STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMIE PRITCHETT,

Defendant-Appellant.

UNPUBLISHED
August 9, 1996

No. 173193
LC No. 93 006109

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo,* JJ.

PER CURIAM.

Defendant appeals of right his convictions by jury of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and subsequent guilty plea to habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The court sentenced defendant to a two-year term of imprisonment for the felony-firearm conviction and a consecutive twenty- to forty-year term of imprisonment for the habitual offender conviction.[1] We affirm.

Shortly before 1:00 a.m. on April 2, 1993, complainant Paul Peters left a Detroit party store and returned to his car. Defendant Tommie Pritchett and another man, codefendant Antonio Moffett,[2] approached Peters. One of the men stated that he was taking Peters' car. When Peters objected, defendant pointed a semi-automatic handgun at Peters and ordered him into the back seat of the car. Defendant got into the car beside Peters, pointed the gun at Peters' head, and demanded the car keys. Moffett drove the car. As they drove, defendant demanded Peters' wallet, from which defendant took cash and credit cards. Defendant threatened to kill Peters because Peters had seen his face. The men eventually left Peters at another Detroit location.

On May 10, 1993, Hamtramck police officers stopped Peters' car, which was being driven by Moffett, who then fled on foot. Police thereafter apprehended Moffett and his passenger, Willie Thomas. On May 11, Peters identified Moffett in a lineup. Peters later identified defendant from a

* Circuit judge, sitting on the Court of Appeals by assignment.

photographic array; the police had selected defendant's photograph for the array on the basis of information supplied by Thomas' mother.

At trial, Moffett testified that he had borrowed the car from David Pritchett, defendant's brother. Thomas, however, testified that Moffett said that he got the car from David Pritchett and defendant. Defendant did not testify.

Defendant first asserts that he is entitled to a new trial because he was denied his right to a separate trial and/or jury. The trial court has discretion whether to sever or join the trials of multiple defendants. MCL 768.5; MSA 28.1028; MCR 6.121(D); *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Defendant never actually requested a separate trial or a separate jury. Defendant argues that he and Moffett presented antagonistic defenses to the jury. We disagree. Defendant and Moffett did not present antagonistic defenses; indeed, Moffett implicated defendant's brother, not defendant. The trial court did not abuse it discretion in trying defendant and Moffett jointly.

Even if the defenses had been antagonistic, the result is the same. Although antagonistic defenses present serious negative implications for a defendant, the standard for severance is not lessened. *Id.* at 347. That defenses are inconsistent is insufficient to mandate severance. *Id.* at 349. Under MCR 6.121(C), severance is mandated only when a defendant shows that his substantial rights will be prejudiced and that severance is the necessary means to rectify the potential prejudice. *Id.* at 331. Defendant did not show that his substantial rights would be prejudiced. Defendant made no offer of proof that severance was the necessary means to rectify the alleged prejudice.

Defendant also argues that he was deprived of the effective assistance of counsel because his counsel did not move for a separate trial. This argument is without merit. First, defendant did not preserve this issue by including it within his statement of questions presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Second, as noted above, defendant was not entitled to a separate trial; thus, counsel's failure to move for a separate trial was not ineffective. Counsel is not required to make meritless motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next contends that the photographic identification procedure was unnecessarily suggestive. Review of the record reflects that any error was harmless. Peters saw defendant during the commission of the crime and quickly chose defendant's photograph from the array. Peters had an independent basis upon which to identify defendant. See *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 , *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977).

Defendant argues that he was entitled to a corporeal line-up. We review a trial court's decision regarding a pretrial lineup under an abuse of discretion standard. *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981). The court did not abuse its discretion in refusing defendant's request for a pretrial lineup. Defendant did not show that eyewitness identification was a material issue and that a reasonable likelihood of mistaken identification existed. See *id.*

Additionally, defendant argues that the court abused its discretion in admitting hearsay evidence. This Court will not reverse on appeal the decision to admit evidence absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Defendant objected to a police officer's testimony that he arranged a photographic lineup based on information from Thomas' mother. An officer may testify to taking certain actions as a result of information received. *People v Stanley*, 27 Mich App 90, 97; 183 NW2d 460 (1970). The officer may not testify, however, regarding precisely what the informant said. *Id.* The officer in this case did not testify regarding what Thomas' mother said. He merely stated that he took a particular course of action after speaking with her. The trial court did not abuse its discretion in admitting the evidence.

