STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR WILLIAM DITTMAR,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 352576
Saginaw Circuit Court
LC No. 18-045723-FC

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

A jury convicted defendant of delivery of a controlled substance causing death, MCL 750.317a, and delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(*iv*). The trial court sentenced defendant to serve concurrent terms of 11 to 30 years' imprisonment for delivery of a controlled substance causing death, and 4 to 10 years' imprisonment for delivery of a controlled substance less than 50 grams. The trial court ordered defendant to pay $12,104.72 in restitution. Defendant appeals by right both his convictions and sentences. We affirm.

I. FACTUAL BACKGROUND

On August 7, 2018, defendant arranged to meet the victim at the victim's home. The victim, who had been disabled as a result of a motor vehicle accident which caused a spinal injury, required the assistance of a caretaker two to three days a week. Both the victim and defendant had prior substance abuse issues. The victim texted defendant and asked if he could provide him some heroin. Defendant replied affirmatively and that he would bring it with him. The caretaker took the victim to his bank to withdraw cash. When they returned, they found defendant in the driveway waiting in a car. The victim paid defendant $120 and the two went into the victim's house to his room. Approximately 20 minutes later, defendant emerged alone and had the victim's caretaker drive him to a gas station. After she returned, the caretaker did some chores. When she went in to the victim's bedroom to put away laundry she found the victim unresponsive. Medical personnel and police responded to the scene and performed CPR but their efforts were unavailing and the victim died. The medical examiner determined that the victim had heroin, fentanyl, and acetylfentanyl in his body and ruled drug intoxication as the cause of death.

Defendant admitted to investigators he had been with the victim while he used the drugs, but he claimed the victim had fallen asleep and that he had left. Defendant also asserted the victim had already possessed all of the drugs used, and he had not brought him any on August 7, 2018. He claimed the victim paid him $120 for a debt the victim owed to an acquaintance to whom defendant passed along the money. The prosecution presented testimony from the victim's caretaker, police officers who investigated the death, and the medical examiner. The prosecution also presented the testimony of an inmate, Randy Dembinski, who testified that defendant admitted that he delivered drugs to the victim and saw him die. The prosecution also introduced the text messages between the victim and defendant, which were recovered from the victim's phone.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution failed to present sufficient evidence to sustain either of his convictions. We disagree.

"We review de novo a defendant's challenge to the sufficiency of the evidence." *People v Kosik*, 303 Mich App 146, 150; 841 NW2d 906 (2013) (citation omitted). "In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. (citation omitted). It is for the trier of fact, rather than this Court, to determine the weight of the evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence and what weight to afford the inferences. *Id*. at 150-151. Circumstantial evidence, and reasonable inferences that arise from that evidence, can constitute satisfactory proof of the elements of the crime. *Id*. at 151. All conflicts in the evidence are resolved in favor of the prosecution. *Id*. at 151.

The jury convicted defendant of violations of MCL 750.317a and MCL 333.7401(2)(a)(*iv*). MCL 750.317a provides:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

"The elements of a prosecution under MCL 750.317a are: (1) delivery to another person, (2) of a schedule 1 or 2 controlled substance (excluding marijuana), (3) with intent to deliver a controlled substance as proscribed by MCL 333.7401, (4) consumption of the controlled substance by a person, and (5) death that results from the consumption of the controlled substance." *People v Dumback*, 330 Mich App 631, 641; ___ NW2d ___ (2019).

MCL 333.7401(2)(a)(*iv*) proscribes delivering a schedule 1 or 2 narcotic "in an amount less than 50 grams." Heroin is a Schedule 1 controlled substance, MCL 333.7212(1)(b), and fentanyl is a Schedule 2 controlled substance, MCL 333.7214(b). "The elements of delivery of less than 50 grams of heroin are (1) a defendant's delivery (2) of less than 50 grams (3) of heroin

or a mixture containing heroin (4) with knowledge that he or she was delivering heroin." *People v Dickinson*, 321 Mich App 1, 12; 909 NW2d 24 (2017) (citation omitted). "MCL 333.7105(1) defines delivery as follows: ' "Deliver" or "delivery" means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.' " *Id.* "[T]ransfer is the element which distinguishes delivery from possession." *Id.* (quotation marks and citation omitted, alteration in original).

