STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE BLANCHARD,

Defendant-Appellant.

UNPUBLISHED
June 10, 2004

No. 241960
Wayne Circuit Court
LC No. 01-007696-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LYONS,

Defendant-Appellant.

No. 242319
Wayne Circuit Court
LC No. 01-007696-04

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAUHEED WILDER,

Defendant-Appellant.

No. 242320
Wayne Circuit Court
LC No. 01-007696-03

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendants Johnnie Blanchard, Derrick Lyons, and Tauheed Wilder were tried jointly, defendants Blanchard and Lyons before separate juries, and defendant Wilder before the court. Defendant Blanchard was convicted of two counts of armed robbery, MCL 750.529, carjacking, MCL 750.529a, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of two to twenty years each for the armed robbery, carjacking and assault convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant Lyons was convicted of carjacking and felony-firearm. He was sentenced to a prison term of nine to thirty years for the carjacking conviction and a consecutive two-year term for the felony-firearm conviction. Defendant Wilder was convicted of armed robbery, felon in possession of a firearm, MCL 750.224f, and felony-firearm. He was sentenced to concurrent prison terms of ten to thirty years for the armed robbery conviction, and one to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. Defendants' convictions arise from an armed robbery and carjacking. All three defendants appeal as of right.[1] Their appeals have been consolidated for this Court's consideration. We affirm.

I. Docket No. 241960 (Defendant Blanchard)

Defendant Blanchard argues that the trial court erred in admitting both his confession and complainant Candace Lockridge's in-court identification of him, and additionally argues that he was convicted without the benefit of the effective assistance of counsel.

A. Confession

In a statement given to the police, defendant Blanchard admitted that he went driving with codefendant Wilder intending "to hit a lick," and "looking for somebody to rob." The statement further included the following:

> Tone walked up to my car, and told us there was two girls in the car that he had just spoke to.
>
> Then, me and Tauheed [defendant Wilder] got out, and me, Tauheed and Tone was walking towards the Monte Carlo. I had my gun out on my side. Tauheed had his gun drawn. Tone walked to the passenger side, and he yelled, bitch, get out the car.
>
> * * *
>
> Once he got her out the car, he came around to the driver's side, opened the door, and grabbed the driver by her hair. When he pulled her out the car, he snatched at her chest, and pulled her gold chain off. I picked it up. The girl ran,

[1] A fourth codefendant, Eddie Fantroy, was also tried with the present defendants, but is not a party to this appeal. Charges against a fifth codefendant, Antonio Stallings, were resolved without going to trial.

> fell to the ground, and stayed there. I ran toward my car, turned around, and started shooting in the lady's direction that fell, but at an angle.

This statement was admitted into evidence, without objection. Defendant argues that the trial court erred in declining sua sponte to rule the confession inadmissible because the police made no audio or video recording of the interview. This argument is without merit.

Defendant points to certain of our sister states that have adopted requirements that police interrogations be recorded, and urges this Court to hold that due process under our state constitution requires the same. See Const 1963, art 1, § 17. However, as defendant concedes, this Court has addressed that argument, and squarely rejected it. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). *Fike* is binding precedent, MCR 7.215(J)(1), and we decline defendant's invitation to express disagreement with it.

B. Identification

Contrary to defendant's assertions, only one witness, complainant Lockridge, identified defendant Blanchard as a participant in the criminal activity here at issue. When the prosecutor first attempted to elicit the in-court identification from Lockridge, the trial court sustained defense counsel's objection on the ground that the inquiry was leading. A bench conference followed, then the prosecutor rephrased the question. Counsel for codefendant Wilder then raised an objection on the ground of relevance, which defendant Blanchard's attorney joined, but the court overruled them. When asked whether she recognized defendant, Lockridge answered, "Yes, as the gentleman in the back of the vehicle," whom she observed while "looking to [complainant] Robin [Taylor] telling her to pull off."

Defendant argues that Lockridge's identification of him should have been suppressed, on the ground that the in-court setting was so suggestive as to taint that witness' identification. The fairness of an identification procedure is evaluated in light of all the circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *People v Kurylczyk,* 443 Mich 289, 311-312 (Griffin, J., joined by Mallett, J.), 318 (Boyle, J., joined by Riley, J., joining Griffin, J., in pertinent part); 505 NW2d 528 (1993); *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). Defendant must show that, in light of all the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczyk, supra* at 302, 306, 318.