Defendant next asserts that the court should have permitted him to cross-examine Peters regarding his activities before the offense. Defendant did not make an offer of proof; thus, he has not preserved this issue. See MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Moreover, the name of the bar that Peters visited earlier that evening is irrelevant.

Next, defendant argues that prosecutorial misconduct denied him a fair trial. Courts decide questions of prosecutorial misconduct on a case by case basis, and this Court must examine the record and evaluate the remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Defendant objected to the prosecutor's remarks during closing argument. The prosecutor's remarks, although strongly worded, were in reply to defense counsel's closing. Error requiring reversal does not arise if a prosecutor's improper remarks merely responded to innuendoes of defense counsel. *People v Sharbnow*, 174 Mich App 94, 100-101; 435 NW2d 772 (1989). The record does not reflect that the prosecutor committed error requiring reversal.

Defendant further asserts that the court erred in instructing the jury on the elements of felony-firearm. To preserve an instructional issue for appeal, a party must object to the instruction. MCR 2.516(C); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because defendant failed to object, this Court examines the issue in the context of manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). Defendant contends that the instructions were erroneous because they did not include the definition of the term "firearm." The definition of a firearm was not at issue in this case because Peters testified that defendant pointed a semi-automatic handgun at him. We find no manifest injustice.

Defendant next contends that he is entitled to be resentenced because his sentence was disproportionate, his sentence was based on inaccurate information, and the court failed to state reasons for the lengthy sentence. This Court reviews sentencing decisions for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). An abuse of discretion occurs when the sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 667; 461 NW2d 1 (1990).

Defendant maintains that the court erroneously scored Offense Variable (OV) 2 at 25 points, although he did nothing to increase substantially the fear or anxiety inherent in an armed assault. A trial

court has discretion in determining the points to be scored under the guidelines, provided that the record adequately supports a particular score. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1991). This Court will not intervene in the trial court's scoring decision if evidence supports the decision. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). The evidence supports the 25-point score. Defendant ordered Peters into the car at gunpoint, pointed the gun at his head, and threatened to kill him. Defendant subjected Peters to terrorism such that the trial court did not abuse its discretion in scoring OV 2 at 25 points.

Likewise, the trial court correctly scored OV 9 at ten points, indicating that defendant was the leader in this multiple offender situation. Defendant ordered Peters into the car, carried and pointed the gun, ordered Peters to surrender his wallet, and took money and credit cards from Peters' wallet. The trial court did not abuse its discretion in characterizing defendant as the leader. *People v James Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993) (finding that OV 9 was properly scored at ten points where the defendant did most of the talking, controlled the victim, and was the only defendant to assault the victim).

Defendant next argues that the court misscored OV 5 at fifteen points. This argument is without merit because the court scored OV 5 at zero points.

Defendant also argues that his sentence was disproportionate. The sentencing guidelines do not apply to habitual offenders. *People v Cervantes*, 448 Mich 620, 630; 532 NW2d 831 (1995). Nonetheless, a sentence must be proportionate to the seriousness of the offense and the background of the offender. *Milbourn*, *supra* at 650-651. The maximum term for habitual offender fourth is life imprisonment, MCL 769.12; MSA 28.1084. Defendant has four prior adult felony convictions, including two for armed robbery. Indeed, defendant was on parole for an armed robbery conviction when he committed the instant offense. Defendant's record also contains a juvenile conviction. In this case, defendant pointed a gun at Peters and threatened to kill him. Defendant has not established, given his criminal history and the nature of this offense, that the court abused its discretion in sentencing him. See *Cervantes*, *supra*.

Finally, defendant asserts that he should be resentenced because the court failed to articulate its reasons for imposing the sentence. When a trial court fails to give reasons for a sentence, remand for articulation is generally required. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). The context of the remarks preceding sentencing, however, may satisfy the articulation requirement. *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992). The trial court's remarks that defendant was a danger to the public and had an extensive criminal record satisfied the articulation requirement.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo

[1] The court also sentenced defendant to a twenty- to forty-year term of imprisonment for the armed robbery conviction. The court vacated that sentence.

[2] The jury found Moffett guilty of armed robbery.