, Lown's brother's fiancée, around 9:30 p.m. or 10:00 p.m. While at the house, she agreed to give Lown, who she had just met for the first time, a ride home. However, while en route, Lown told her "he had to drop some tools off to his friends" and directed Davidson to drive to that location. According to Davidson, Lown had carried hand tools with him into her vehicle. Davidson also testified that during the 30-minute drive, Lown asked her about a movie called *Natural Born Killers* and asked her if she "could ever watch somebody be killed[.]"

Davidson testified that when they arrived at the house to which Lown directed her, Lown told her to "sit in . . . [her] truck while he went and handed the tools off." She testified that she watched Lown knock on the front door and then talk for a minute with the man who answered, after which both men walked into the house. Lown was carrying the tools when he went inside. Davidson testified that five or ten minutes later Lown reached his hand out the door and waved her in. She entered the house and found the man who had answered the door on the floor in front of the refrigerator, laying on his left side. The man was "all bloody." Lown was holding a wrench in his left hand. Lown told Davidson "to go off into the bedroom and grab . . . [j]ewelry, expensive stuff," but she refused. When Lown went down the hallway, Davidson left.

Virgil Lown, Lown's uncle, testified that Lown arrived at his house around 12:30 a.m. the night of Gierke's death. Lown arrived in a truck and had a duffel bag full of hunting equipment. The duffel bag, hunting equipment, and truck were later identified as belonging to Gierke. Lown took Virgil Lown's wife's van without permission and left the truck behind.

Leonard Christopher, a friend of Lown's, testified that Lown called him at about 6:30 a.m. the morning after Gierke's death and asked, among other things, if he knew anybody who wanted to buy a .357 magnum pistol. According to Gierke's son, his father owned a .357 magnum that was unaccounted for when he went to his father's house after his death.

Robert Neal testified that he was working as the assistant manager at Self-Serve Lumber Company in Saginaw in November 2004. According to Neal, shortly after 7:30 a.m. the morning after Gierke's murder, Lown entered the store and robbed him at gunpoint of his car keys and the $160 in the cash register till. During the robbery, Lown told him that "I just bludgeoned somebody to death this weekend and I'm not going back. I need your car." Neal testified that Lown then escorted him to the back area of the store and retrieved the videotape from the surveillance system. Neal stated that Lown barricaded him in the "tape room" and left with Neal's 1995 Grand Prix, the money from the till, and Neal's in-store cell phone.

Richard Near testified that Lown, his cousin, appeared at his house between 8:30 and 9:00 a.m. the morning after Gierke's death. According to Near, the two men took a drive in Near's Camaro and ended up at a motor home owned by a friend of Near, where Lown ultimately was arrested. Police recovered Gierke's .357 magnum from the passenger side floor of Near's Camaro.

II. Effective Assistance Of Counsel

A. Standard Of Review

Lown asserts that he was deprived of his constitutional right to the effective assistance of counsel where trial counsel failed to move to sever charges involving the armed robbery of Robert Neal and failed to pursue an insanity defense. We disagree. Lown failed to move below for an evidentiary hearing or a new trial on the issue of ineffective assistance of counsel. Therefore, our review is limited to the existing record.[9]

In order to show ineffective assistance of counsel, a defendant must show that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different."[10]

B. Failure To Request Severance Of The Charges

Generally, two charged offenses may be tried together if they are related.[11] MCR 6.120 provides that offenses are related if they are based on: "(a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan."[12] However, "[o]n the defendant's motion, the court must sever for separate trials offenses that are not related . . . ."[13] In this case, the evidence adduced at trial indicates that Lown stated during the armed robbery of Neal committed hours after the murder of Greg Gierke, Sr., "I just bludgeoned somebody to death this weekend and I'm not going back. I need your car." Accordingly, Lown's robbery and carjacking of Neal were intended to further his getaway after the commission of the murder. Therefore, the murder and the robbery of Neal were parts of "a series of connected acts" and were thus related. Because defense counsel is not required to make a meritless motion,[14] trial counsel was not ineffective for failing to move to sever the charged offenses.

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[9] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[10] *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000).

[11] MCR 6.120.

[12] MCR 6.120(B)(1).

[13] MCR 6.120(C).

[14] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

C. Failure To Pursue An Insanity Defense

Generally, "[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. . . . A substantial defense is one that might have made a difference in the outcome of the trial."[15] To prevail on an insanity defense, a defendant is required to show that, because of mental illness or retardation, the defendant "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity."[16] This Court will not reverse a conviction on the basis of the assertion that counsel was ineffective for failing to pursue an insanity defense where failure to do so was a matter of trial strategy.[17]

In support of his assertion that his counsel was ineffective for not pursuing an insanity defense, Lown cites the conversation he had with Katie Davidson in which they discussed, among other things, the movie *Natural Born Killers*, his alleged behavior at the crime scene, and the brutal nature of the crime. However, the fact that an individual discussed a mainstream movie known for its violent content does not show that this individual lacks the cognitive ability to appreciate the nature of criminal conduct or the volitional capacity to conform to the law. The act of viewing and discussing a movie, even if the violence of that movie is lauded, does not conclusively establish that a person is legally insane. Nor does, as Lown's argument suggests, the violence of the crime directly correlate to the actor's sanity. Lown's argument presumes that the more bizarre or horrific the crime, the more likely it is that the actor lacks the requisite sanity to be held responsible. However, while these characteristics may raise questions about an actor's sanity, they do not necessarily evidence defective cognitive and volitional ability, let alone establish a prima facie case of insanity. Therefore, because the record does not support a finding that an insanity defense stood a reasonable chance of succeeding,[18] trial counsel cannot be deemed ineffective for not pursuing it.[19]

III. Admissibility Of Other Acts Evidence

We also reject Lown's argument that the introduction of evidence of the crimes committed against Neal constituted error requiring reversal. As previously noted, the robbery and carjacking of Neal were part of a series of connected acts. Accordingly, those charges were properly joined with the charges stemming from the murder, and the admission of the evidence regarding the former was appropriate.[20]

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[15] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

[16] MCL 768.21a(1).

[17] *People v Lotter*, 103 Mich App 386, 391; 302 NW2d 879 (1981).

[18] *People v Snyder*, 108 Mich App 754, 757; 310 NW2d 868 (1981).

[19] *Fike*, *supra* at 182.

[20] MRE 402.

IV. Sentencing

Lown argues that the trial court abused its discretion in imposing a sentence of 75 to 100 years' imprisonment on the carjacking convictions because Lown has no reasonable prospect of surviving the sentence given his age at sentencing. This argument is based on *People v Moore*,[21] which has been effectively overruled on the very proposition for which Lown cites it.[22] More importantly, Lown's argument is without merit in light of the adoption of the legislative sentencing guidelines.[23] "If the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence."[24] In this case, the guidelines were scored for the carjacking, with the calculated minimum range determined to be 270 to 900 months, i.e., 22½ to 75 years. Thus, the 75 to 100 year term of imprisonment was within the guidelines and must be affirmed.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra

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[21] *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989).

[22] *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997).

[23] MCL 769.31 *et seq*.

[24] *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Accord MCL 769.34(10).