Defendant first contests the sufficiency of the evidence as to the amount of the controlled substance involved. To establish a violation of MCL 333.7401(2)(a)(*iv*), the prosecution had to present sufficient evidence that defendant delivered "less than 50 grams" of a controlled substance. In this case, the prosecution presented testimony from Dembinski, and text messages from defendant to the victim that indicated that defendant agreed to deliver to the victim a quantity of one gram of heroin. Evidence established that 0.93 grams of heroin and fentanyl were found in the victim's nightstand after he had died, and the medical examiner discovered both heroin and fentanyl in the victim's body. The prosecution, therefore, presented sufficient evidence to establish that defendant delivered less than 50 grams of a controlled substance to the victim.

Defendant also challenges the delivery element of both crimes, arguing that insufficient evidence linked the drugs that were used by and killed the victim with any that defendant delivered. The record reflects that defendant presented some evidence that challenged Dembinski's credibility. As a prosecution witness, Dembinski expected to receive a deal that removed a sentencing enhancement in exchange for his testimony. Defendant also presented the testimony of other inmates who stated that Dembinski read defendant's case materials while in jail and had lied about defendant admitting to the crimes. The jury observed the demeanor of each of these witnesses at trial and evaluated their conflicting testimonies. Such evidence went to Dembinski's credibility, but the jury bore the ultimate responsibility to evaluate the credibility of the witnesses. *Kosik*, 303 Mich App at 150.

Moreover, the prosecution's case was not built solely on Dembinski's testimony. The victim and defendant both had a history of drug abuse. The victim's caretaker testified defendant came to the house, received money from the victim, went into the victim's room, and acted nervously when he left the room. She also described that defendant prevented her from checking up on the victim before she left to drive defendant. The detective who interviewed defendant testified defendant admitted to receiving money from the victim, being with the victim while he used drugs, and deleting the text messages he had sent the victim before they met. Such circumstantial evidence supported the prosecution's version of events and could be properly considered by the jury for its determination of the facts. See *Kosik*, 303 Mich App at 151. Finally, the text messages themselves were obtained from the victim's phone. They showed defendant and the victim arranged a sale of heroin that specified a quantity and price and arranged for delivery to the victim at his home. Evidence established defendant met with the victim in the exact way described by the texts. The record indicates the prosecution presented sufficient evidence to establish beyond a reasonable doubt defendant committed the charged offenses.

B. DOUBLE JEOPARDY

Defendant also argues his convictions violated the constitutional protection against double jeopardy. We disagree.

Double jeopardy challenges must be raised before appeal to be preserved for appellate review. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). The record does not indicate that defendant raised this issue before the trial court. Therefore, the issue is unpreserved. Unpreserved claims of error are reviewed for plain error affecting the defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Both the United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). Because defendant's convictions arose "from the same conduct at the same trial, this case involves the multiple punishments strand of double jeopardy." *People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015).

When determining whether the multiple punishments strand of double jeopardy has been violated we first look at whether the Legislature has made clear an intention to either authorize or prohibit multiple punishments. *Id*. at 18. If multiple punishments have been specifically authorized, there is no violation of double jeopardy. *Id*. If multiple punishments have been specifically prohibited, the imposition of multiple punishments is a violation of double jeopardy. *Id*. The plain language of MCL 333.7401 and MCL 750.317a contain no reference or indication about multiple punishments. Therefore, we must consider the second step in the multiple punishments analysis.

If the Legislature has not made its intentions clear, we must apply the abstract legal-elements test. *Id*. at 19. This test, as enunciated by *People v Ream*, 481 Mich 223, 225-226; 750 NW2d 536 (2008), requires analysis whether "each of the offenses for which defendant was convicted has an element that the other does not." If they do, then the prohibition against double jeopardy has not been violated. In other words, "two offenses will only be considered the 'same offense' where it is impossible to commit the greater offense without also committing the lesser offense." *Miller*, 498 Mich at 19. MCL 750.317a requires a death, an element clearly not required by MCL 333.7401(2)(a)(*iv*). "Because each of the offenses for which defendant was convicted has an element that the other does not, they are not the 'same offense' and, therefore, defendant may be punished for both." *Ream*, 481 Mich at 225-226.