Defendant points out that Lockridge identified him only at his preliminary examination and then his trial. However, in-court appearances are unavoidably suggestive, and potential suggestiveness alone does necessarily render an identification procedure constitutionally defective. See *id.* at 306. Defendant argues that "[t]his was an in-court pointing out [of] the Defendant by the prosecuting attorney," which he characterizes as "clearly inadmissible and improperly suggestive." Defendant implicitly argues that Lockridge came to court with no recollection of the assailant who had positioned himself at the rear of the car, but then assumed it was him simply because the prosecutor endeavored to elicit that connection. The record does not support this interpretation of events. We note that the prosecutor accepted complainant Taylor's inability to identify defendant without trying to resort to suggestive tactics, and that Lockridge evidenced genuinely discriminating judgment in the matter, having identified defendants

Blanchard and Lyons, while expressly declining to identify codefendant Wilder and the others involved in the crime.

Moreover, defendant confessed his involvement in the crime to the police before trial, and to the trial court at sentencing. Because defendant fails to show that Lockridge's identification of him at trial was plain error, or that it resulted in the conviction of an innocent man, *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999), we reject this claim of error.

C. Assistance of Counsel

Defendant argues that he was denied the effective assistance of trial counsel. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

After trial, but before sentencing, defendant terminated his relationship with his trial attorney and had his appellate attorney continue the representation. Because defendant neither expressed dissatisfaction with trial counsel during the course of trial, nor moved the trial court or this Court for a *Ginther*[2] hearing to test the factual bases for his claim of ineffective assistance, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

1. Confession

Defendant argues that defense counsel was ineffective for failure to move the trial court to suppress his confession. We disagree.

Defendant asserts that the police extracted his inculpatory statement from him by improper coercive means, including by holding him incommunicado for fifteen hours, imposing actual and threats of violence, and insisting that his mother's car would remain impounded unless he said what they wanted to hear. Such allegations do spell out examples of improper police conduct of the sort that would render a resulting confession inadmissible. See US Const, Am XIV; Const 1963, art 1, § 17 (due process); US Const, Am V; Const 1963 art 1, § 17 (self-incrimination); US Const, Ams VI and XIV; Const 1963, art 1, § 20 (assistance of counsel); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). However, defendant provides no citations to the record below to support these accusations. Instead, defendant hopes to enlarge the record by appending to his brief on appeal an unsigned, unnotarized, typewritten summary purporting to indicate "exactly what happened on Tuesday, June 19, 2001 @ approximately 6:30 a.m."

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

The evidence of record indicates that defendant provided his inculpatory statement to the police only after being advised of, and waiving, his *Miranda*[3] rights, and was otherwise fully cooperative throughout. Because defendant fails to show, by reference to the record below, that any police misconduct was involved in obtaining his statements, that he was in fact at that moment lacking in mental competency, or that any pretrial suppression hearing was requested below, we decline to allow defendant to litigate the issue on appeal. See *Abraham, supra*. We do not deem defendant's allegations sufficient to support the argument that defense counsel should have moved the trial court to suppress the confession. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is "not required to argue a frivolous or meritless motion").

2. Request for Supplemental Compensation

Defendant asserts that appointed trial counsel approached him and his mother with the proposal that they pay him $5,000, the implication being that counsel was thus hoping to supplement the compensation he was receiving in his capacity as a public defender. Defendant further asserts that this ethical breach militates in favor of the conclusion that trial counsel was ineffective. Again, defendant fails to support his allegation with citations to the lower court record, but instead hopes to enlarge the record by offering an affidavit from his mother. Moreover, defendant's mother's personal opinion that defense counsel was less than zealous in his representation because he received no supplemental remuneration lends little support for a claim of ineffective assistance.

Defendant cites an administrative order of our Supreme Court for the proposition that it is unethical for a court-appointed attorney to "seek or accept fees from the defendant or from any other source on the defendant's behalf other than those authorized by the appointing authority." Administrative Order No. 1981-7, standard 20.[4] However, even assuming, without deciding, the truth of defendant's assertion that trial counsel sought supplemental compensation from defendant and his mother, this does not compel the conclusion that defendant suffered from ineffective assistance.

Defendant characterizes an attorney who seeks supplemental compensation as operating with a conflict of interest. We disagree. An appointed attorney bears the same duty of zealous representation as a retained one, see comment to MRPC 6.2, and shares also the incentives to succeed, e.g., for the sake of general reputation or further practice opportunities. Defendant's allegations in fact do not suggest the existence of a conflict of interest. His unsupported assertion that trial counsel provided only substandard service out of dissatisfaction with his compensation arrangement does not warrant appellate relief.

[3] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Although this pronouncement concerns appointed *appellate* attorneys, the ethical matter addressed is not limited to appellate, as opposed to trial, representations.

3. Miscellaneous Allegations of Error

Defendant states that "[f]ailure to adequately research or interview witnesses is believed to have also contributed to Defendant's conviction." However, defendant leaves this Court to guess what useful information such additional investigation would have brought to light. This failure of presentation is fatal to this bald, unsupported, assertion. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993); MCR 7.212(C)(7).

Defendant stated on the record that he had decided not to testify on his own behalf, but now suggests that trial counsel erred in counseling him on the matter. However, the decision whether to testify is a crucial aspect of trial strategy, which is ultimately for a criminal defendant, with the advice of counsel, to decide personally. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987). An unsuccessful defendant can always assert in retrospect that that question should have been decided differently, and defendant in this case offers no argument beyond such second guessing. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant likewise suggests that had he been better counseled he might have elected to plead guilty, but fails to indicate what additional information might have led him to offer such a plea, or to show that he ever had any such inclination.

For these reasons, we reject defendant Blanchard's claim of ineffective assistance of counsel.

II. Docket No. 242319 (Defendant Lyons)

Defendant Lyons argues that the trial court erred in failing to instruct his jury on abandonment, and that he was convicted without the benefit of the effective assistance of counsel.

A. Instruction on Abandonment

Defendant argues that the trial court erred because it did not sua sponte instruct his jury on the defense of abandonment. We disagree. "Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 Mich 655 (2003), citing *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). However, defendant concedes that the record includes no indication that the defense ever requested an instruction on abandonment, and that defense counsel in fact expressed satisfaction with the instructions actually given. Our review is thus limited to ascertaining whether there was plain error affecting defendant's substantial rights. *Carines, supra*. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *Daniel, supra* at 53. Instructions should cover all material issues, defenses, and theories that have evidentiary support. *Id.*

The prosecutor's theory of the case was that defendant Lyons was the man who first walked by the victims while they were seated in their car, and that he did so acting as a "scout"

for the other assailants. In his opening statement, defense counsel informed defendant's jury that defendant's inculpatory statement to the police would be coming into evidence, but suggested that the statement should be disbelieved as the product of a young man under stress. Defense counsel conceded that defendant was socially acquainted with the people involved in the crimes, but asserted that by "the time this car jacking and robbery took place, [defendant] had left."

In his police statement, defendant admitted that he was involved in an earlier armed robbery on the same day, along with persons named Antonion Stallings, Tauheed, and John, but maintained that he had a change of heart prior to the instant crimes and simply walked past the victims, after which he heard gunshots, and "somebody who I was with stole the vehicle."

In closing argument, defense counsel expressly refused to concede that defendant was indeed the man who first walked past the victims' car, choosing instead to challenge the veracity of defendant's confession, and the accuracy of Lockridge's identification of him. Counsel argued that defendant was with the others who executed the crime "in the beginning, but he left them long before this robbery occurred," and asserted that a different participant was the one who initially walked past the car.

It is clear, then, that although the theory of abandonment would have comported with what defendant told the police, it was not consistent with the position the defense took at trial. More specifically, defense counsel urged the jury not to accept defendant's confession, and Lockridge's identification of him, and to believe instead that defendant left the company of his friends before ever becoming party to their plan to engage in the criminal activity at issue.

The trial court instructed the jury that mere presence with others who are committing a crime is not enough to establish guilt. That instruction covered the defense actually advocated. *Daniel, supra* at 53. Had the trial court sua sponte instructed the jury also on abandonment, the court would have highlighted a theory that the defense had chosen to disavow—that defendant Lyons was indeed the person who walked past the victims in their car just before the assaultive conduct began. The court thus properly respected the strategic choices of defendant and his attorney.

B. Assistance of Counsel

Defendant argues that his trial attorney was constitutionally defective, on the ground that counsel failed to request an instruction on abandonment, failed to move the trial court to redact from defendant's police statement his admission that he had participated in other crimes, and failed to correct a prejudicial error involved in determining defendant's sentence. We disagree.

1. Instruction on Abandonment

Defendant acknowledges that the defense of abandonment and mistaken identity are inconsistent, but argues that the defense wished to present both even so, and thus that defense counsel was ineffective for failing to highlight the abandonment theory by insisting on a particular such instruction. This argument is unpersuasive. As noted above, defense counsel urged the jury to conclude that defendant was misidentified as the person who walked past the victims' car just before the others appeared and executed the robberies and carjacking. Counsel's decisions concerning the choice of theories to present are presumed to be exercises of

sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). Defendant fails to show that his defense was conducted ineptly simply because of the decision to emphasize the defense of mistaken identification over that of abandonment. And having chosen the former, a strategic reason for downplaying the latter by not seeking an instruction on it is obvious. Defendant has failed to show that this aspect of trial strategy constituted ineffective assistance of counsel.

2. Confession

Defendant argues that his trial attorney was ineffective for failing, after unsuccessfully seeking to have defendant's entire police statement suppressed, to try to have defendant's admissions of other crimes redacted from that statement. However, plain statements admitting to some crimes can lend credibility to simultaneous protestations of innocence concerning others. See *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Allowing defendant's plain admissions of involvement in other crimes to reach his jury without challenge gave the defense the potential benefit of having the jurors contrast defendant's plain admission that he had committed certain crimes with his insistence in the same statement that he did not share in responsibility for the instant ones. Because there were strategic reasons for not objecting to that evidence, that lack of objection will not support a claim of ineffective assistance of counsel. See *Julian, supra*.

Moreover, had defense counsel sought to suppress defendant's confession of involvement in two earlier armed robberies involving the same companions implicated in the instant case, the trial court may well have admitted the evidence to prove "opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." MRE 404(b)(1). Counsel is not obliged to argue futile motions. See *Gist*, *supra*.

3. Sentencing

Defendant next argues that his score for prior record variable 7 was improperly scored and should have been zero, bringing his total prior record variable score down from twenty-nine to nineteen. Defendant concedes that this issue was not preserved. A party may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. MCL 769.34(10); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). In any event, according to defendant's recalculations, had PRV 7 been properly scored at zero, the recommended range for his minimum sentence for carjacking would have been 81 to 135 months. Defendant's actual minimum of nine years, or 108 months, then, still falls within that adjusted range under the guidelines. Because defendant fails to show that the error rendered the proceedings fundamentally unfair or unreliable, this oversight on trial counsel's part does not warrant appellate relief. *Poole, supra*.

III. Docket No. 242320 (Defendant Wilder)

Defendant Wilder argues that the trial court erred in denying his motion to suppress the statement he gave to the police, in allowing complainant Taylor to identify him in court, and in

scoring one of his sentencing variables in recognition that shots were fired in the course of the crimes.

A. Defendant's Statement

In reviewing a trial court's decision following a suppression hearing, this Court reviews the trial court's factual findings for clear error, but reviews the legal conclusions de novo. See *Abraham, supra* at 644. This Court examines the totality of the circumstances surrounding the interrogations, and "[t]he state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights." *Id.* at 645 (citations omitted). Voluntariness is wholly a function of police conduct. *Id.* The right to counsel attaches upon the initiation of criminal proceedings through a formal charge, preliminary hearing, indictment, information, or arraignment. *People v Marsack*, 231 Mich App 364, 376-377; 586 NW2d 234 (1998). Even before the right attaches generally, however, the police are obliged to inform a suspect of the right to have counsel present during questioning, and to cease interrogations once the suspect has invoked the right. *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998), citing *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The latter limitation does not apply where the suspect initiates discussions with the police. *Kowalski, supra* at 478, citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

In this case, defendant complains that he unambiguously asked for an attorney, but that the police simply told him that he would have one for the lineup and otherwise continued interrogating him. Defendant further asserts that he was detained for over twenty hours before he gave his statement, during which time he ate virtually nothing, was dehydrated, and deprived of sleep. Finally, defendant alleges that he cooperated with the police because he was promised their help.

However, at the *Walker*[5] hearing, the police sergeant who interrogated defendant testified that defendant read aloud from a Constitutional Rights Certificate of Notification form, initialed each item, signed the form, and indicated that he understood his rights. The sergeant further recounted that he typed defendant's statement, and that defendant read and signed the document. The officer testified that he neither threatened defendant, nor promised him anything, and that defendant was suffering from no physical injury that he noticed. According to the officer, defendant did not appear sleep deprived, and showed no obvious emotion, or signs of intoxication. The witness added that he touched defendant only in the course of taking handcuffs on and off, and that defendant was "real pleasant" in the matter. Asked if defendant demonstrated any difficulties in reading, the officer answered in the negative, adding that defendant "seemed quite intelligent" and never asked questions about his rights. According to the witness, defendant never requested legal counsel. The officer said that he asked defendant if he had been denied food, access to lavatory facilities, or access to a lawyer, or if he had been threatened, or promised anything in exchange for his statement, and that defendant answered no. Defendant offers no argument why the trial court erred in crediting this testimony, beyond pointing out that he maintained otherwise. "Credibility is a matter for the trier of fact to

[5] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

The trial court had a solid evidentiary basis for its conclusion that defendant's statement was voluntarily, and made pursuant to a knowing and intelligent waiver of his *Miranda* rights. We affirm the court's decision to allow defendant's statement into evidence.

B. Identification

Defendant argues that the trial court erred in allowing complainant Taylor to identify him in court. We disagree. Defendant cites the preliminary examination and two trial excerpts for the proposition that this issue is preserved for appellate review. However, each of the cited passages involves cross-examination of Taylor after she had identified defendant, none presenting any motion to suppress her identification of defendant outright.[6] Because defendant fails to show that there was any challenge to the legal competence of Taylor's identification below, we will review this issue for plain error affecting defendant's substantial rights. *Carines, supra*.

Although Taylor admitted that she failed to select defendant from a live lineup in which he was present, she explained that her principal basis for identifying the assailant in question was his dark skin and braids, which may have been partially obscured by defendant's wearing of a hat at the lineup. Taylor testified that she paid close attention to defendant at the lineup, and hesitated about identifying him then only because she was not entirely certain at the time. We additionally note that Taylor did not identify all the defendants in court, but, of the three defendants involved in this appeal, identified only Wilder. This record does not suggest that Taylor's identification was merely the result of the suggestive circumstances surrounding seeing defendant in court. The trial court did not err in failing sua sponte to disallow the identification at trial. *People v Kurylczyk,* 443 Mich 289, 302, 306, 318; 505 NW2d 528 (1993). See also *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972) (even where the witnesses' identification of the defendant is less than positive, the question remains one for the jury). Further, defendant fails to show that Taylor's identification of him resulted in the conviction of an innocent man.[7] *Carines, supra.* For these reasons, we reject this claim of error.

C. Sentencing

At sentencing, defendant objected to the trial court's assessment of twenty-five points for offense variable 1, aggravated use of a firearm. MCL 777.31. Twenty-five points are to be assessed if shots were fired at or toward a victim. The trial court felt obliged to score that variable at twenty-five points because it was scored that way for codefendant Blanchard, who admitted shooting in the general direction of one of the victims in his statement to the police, and

[6] We remind appellate counsel that her duty of candor before a tribunal includes refraining from presenting such misrepresentations of the record. MRPC 3.3(a)(1).

[7] We note that at sentencing defendant "humbly but boldly" asked for "forgiveness," from the court and the victims, for his part in these crimes.

because MCL 777.31(2)(b) commands that, in multiple-defendant cases, if one defendant is assessed points for that variable, all defendants must be assessed the same number of points. However, as defendant pointed out below, the trial court, sitting as the trier of fact in defendant's bench trial, purged codefendant Blanchard's confession to firing shots from its consideration of that statement for purposes of determining defendant Wilder's guilt. The court in fact opined that, for purposes of determining Wilder's guilt, "it's probable that gunshots were being shot from another vicinity totally unrelated to this particular situation."

Defendant argues that this presents the incongruous situation where the trial court assessed points in direct contravention of its own factual findings. We disagree. When determining guilt or innocence, the trial court was minding its duty not to consider certain information inculpatory of defendant in a confession offered by a nontestifying codefendant. See *People v Banks*, 438 Mich 408, 420-421; 475 NW2d 769 (1991), citing *Bruton v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968). The evidentiary standard, of course, was beyond a reasonable doubt. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). It was in that context that the trial court opined that the gunshots to which the victims attested may have originated elsewhere than with the crimes in question. However, factfinding for purposes of sentencing is governed by substantially different rules. For purposes of sentencing, the court's consideration is confined neither to facts determined beyond a reasonable doubt, nor to evidence that would be admissible for determination of guilt or innocence. Factual findings for sentencing purposes require a mere preponderance of the evidence. See *People v Ewing (After Remand)*, 435 Mich 443, 472-473; 458 NW2d 880 (1990). Information relied upon may come from several sources, including some that would not be admissible at trial, e.g., a presentence investigator's report. *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1101(b)(3).

In this case, the trial court's scoring of twenty-five points against codefendant Blanchard for OV 1 indicates that the trial court believed, on a preponderance of the evidence, that shots were fired in the course of the robberies and carjacking. The evidence unmistakably supports that finding. Aside from each victim's testimony about hearing gunshots as she ran from the scene, defendant's presentence investigator specifically reported that, in the course of criminal conduct involving defendant, codefendant Blanchard fired some shots in the direction of complainant Taylor. The court's statements to the contrary in the course of rendering its verdict with respect to defendant Wilder were gratuitous, as its determination of the elements of the charged crimes did not require a finding regarding the gunshots. The court's pronouncements at the close of trial, but before the sentencing investigation and other attendant proceedings, did not bind the court when it came time to pronounce sentence. Because there was evidence to support the trial court's scoring of OV 1, we affirm that decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello