

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEVON DECARLOS GLENN, JR.,

Defendant-Appellee.

---

SUPREME COURT NO. 144979

COURT OF APPEALS NO. 302293

CIRCUIT COURT NO. 09-005862-FC

HENRY C. ZAVISLAK (P49729)  
Prosecuting Attorney  
JERROLD SCHROTENBOER (P33223)  
Chief Appellate Attorney  
312 S. Jackson Street  
Jackson, MI 49201-2220  
(517) 788-4283

LINDA D. ASHFORD (P29303)  
Attorney for Defendant-Appellee  
243 W. Congress Street, Suite 350  
Detroit, MI 48226  
(313) 237-6316

---

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

JERROLD SCHROTENBOER (P33223)  
CHIEF APPELLATE ATTORNEY



TABLE OF CONTENTS

Index of Authorities ..... ii

Statement of the Question Presented ..... iii

Statement of Facts ..... 1-2

Argument ..... 3-7

**Because defendant (1) struck a convenience store teller on the head with his gun knocking him to the floor during an armed robbery, (2) struck someone else on the head with the gun, and (3) thrust both victims behind the counter during the robbery, some evidence supports scoring OV 7 as a "50" ("conduct designed to substantially increase the fear and anxiety a victim suffered during the offense").**

Relief ..... 7

## INDEX OF AUTHORITIES

<i>People v Hereford (On Rehearing)</i> , docket no. 227296 released 01/28/03, lv den 469 Mich 921: 670 NW2d 226 (2003) .....	6
<i>People v Hunt</i> , 290 Mich App 371; 810 NW2d 588 (2010) .....	5
<i>People v King</i> , docket no. 279809, released 12/11/08, lv den 483 Mich 980: 764 NW2d 265 (2009) .....	5, 6
<i>People v Lechleitner</i> , 291 Mich App 62; 804 NW2d 345 (2010), lv den 489 Mich 934; 797 NW2d 151 (2011) .....	3
MCL 777.37(1)(a)(OV 7) .....	3, 5, 6, 7
OV 8 .....	5

**STATEMENT OF THE QUESTION PRESENTED**

**Where defendant (1) struck a convenience store teller on the head with his gun knocking him to the floor during an armed robbery, (2) struck someone else on the head with the gun, and (3) thrust both victims behind the counter during the robbery, does some evidence support scoring OV 7 as a "50" ("conduct designed to substantially increase the fear and anxiety a victim suffered during the offense")?**

**The Court of Appeals answered:  
Plaintiff-Appellant answers:**

**No  
Yes**

## STATEMENT OF FACTS

To a certain extent, the Court of Appeals' opinion states what happened:

Defendant robbed a gas station/party store. He entered the gas station carrying an airsoft shotgun that appeared to be an actual sawed-off shotgun. When defendant entered the store, he struck the clerk in the left side of the head with the butt end of the gun, knocking him to the ground. Defendant directed the clerks to come behind the counter and open the store's cash register and safe. Defendant took the money, hit the other clerk on the head with the butt of the airsoft gun, and fled the premises. Neither victim suffered serious physical injuries and neither required medical care. (65a-66a). 295 Mich App 531).

The presentence report fills in more of the material facts. After striking the store clerk, Ryan Guenther, in the head to the floor, defendant forced him behind the counter. (27a). Likewise, defendant also shoved the other person, Daniel Bucholtz, behind the counter after he struck him too in the head with the gun. (28a). During the robbery, Georval Pennington helped defendant in the armed robbery. (30a).

After taking money from the store, defendant and Pennington ran into the street where they encountered a car driven by an off-duty deputy. (28a). After an encounter in which the deputy fired his gun, defendant and Pennington ran. (28a-29a). The deputy then drove after the getaway car, driven by Kyle Ybarra. (29a).

Defendant pled guilty on June 17, 2010, to armed robbery, MCL 750.529, and felonious assault, MCL 750.82, in return for plaintiff dismissing conspiracy to commit armed robbery, MCL 750.157a, another armed robbery, and another felonious assault. (14a). In addition, plaintiff agreed that defendant not be sentenced as a third felony offender. MCL 769.11. (15a). Subsequently, on July 22, 2010, Jackson County Circuit Court Judge John McBain sentenced defendant to 15 - 30 concurrent to 1 ½ - 4

years. (62a). Then, after granting leave to appeal (64a), in a published opinion on February 28, 2012, the Court of Appeals ruled that OV 7 was misscored and remanded for resentencing. 295 Mich App 529; 814 NW2d 686 (2012). (65a-68a). This Court then granted leave to appeal on June 8, 2012. \_\_\_Mich\_\_\_; 814 NW2d 294 (2012). (69a).

Both of the other defendants were also convicted and appealed.

Pennington pled to armed robbery and felonious assault as a second felony offender on May 25, 2010. Then, on August 3, 2011, the Court of Appeals denied leave to appeal. (Docket no. 304868). Subsequently, on March 5, 2012, this Court also denied leave to appeal. 491 Mich 853; 808 NW2d 777 (2012).

A jury convicted Ybarra on June 23, 2010, of conspiracy to commit armed robbery and two armed robberies. The Court of Appeals then affirmed on December 13, 2011. (Docket no. 301243). Ybarra's application to this Court is still pending. (Docket no. 144620).

## ARGUMENT

**Because defendant (1) struck a convenience store teller on the head with his gun knocking him to the floor during an armed robbery, (2) struck someone else on the head with the gun, and (3) thrust both victims behind the counter during the robbery, some evidence supports scoring OV 7 as a "50" ("conduct designed to substantially increase the fear and anxiety a victim suffered during the offense").**

A person hit to the floor on the head during an armed robbery with what looks like a sawed-off shotgun and then told to go behind the counter will naturally think that he is about to die. Whatever else OV 7 requires, a physical manifestation of violence is "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The Court of Appeals opinion saying the opposite sets too high a bar. It sets a standard higher than the Legislature intended in enacting MCL 777.37(1)(a). This Court should reverse and reinstate the sentence.

The Court of Appeals correctly stated the proper review standard. The reviewing court looks at scoring decisions for an abuse of discretion and upholds the decision if any evidence supports it. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010), lv den 489 Mich 934; 797 NW2d 151 (2011). On the other hand, legally interpreting the guidelines themselves is reviewed *de novo*. *Id.*

MCL 777.37(1)(a) (OV 7) requires the sentencing court to score 50 points if a "victim was treated with sadism, torture, or excessive brutality or *conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.*" (Emphasis added.) Although scoring this variable requires more fear than the average

armed robbery presents, defendant in fact committed such conduct:

- An armed robbery by no means requires the robber to hit both victims in the head with a gun that looks like a sawed-off shotgun. In other words, an armed robbery does not require a physical manifestation of violence.
- An armed robbery does not require striking a victim to the floor.
- An armed robbery also does not require the robber to place both victims behind the counter—a place that is more difficult to escape from—a place that is far more convenient to die.

The Court of Appeals, along with denigrating defendant hitting both victims in the head with what looked like a sawed off shotgun, completely ignored the third point. Instead, the entire transaction should be considered. As pointed out above, the average person being hit in the head to the floor during an armed robbery with what looks like a sawed off shotgun<sup>1</sup> and then being herded around the corner would likely think that he is about to die. The Court of Appeals was wrong, the sentencing court

---

<sup>1</sup>Even though defendant used an airsoft, both victims in the store described it as a “sawed off shotgun.” (27a). Even Deputy Daniel Szymanski believed it to be a sawed off shotgun:

The hardest thing I’m dealing with at this time is the fact that I had a chance to kill Mr. Pennington. My first chance was when Mr. Pennington was standing at my car pointing a shotgun at my face. I pulled out my hand gun and pointed it at him. I held my hand gun pointed at Mr. Pennington’s face as he was standing at the passenger window of my car pointing a shotgun at my face. I felt terrified and for some reason I also felt a peace with myself. I knew that I was about to die as I looked at the end of Mr. Pennington’s shot gun barrel waiting to see the fire blast into my face. (45a).

If a deputy can mistake this gun for a shotgun, just about anyone can.

correctly scored OV 7 as a "50."

Despite relying heavily on *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010), the Court of Appeals missed the most helpful part. *Hunt* gave three examples of where what a defendant does in an armed robbery may cross the line. The Court of Appeals in both *Hunt* and the present case were correct in pointing out that (1) any armed robbery necessarily entails victim anxiety and (2) OV 7 requires substantially more. *Hunt* accordingly gave three examples for significantly increasing the victim's fear: Where the defendant (1) fires a gun, (2) threatens to fire a gun, or (3) hits the person with the gun (a physical manifestation of violence). In the present case, defendant did not merely point what looked to be a sawed off shotgun at the two victims. Instead, he did something that would make the average person believe that he is about to die. He first hit the one victim on the head so hard that he knocked him to the floor. He then put him behind the counter (a place that reduces any escape chances). Defendant then hit the other victim in the head and put him behind the counter too.<sup>2</sup>

As it is, the present Court of Appeals opinion is difficult to reconcile with two previous opinions. *People v King*, docket no. 279809, released 12/11/08, pp 2-3, lv

---

<sup>2</sup>Although the Court of Appeals correctly pointed out that moving the victim is often more appropriately scored in OV 8, that defendant moved the victims behind the counter should not be ignored here. Combining hitting the victims on the head and moving them behind a counter was "conduct designed to substantially increase the fear and anxiety" that they "suffered during the offense." Nothing prevents a fact from one guideline scoring to be combined with facts for another guideline scoring. As it was, OV 8 was not even scored in the present case.

Incidentally, even though plaintiff's application raised OV 8's scoring, this brief does not address its scoring only because this Court order granting leave to appeal is restricted to OV 7. (69a)

den 483 Mich 980; 764 NW2d 265 (2009), upheld scoring OV 7 as a "50" in a rather similar case (also from Jackson County). In *King*, the defendant and two others entered the victim's house which contained the victim, his girlfriend, and his two sons. The defendant knocked the victim to the ground, hit him on the head with a gun, and dragged him across the room. The Court found sufficient evidence for the scoring.

Earlier, *People v Hereford (On Rehearing)*, docket no. 227296, released 01/28/03, pp 4-5, lv den 469 Mich 921; 670 NW2d 226 (2003), also upheld scoring OV 7 as a "50" in a similar situation. In *Hereford*, the defendant "had a gun during the robbery, . . . the gun was pointed at both victims during the robbery, . . . a robber used the gun to strike one victim on the back of his head, . . . the victims feared for their lives, and . . . the robbers fired the gun during the robbery."

Defendant's attempt to distinguish *King* and *Hereford (On Rehearing)* misses a few points. Although he admits that firing a gun, as in *Hereford (On Rehearing)*, is sufficient for OV 7, he never explains why firing a gun is different than hitting someone with the gun. He never explains the principle behind such an extremely fine line drawing.

In fact, defendant and, to a large extent, the Court of Appeals are somewhat asking this Court to eliminate the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Every situation that either comes up with for why OV 7 may be appropriately scored deals with "sadism, torture, or excessive brutality." Neither defendant nor the Court of Appeals comes up with a single example where what a defendant does can be the fourth alternative, "conduct designed to substantially increase the fear and anxiety a victim suffered the

offense," without also being one of the first three, "sadism, torture, or excessive brutality." Ever most likely, the legislature did not put in the fourth alternative expecting it to be judicially interpreted away.

Although the Court of Appeals correctly concluded that the conduct must be more than normally inherent in the offense itself, such conduct occurred here. Unlike a typical armed robbery, this one involved a physical manifestation of violence. Defendant hit both victims in the head. He hit them with what looked like a sawed off shotgun. He struck one to the floor. He then herded them both behind the counter, a place convenient for death. The average person under these circumstances would probably think that he is about to die. Therefore, the sentencing court did not abuse its discretion. Some evidence exists that defendant committed "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." OV 7 was properly scored. This Court should reverse and reinstate the sentence.

**RELIEF**

**ACCORDINGLY**, plaintiff asks this Court to reverse and reinstate the sentence.

Respectfully submitted,

August 3, 2012

  
**JERROLD SCHROTTENBOER (P33223)**  
**CHIEF APPELLATE ATTORNEY**

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEENAN OMAR KING,

Defendant-Appellant.

---

UNPUBLISHED  
December 11, 2008

No. 279809  
Jackson Circuit Court  
LC No. 07-003708-FC

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, one count of unlawful imprisonment, MCL 750.349b, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 18 to 40 years for each of the armed robbery convictions and eight to 15 years for the unlawful imprisonment conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. Factual Background

Defendant's convictions arose from a robbery at the home of Germaine Overton on March 25, 2007. Three intruders entered Overton's house shortly after Overton, Carita Keene, and Overton's two sons arrived home late that night. Overton identified one of the intruders as defendant. According to Overton, defendant and another intruder rushed at him and knocked him to the ground. Defendant then hit Overton over the head with a gun and knelt over him, still holding the gun. While defendant and another man dragged Overton into the dining room and pointed a gun to his neck, a third intruder swung a gun at Keene to hit her, but she moved out of the way. Keene tried to escape with the two boys, but one of the intruders stopped them in the kitchen. The gunmen held Keene and the boys on the floor, against the wall, and demanded Keene's jewelry and cell phone. Defendant and his two accomplices then took Overton, Keene, and the two boys upstairs into a bedroom. They took Overton's jewelry and then searched his pockets, taking approximately \$800 in cash.

Police officers investigating other activity on the street observed suspicious activity in Overton's house and went to investigate. Officer Ralph Morgan looked through a window and saw a person on the ground with another person kneeling over him and holding a gun. After the police knocked at the door, defendant gave his gun to another intruder and told Overton to get rid

of the police. Defendant then escorted Overton downstairs. The officers eventually entered the house and arrested defendant. The other intruders apparently escaped through an upstairs window.

## II. Scoring of the Sentencing Guidelines

Defendant argues that offense variables (“OVs”) 7, 8, and 16 of the sentencing guidelines were improperly scored. Because defendant did not challenge the scoring of these offense variables in the trial court, this issue is not preserved. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). We may, however, review the issue for plain error affecting defendant’s substantial rights. *Id.* at 312. Further, defendant argues that defense counsel was ineffective for failing to object to the scoring of OVs 7 and 16. To establish ineffective assistance of counsel, defendant must show that his attorney’s performance was objectively unreasonable in light of prevailing professional norms and that but for his attorney’s error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).

Armed robbery is categorized as a class A crime against a person. MCL 777.16y. As scored by the trial court, defendant received 25 total prior record variable points and 105 total OV points, placing him in the D-VI cell of the class A grid, for which the sentencing guidelines range is 171 to 285 months. On appeal, defendant challenges the trial court’s scoring of 50 points for OV 7, 15 points for OV 8, and five points for OV 16.

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We will uphold a trial court’s scoring decision if there is any evidence supporting the score. *Id.* Questions concerning the interpretation of the statutory sentencing guidelines are questions of law subject to de novo review. *Id.*

### A. OV 7

MCL 777.37(1)(a) provides that 50 points may be scored for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” Each person who was placed in danger of injury or loss of life is considered a victim for purposes of OV 7. MCL 777.37(2). It is proper to consider the entirety of a defendant’s conduct when scoring the sentencing guidelines. See *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

MCL 777.37(3) defines “sadism” as “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.” We agree that defendant’s conduct does not meet the definition of sadism, because there is no evidence that a victim was subjected to extreme or prolonged pain or humiliation. The terms “torture” and “brutality” are not defined in the statute, but *Random House Webster’s College Dictionary* (1997) defines “torture” as “the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty,” and defines “brutality” as “the quality of being brutal.” “Brutal,” in turn, is defined as “savage; cruel; inhuman” or “harsh; severe.” *Id.*

Defendant's conduct throughout the course of the robbery can reasonably be described as excessively cruel, harsh, and severe. In *People v Wilson*, 252 Mich App 390, 396; 652 NW2d 488 (2002), this Court held that a defendant's excessive brutality in beating a victim in front of her family, or pointing a gun at the victim's son, was evidence supporting a 50-point score for OV 7. Here, in addition to confronting Overton and Keene with a gun in Overton's home in the presence of his two children, ages 9 and 11, defendant hit Overton over the head with the gun, forced him to the floor, pointed the gun at his neck while kneeling over him and demanding money, and then dragged him throughout the house. Additionally, one of defendant's accomplices attempted to strike Keene with a gun. Keene and the two children were also forced against a wall at gunpoint and then taken upstairs. Overton testified that the experience was very traumatic for him and his children. This entire continuum of conduct can reasonably be described as "excessively brutal." Accordingly, there was no plain error in scoring 50 points for OV 7, and defense counsel was not ineffective for failing to object to the scoring of this variable.

### B. OV 8

Defendant argues that the trial court miscoded OV 8 (victim asported to another place or situation of greater danger), MCL 777.38(1)(a), because the statute provides that this variable is not to be scored if the sentencing offense is kidnapping. MCL 777.38(2)(b). Although defendant contends that unlawful imprisonment, MCL 750.349b, is a form of kidnapping, the trial court did not score the guidelines for the offense of unlawful imprisonment. Instead, pursuant to MCL 771.14(2)(e)(i) and MCL 777.21(2), the court scored the guidelines only for armed robbery, the crime having the highest crime class. Accordingly, there was no plain error.

### C. OV 16

OV 16 may be scored at five points if the value of property obtained is between \$1,000 and \$20,000. MCL 777.46(1)(c). Although this variable is to be scored for all crimes against property, it is not to be scored for crimes against a person, except for home invasion. MCL 777.22(1) and (2). Armed robbery is a crime against a person, MCL 777.16y. Therefore, the trial court clearly erred in scoring five points for OV 16. But because a five-point reduction in defendant's total OV score would not affect the appropriate guidelines range, the error is harmless and resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Further, because defendant was not prejudiced by defense counsel's failure to object, his ineffective assistance of counsel claim fails as well.

## III. Double Jeopardy

Defendant argues that his convictions for two counts of armed robbery and two counts of felony-firearm violate his constitutional double jeopardy protections. The Double Jeopardy Clauses of the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clause protects against multiple prosecutions and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). A double jeopardy challenge presents a constitutional issue reviewed de novo on appeal. *Id.* at 573.

The constitutional protections against double jeopardy do not prohibit separate convictions for crimes committed against different victims, even if the crimes occurred during

the same criminal transaction. Here, both Overton and Keene were robbery victims, and each was robbed at gunpoint. Therefore, defendant's convictions of two counts of armed robbery and two counts of felony-firearm do not violate double jeopardy protections. *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253 (2002). Defendant's reliance on cases holding that a defendant cannot be convicted and sentenced for both felony-murder and the predicate felony is misplaced. That theory has no relevance here, where defendant was convicted of separate offenses against separate victims.<sup>1</sup> Accordingly, there is no merit to this issue.

#### IV. Restitution

Defendant next argues that the trial court erred in ordering him to pay restitution of \$800. Defendant acknowledges that he failed to preserve this issue by objecting to the restitution award at sentencing, but argues that the trial court's restitution order constitutes plain error affecting his substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), because the record clearly reflects that the prosecution did not meet its burden of proving the amount of the loss and because the trial court failed to make factual findings on the issue.

When sentencing a defendant in a criminal action, the trial court must "order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 769.1a(2). Additionally, MCL 780.767 provides, in part:

(1) In determining the amount of restitution to order under section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense.

\* \* \*

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

But as explained in *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997),

the language of [MCL 780.767] does not require the trial judge to make a separate factual inquiry and individual findings on the record. When determining restitution, whether it is included in the plea agreement or is statutorily imposed at the discretion of the trial court, the statute requires the court "to consider" the enumerated factors in light of all the information available at the time of the sentencing hearing and then impose the sentence. *Only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of*

---

<sup>1</sup> Moreover, our Supreme Court recently overruled this rule in *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

*restitution, triggers the need to resolve the dispute by a preponderance of the evidence.* MCL 780.767(4). [Emphasis added.]

Here, there was no actual dispute regarding the amount of restitution, so the trial court was not required to determine whether the prosecutor had proven the amount by a preponderance of the evidence. Moreover, in light of Overton and Keene's trial testimony that jewelry valued at more than \$1,000 and \$800 in cash was stolen, and the information in the presentence report that Overton had filed an insurance claim with a deductible amount of \$1,000, there was no plain error in awarding restitution of \$800.

#### V. Jury Array

Defendant argues that his right to an impartial jury drawn from a fair cross-section of the community was violated because his jury array included only one African-American. In *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003), this Court stated:

To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving "that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203, 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

However, to properly preserve a challenge to the jury array, a party must raise this issue before the jury is empaneled and sworn. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). A review of the record in this case indicates that defendant failed to make any objections regarding the composition of her jury array. Further, there is no evidence in the lower court record to support defendant's argument. Consequently, we have no means of conducting a meaningful review of defendant's allegations on appeal.

In this case, not only did defendant fail to object to the jury array at trial, his counsel stated, "we are satisfied with this jury." Because defendant failed to raise this issue below, no record was developed. On appeal, defendant has not identified any evidence suggesting that any underrepresentation of African-Americans in his particular jury was due to systematic exclusion. Accordingly, there is no basis for concluding that the fair cross-section requirement was violated.

Furthermore, defense counsel expressed his satisfaction with the jury. As our Supreme Court explained in *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001), "[w]hen a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal." Defense counsel's affirmative approval of the jury waived any claim of error. *Id.*; *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

#### VI. Juror Partiality

Finally, defendant argues that he was denied his right to a fair and impartial jury when a juror who admitted to having previously met Overton was allowed to remain on the jury.

After the jurors were selected, but before they were administered their oath, the prosecutor revealed that Overton had disclosed that he may have had a conversation about the case with one of the prospective jurors. The trial court agreed to question the juror and the following exchange occurred:

Q. [T]he prosecutor is indicating that Mr. Overton had indicated maybe he had spoke to you about the case?

A. Um . . . . no, not really.

Q. All right. You don't recall anything about being told anything about the facts

--

A. Hum-um

Q. --either from him or anybody else?

A. No. Yeah, I heard about it on the streets.

\* \* \*

Q. And you'll be able to put that out of your mind, and upon deliberating in this matter, only consider what comes to you in the course of this trial, right?

A. Yes.

The juror further stated that she "just heard that it had happened," and denied hearing any specific details. When defense counsel asked the juror whether she had any conversation with Overton in which the robbery was mentioned, the juror denied this. The trial court commented, "I don't see any big problem based on what you've said. She can listen to what goes on here. So we'll proceed with the twelve that we have."

Defendant now argues that the trial court should have declared a mistrial or at least investigated the matter further by questioning Overton. Because defendant did not move for a mistrial below or otherwise object to the juror's continued presence on the jury, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Additionally, where a defendant contends that a jury was exposed to extraneous influences, the defendant must show that the jury was exposed to such influences, and further, that there is a real and substantial possibility that they could have affected the jury's verdict. *Id.* at 88-89. In *People v Schram*, 378 Mich 145, 159-160; 142 NW2d 662 (1966), our Supreme Court held that outside contact between a juror and an attorney for one of the parties did not require reversal unless the defendant could demonstrate that he was prejudiced by the contact. A mere possibility of prejudice was deemed insufficient to require reversal. *Id.* at 159.

In this case, upon inquiry by the trial court, the juror denied having a conversation about the case with Overton, and indicated that she had only heard "on the streets" that it had

happened, but did not hear any of the details. The juror indicated that she could set aside what little she had heard and decide the case only on the evidence presented at trial. In light of the juror's responses, there is no basis for concluding that the juror's prior exposure to information would cloud her impartiality, or that there is a real and substantial possibility that the jury's verdict was tainted by extraneous influences. Further, we are satisfied that the trial court made an appropriate inquiry. Both parties were apparently satisfied with the juror's responses and did not request any further inquiry. Accordingly, the trial court's failure to declare a mistrial or investigate the matter further was not plain error.

Affirmed.

/s/ Henry William Saad  
/s/ E. Thomas Fitzgerald  
/s/ Jane M. Beckering

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRON LAMAR HEREFORD,

Defendant-Appellant.

---

UNPUBLISHED  
December 3, 2002

No. 227296  
Oakland Circuit Court  
LC No. 99-166249-FC

Before: O'Connell, P.J., and White and B. B. MacKenzie\*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced to a term of 9 to 20 years' imprisonment. He appeals as of right. We affirm.

Defendant and two codefendants, Alvin Smith and Kyle Davis, were charged with the April 22, 1999, armed robbery of a Hungry Howie's restaurant in Southfield. Codefendant Smith stood trial separately and was convicted of armed robbery. Defendant and codefendant Davis stood trial together, with a jury determining Davis' guilt and the circuit court determining defendant's guilt.

I

Defendant first challenges the circuit court's findings that he participated in the armed robbery and that he possessed a gun during the robbery. To the extent defendant suggests that insufficient evidence supported the circuit court's findings, we review all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable factfinder could determine defendant's guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Questions regarding witness credibility must be resolved by the factfinder, and this Court should not interfere with the factfinder's role in determining witness credibility or the weight of evidence. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002).

In considering defendant's related claim that the circuit court clearly erred in finding that he participated in and held a gun during the robbery, this Court reviews the entire record to determine whether it possesses the definite and firm conviction that the circuit court made a

---

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

mistake. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). An appellate court will defer to the circuit court's resolution of factual issues, especially where it involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

Defendant's claim that the evidence at trial did not support the circuit court's identification of him as a participant in the robbery lacks merit. The assistant manager of the restaurant testified extensively regarding his recollections of the armed robbery. Both the assistant manager and the restaurant's part owner recalled that the assistant manager had worked with defendant for at least a month, on several occasions each week. The assistant manager testified repeatedly and with certainty that he recognized defendant as one of the robbers when defendant's mask briefly slipped from his face. A police officer who responded to the restaurant after the robbery testified that the assistant manager positively identified defendant as a participant in the robbery. Codefendant Smith also offered testimony that defendant participated in the robbery.

This evidence amply supports the circuit court's finding that defendant participated in the robbery. *Nowack, supra*. While defendant questions the assistant manager's ability to have discerned his identity during the robbery, this Court will not interfere with the circuit court's assignment of significant weight to the assistant manager's unwavering identification testimony. *Elkhoja, supra*. Likewise, we will not second guess the circuit court's explicit determinations to credit the testimony indicating that defendant participated in the crime and to disbelieve defendant's testimony regarding his whereabouts. *Id.* In response to defendant's claim that some evidence suggested that a person other than defendant might have participated in the crime, we note that "the prosecutor need not negate every reasonable theory consistent with innocence . . . ." *Nowack, supra* at 400.<sup>1</sup>

We similarly conclude that, after reviewing the entire record, including the aforementioned evidence of identification credited by the circuit court, we do not possess the definite and firm conviction that the circuit court erred in finding that defendant participated in the robbery. *Cartwright, supra; Swirles (After Remand), supra*.

Regarding defendant's challenge to the circuit court's finding that defendant possessed a gun during the robbery, codefendant Smith's testimony to this effect constituted the sole evidence of record supporting the court's finding. Smith's testimony directly contradicted the assistant manager's recollection that defendant did not have the gun during the robbery. Although Smith never testified that anyone other than defendant had the gun during the robbery, Smith's account of the crime otherwise appeared vague and somewhat inconsistent with the victims' recollections.<sup>2</sup> Nonetheless, the circuit court apparently believed at least that portion of

<sup>1</sup> Regarding defendant's repeated references in his briefs on appeal to a police evidence analysis that detected no gunpowder on defendant's hands, we decline to consider the analysis because defendant did not introduce this exhibit during trial. See *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998) (noting that this Court generally will not permit enlargement of the record on appeal), rev'd in part on other grounds 462 Mich 415 (2000).

<sup>2</sup> Defendant has not properly preserved for our review his assertion that the prosecutor improperly utilized leading questions to elicit Smith's testimony, because defendant failed to  
(continued...)

Smith's testimony recounting defendant's possession of a weapon, and we reiterate that "[t]his Court should not interfere with the [factfinder's] role in determining the weight of the evidence or the credibility of witnesses." *Elkhoja, supra*.

Accordingly, we find that sufficient evidence existed to support the circuit court's determination that defendant possessed a weapon during the robbery. Furthermore, because evidence supports the circuit court's finding that defendant possessed a weapon and the court found this testimony credible, we cannot conclude that the court clearly erred in making this finding. *Cartwright, supra*; *Swirles (After Remand), supra*.<sup>3</sup> Moreover, even disregarding Smith's testimony that defendant had a weapon, the substantial identification testimony discussed above amply supported defendant's conviction as an aider and abettor of the armed robbery. MCL 767.39; see also *People v Acosta*, 153 Mich App 504, 512; 396 NW2d 463 (1986).<sup>4</sup>

---

(...continued)

raise this issue in his appellate brief's statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, the circuit court did not abuse its discretion in permitting the prosecutor to employ leading questions because (1) Smith was "identified with an adverse party" and no indication existed that Smith had received consideration for his testimony against defendant, MRE 611(c)(3); and (2) Smith possessed diminished mental capacity. MRE 611(a); see e.g., *People v Wheeler*, 186 Mich 489, 492-493; 152 NW 968 (1915); *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

<sup>3</sup> In a related contention, defendant suggests that the circuit court, which had presided over codefendant Smith's earlier trial, erred in relying on its knowledge regarding the evidence introduced at Smith's trial in finding that defendant had a gun during the robbery. We find that defendant's contention lacks merit. Smith testified at defendant's trial that defendant had a gun during the robbery, the circuit court cited and relied on Smith's testimony at the instant trial, and the court's finding that defendant had a weapon cannot be characterized as clearly erroneous. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

<sup>4</sup> Defendant failed to preserve for appellate review his argument, raised for the first time on appeal, that Smith lacked the capacity to testify pursuant to MRE 601. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Defendant also failed to present any evidence rebutting the presumption that Smith, whose testimony reflected his ability to distinguish the truth from a lie, was competent to testify. See *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

Regarding defendant's suggestion that the circuit court should have discounted Smith's testimony on the basis of Smith's status as an accomplice to the robbery, defendant failed to properly present this claim within his appellate brief's statement of questions presented. *Brown, supra*. Furthermore, the record reflects the circuit court's awareness of Smith's accomplice status, Smith's denials that he received any promises of leniency, and Smith's own imminent sentencing hearing. *People v Reed*, 453 Mich 685, 691-692; 556 NW2d 858 (1996). Moreover, in light of the other identification testimony supporting defendant's conviction as an aider and abettor of the robbery, any error with respect to the admission of Smith's accomplice testimony qualifies as harmless. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

## II

Defendant also raises many and varied allegations that his defense counsel rendered ineffective assistance. Because defendant failed to properly preserve this issue for appellate review by timely moving for a new trial or evidentiary hearing on the basis of ineffective assistance, our review of defendant's allegations is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers, supra* at 714-715.

Limiting our review to the existing record, we are not persuaded that defense counsel was ineffective. Defendant has failed to overcome the strong presumption that defense counsel's evidentiary decisions and witness examinations constituted sound trial strategy, or to demonstrate that any action by defense counsel deprived him of a substantial defense or otherwise adversely affected the outcome of his trial. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

We note that defense counsel vigorously cross-examined both witnesses who identified defendant, namely the assistant manager and codefendant Smith. We further note that the record, which reflects defendant's knowing and voluntary waiver of his right to a jury trial, contradicts defendant's claim that defense counsel gave him poor advice regarding his decision to opt for a bench trial. See MCR 6.402(B); *People v Reddick*, 187 Mich App 547, 549-550; 468 NW2d 278 (1991). We lastly observe that defense counsel did not provide ineffective assistance by failing to make a meritless motion to suppress defendant's precustodial statements to the police. See *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

## III

Defendant next argues that the circuit court erred in calculating the sentencing guidelines range by assigning fifty points to offense variable seven (OV 7). This Court reviews for an abuse of discretion a sentencing court's offense variable scoring, provided that some evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We find that the circuit court properly scored fifty points for OV 7 (aggravated physical abuse) on the basis that the victims of the robbery were "treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). At the time of defendant's 1999 offense, terrorism

was defined as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.”<sup>5</sup> MCL 777.37(2). The instant record contains evidence that defendant had a gun during the robbery, that the gun was pointed at both victims during the robbery, that a robber used the gun to strike one victim on the back of his head, that the victims feared for their lives, and that the robbers fired the gun during the robbery. Under these circumstances, we cannot characterize the circuit court’s scoring of OV 7 as an abuse of discretion. *Hornsby, supra* at 468-469.

Affirmed.

/s/ Peter D. O’Connell  
/s/ Helene N. White  
/s/ Barbara B. MacKenzie

---

<sup>5</sup> We note that this statute was amended in 2002 to remove the “terrorism” language. See I37 PA 2002.