In *People v Mass*, 464 Mich 615, 625; 628 NW2d 540 (2001), our Supreme Court held that "MCL § 333.7401 makes the amount of a controlled substance an element of a delivery offense." Therefore the "less than 50 grams" quantity described in MCL 333.7401(2)(a)(*iv*) is an element which also distinguishes this offense from MCL 750.317a. Each of defendant's convictions required an element which the other did not, and therefore convicting defendant of both delivery of less than 50 grams of a controlled substance and delivery of a controlled substance causing death did not violate the constitutional protection against double jeopardy. Accordingly, defendant has failed to establish plain error.

C. EVIDENCE OF PAST CONVICTION

Defendant next argues that the trial court abused its discretion by refusing to allow admission of evidence of a prosecution witness's prior conviction. We disagree.

We review evidentiary rulings for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217. We review de novo whether a rule of evidence precludes admissibility. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

MRE 609 provides in pertinent part:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
>
> (b) For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.
>
> (c) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

"While crimes having an element of theft are probative of veracity, we recognize that there are variations within this category." *People v Allen*, 429 Mich 558, 608 n 36; 420 NW2d 499 (1988). If the probative value of a prior conviction is insignificant, it should not be admitted. *Id.*

Robbery is "primarily an assaultive crime" and "has a lower probative value on the issue of credibility than would other theft crimes." *Id*. at 611.

The parties do not dispute that the prosecution's witness, Dembinski, had a 1997 armed robbery conviction which contained an element of theft as required under MRE 609(a)(2), a crime punishable by imprisonment in excess of one year as required under MRE 609(a)(2)(A), and that the conviction was not time-barred by MRE 609(c). Defendant argues that the trial court abused its discretion by finding that the conviction did not have significant probative value. We disagree.

Defendant is correct that the conviction, which had an element of theft, had some probative value on the issue of credibility. See *Allen*, 429 Mich at 608 n 36. Yet, even though it was not lacking in probative value, it had very limited probative value. See *Id*. The two factors to consider respecting probative value are "the age of the conviction and the degree to which a conviction of the crime is indicative of veracity." MRE 609(b). The 21-year-old conviction in this instance for an armed robbery fell within the class of theft crimes primarily assaultive and less indicative of veracity. See *Allen*, 429 Mich at 611. The trial court, therefore, in the exercise of its discretion could exclude such evidence.

Further, the record reflects defendant attacked Dembinski's credibility directly in a number of ways. Defendant presented the testimony of three fellow inmates concerning his activities in his jail cell, including with defendant, that contradicted Dembinski's testimony. Dembinski's testimony also revealed he had a deal in exchange for his testimony. Although Dembinski's conviction itself was not enunciated, the jury knew of his current incarceration for a parole violation, and knew that he faced a sentence enhancement that potentially exposed him to life in prison. Such evidence had greater probative value respecting the witness's credibility than evidence of the armed robbery conviction. The trial court, therefore, did not abuse its discretion by determining that this conviction had little probative value and did not commit reversible error by declining to admit evidence of it.

D. SENTENCE REASONABLENESS

Defendant also contends the trial court imposed unreasonable sentences that violated the Sixth Amendment. We disagree.

"A Sixth Amendment challenge presents a question of constitutional law that this Court reviews de novo." *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015). We review a sentence that departs from the applicable guidelines range for reasonableness. *Id*. at 392. We review a sentence's reasonableness for an abuse of discretion. *People v Dixon-Bey*, 321 Mich App 490, 520; 909 NW2d 458 (2017). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

The trial court calculated defendant's minimum guidelines range as 135 to 225 months (11.25 to 18.75 years). The trial court sentenced defendant to a minimum term of imprisonment of 11 years, departing downward slightly from the statutory guidelines range. Defendant, nevertheless, argues that his characteristics make even this downward departure sentence disproportionate.

Michigan's sentencing guidelines are advisory only. *Lockridge*, 498 Mich 358 at 364-365 & n 1. "Conceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). The "principle of proportionality" articulated in *Milbourn* "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017). "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Id*. A sentence at the bottom of the minimum range is presumptively proportionate, and unusual circumstances must be presented to overcome that presumption. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997).

Defendant argues the substance abuse histories of both himself and the victim mandate a more lenient sentence. The trial court specifically acknowledged and weighed defendant's lack of specific intent to kill or even hurt the victim. The trial court, nevertheless, explained the dangerous nature of defendant's pattern of drug abuse. The trial court made clear it considered "punishment, rehabilitation, protection of society and deterrence," and that the protection of society and deterrence called for a sentence which would reduce death from drug overdoses. The trial court cogently explained how defendant's long history of drug abuse, especially given how it had affected and could continue to affect others, justified defendant's sentence. The record reflects the trial court adequately explained how defendant's abuse of substances did not weigh in favor of a more lenient sentence here. Defendant also argues his 50 years of age and imperfect physical condition rendered the sentence an abuse of discretion. Defendant, however, points to no authority that supports his contention.

Further, defendant ignores the many aggravating characteristics of his crime. Evidence at trial established defendant not only delivered the drugs, but also injected the victim. He told the victim's caretaker not to check on the victim, lied that the victim fell asleep, and blocked the caretaker's path to the victim. Evidence also indicated defendant placed the syringe in the victim's drawer, left the scene without providing the victim assistance or seeking medical assistance, had the caretaker drop him off away from his home, and sent a text to the victim after the fact as a misdirection ploy. This evidence indicated that defendant attempted to delay any discovery of the death and obscure his involvement in the circumstances leading to it. Defendant's minimum sentence below the guidelines range did not constitute an abuse of discretion or a violation of the principle of proportionality.

E. RESTITUTION

Finally, defendant argues that the trial court abused its discretion by ordering him to pay $12,104.72 in restitution. We disagree.

We review a trial court's factual findings for clear error and calculation of restitution for an abuse of discretion. *People v Bryant*, 319 Mich App 207, 210; 900 NW2d 360 (2017). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. We review de novo matters of statutory interpretation, such as the correct application of statutes authorizing the assessment of restitution at sentencing. *People v McKinley*, 496 Mich 410, 414-415; 852 NW2d 770 (2014).

The William Van Regenmorter Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, mandates when a sentencing court may order convicted defendants to pay restitution. MCL 780.766(2) provides that the sentencing

> court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, 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.

This restitution shall include "the cost of actual funeral and related services," MCL 780.766(4)(f), and is to "be made to those entitled to inherit from the victim's estate" when the victim is deceased. MCL 780.766(7). The prosecution has the burden of demonstrating by a preponderance of the evidence the amount of loss suffered by the victim. MCL 780.767(4). "Restitution encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct." *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006) (citation omitted). When determining the amount of restitution, "the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). This is the only factor the sentencing court is to consider. *Gubachy*, 272 Mich App at 711.

A trial court abuses it discretion when it orders an "arbitrary amount" of restitution without any findings as to the actual amount of damages. *People v Tyler*, 188 Mich App 83, 87-88; 468 NW2d 537, 540 (1991). A restitution figure "not supported by the testimony at the sentencing proceeding" is also an abuse of discretion. *People v Orweller*, 197 Mich App 136, 141; 494 NW2d 753 (1992).

Defendant argues that the trial court abused its discretion by ordering restitution without the receipts for the victim's funeral expenses being presented at the sentencing hearing. The victim's mother testified at defendant's sentencing hearing. She presented detailed testimony regarding how she calculated the restitution request. Defense counsel cross-examined the victim's mother. Defense counsel presented no evidence or argument the restitution amount was inaccurate. In fact, the only evidence defendant presented at sentencing to contradict the restitution amount actually would have led to an amount $58 higher.

The trial court also required the victim's mother provide the court the receipts the same day as sentencing, and stated the restitution order would depend on what they showed. The receipts were provided and the trial court lowered the restitution amount from the $12,118.62 requested to $12,104.72 after receiving and reviewing them. The trial court considered the receipts to determine the appropriate restitution award. The record reflects the trial court considered the testimony and receipts provided and set restitution at an amount supported by the evidence. The trial court, therefore, did not abuse its discretion.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford