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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAJUAN BERNARD PROFIT,

Defendant-Appellant.

UNPUBLISHED
January 28, 2021

No. 351255
Oakland Circuit Court
LC No. 2019-270111-FC

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and third-degree fleeing and eluding, MCL 257.602a(3). Defendant was sentenced to 13½ to 20 years in prison for armed robbery and one to five years in prison for third-degree fleeing and eluding. Defendant argues that his right to due process was violated by the number and location of law enforcement security personnel in the courtroom during his trial; he additionally argues that the trial court erred by assessing 10 points for offense variable (OV) 9. We affirm.

I. UNDERLYING FACTS

This case arises out of a robbery on January 7, 2019, at Costco Wholesale in Commerce Township, Michigan. Defendant and his codefendant, Raphael Simmons,[1] entered Costco and told the employee at the door, Michael Schweier, that they were looking for one of their mothers who was already inside. Defendant and Simmons then proceeded directly to the jewelry stand. Erin Hall, another Costco employee, was working at the jewelry stand and asked defendant and Simmons if they needed help. They told her that they did not and, after she turned away, defendant smashed the case with a hatchet and Simmons reached into the case and retrieved some items. Defendant then raised his hatchet above his head and told Hall to "back up." Defendant and Simmons, who had a hammer in his hand, then fled Costco; as they exited the building Schweier

[1] The jury convicted Simmons of the lesser offense of unarmed robbery, MCL 750.530, and resisting or obstructing a police officer, MCL 750.81d.

was forced to move out of the way to avoid a collision with defendant. Defendant and Simmons were apprehended by police shortly thereafter.

A jury trial began on September 10, 2019. After the jury was excused for a recess, Simmons's trial counsel objected to the total number of deputies in the courtroom and their close proximity to the defense table. Simmons's counsel said that assigning a total of five deputies to the courtroom, with two around the defense table, "sends the wrong message to the jury." The deputies explained that their policy was to assign two deputies to each inmate and that there was an additional deputy for the security of the courtroom and the hallways. Thus, as there were two defendants on trial, policy required five deputies in the courtroom during trial. The deputies additionally explained that their locations at particular spots in the courtroom were "predetermined" and that if they moved from the complained of locations they would then be closer to defendant, and, as the trial court stated, this would have created the appearance that "[t]he concentration will be more on" defendant. Furthermore, the deputies explained that, because of defendant's conduct in jail, he was in the highest security level at the jail and was "automatically a two-deputy belly-chainer in belly chains."[2] The trial court declined to order the deputies to sit in different areas during trial. The trial then proceeded uninterrupted and, as discussed earlier, defendant was convicted of armed robbery and third-degree fleeing and eluding. This appeal followed.

II. LAW ENFORCEMENT PRESENCE AT TRIAL

Defendant first argues that the number and location of deputies in the courtroom during trial deprived him of a fair trial and violated his right to due process. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). The issue of whether the location and presence of law enforcement personnel at trial violated codefendant Simmons's right to due process was raised, addressed, and decided at trial. While defendant's trial counsel did not also raise the issue, any prejudice resulting from the presence of law enforcement officers at trial also would have affected codefendant Simmons's and defendant's rights to due process in equal measure, and therefore, Simmons's objection to the presence of the officers preserved the issue for defendant. See *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007) ("[B]ecause defendant's codefendant raised the objection and the ruling obviously affected both defendants, we here decline to regard the technicality of defendant's lawyer's failing to join in the objection as failing to preserve this issue.").

This Court reviews constitutional issues de novo. *People v Kammeraad*, 307 Mich App 98, 146; 858 NW2d 490 (2014).

[2] Defendant was not in "belly chains" and the record does not establish that he was otherwise shackled at trial.

B. ANALYSIS

Every defendant has a due process right to be presumed innocent, which requires that his or her guilt be determined "on the basis of the evidence introduced at trial rather than on official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010) (quotation marks and citations omitted). The presence of courtroom security may implicate a defendant's due process right to the presumption of innocence. *Holbrook v Flynn*, 475 US 560, 570-571; 106 S Ct 1340; 89 L Ed 2d 525 (1986). "This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down." *Id*. at 567. Indeed, "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance." *Id*. When considering the use of security guards in a courtroom "reason, principle, and common human experience counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial" and because "of the variety of ways in which such guards can be deployed . . . a case-by-case approach is more appropriate." *Id*. at 569. Finally, in order for a defendant to establish that security measures taken at trial violated his or her right to due process, the defendant must show that the security measures were inherently prejudicial and that they actually prejudiced the defendant. *Id*. at 572.

In this case, defendant challenges the number and location of armed deputies inside the courtroom during trial. Specifically, defendant argues that assigning a total of five deputies to the courtroom, with two within 10 feet of the defense table, "sen[t] the wrong message to the jury." The record in this case shows that two deputies were 7 to 10 feet from the defense table, but there is nothing in the record to establish that the presence of courtroom security was unusually alarming or troublesome. Moreover, one of the deputies stated that the courtroom security policy was to have "two deputies for every inmate" and another deputy "for security of the courtroom and the hallways." Consequently, because there were two defendants at trial, five deputies constituted the fewest number of deputies that would normally be present in the courtroom. Indeed, one deputy additionally stated that increased security was called for in this case because (1) there was an "open" weapon in the courtroom, apparently in reference to the hammer that was introduced as an exhibit at trial; (2) defendant was in the highest security level in the jail; and (3) defendant's conduct while in custody required additional security measures such as "belly chains." Defendant was not in "belly chains" or apparently otherwise shackled at trial and the deputy opined that moving the deputies from their placement by the defense table would potentially prejudice defendant because their alternative placement would locate them closer to defendant. Indeed, the trial judge noted that if the deputies were moved it would create the appearance that "[t]he concentration [would] be on" defendant. The trial judge declined to overrule the deputies' judgment on the matter and did not order the deputies to change their placement in the courtroom. In summary, courthouse security policy required five deputies in the courtroom; the presence of a weapon in evidence and defendant's conduct in jail called for additional levels of security; and placing the deputies in alternative seating would have led to the appearance that they were focused on defendant instead of equally concerned with defendant and Simmons. Based on these facts we cannot conclude that the deputies' placement in the courtroom was inherently prejudicial.

Defendant also fails to show actual prejudice arising from the number and location of armed deputies inside the courtroom during trial. Specifically, defendant provides no reason for concluding that the jurors actually were influenced by the number and location of deputies in the

courtroom. Moreover, the trial court instructed the jury on the presumption of innocence and its duty to decide the case on the basis of the evidence, and "the jury is presumed to have followed its instructions." *People v Mahone*, 294 Mich App 208, 218; 816 NW2d 436 (2011). Because defendant has not shown any basis for concluding that the number and location of deputies in the courtroom influenced the jury's verdict, his argument is without merit.

III. OV 9

Defendant next argues that the trial court erred by assessing 10 points for OV 9 because Hall was the only victim placed in danger during the armed robbery. We disagree.

A. STANDARD OF REVIEW

When reviewing a trial court's guidelines scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011) (citation and quotation marks omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438. "The sentencing Court may consider facts not admitted by the defendant or found beyond a reasonable doubt by the jury. Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v Roberts*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 339424) (2020); slip op at 4, reversed in part on other grounds by *People v Roberts*, ___ Mich ___; 949 NW2d 455 (Docket No. 161263).

B. ANALYSIS

Offense variable 9 is codified in MCL 777.39 and provides that a trial court must assess 10 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c). The statute further directs the sentencing court to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim," MCL 777.39(2)(a). "Points assessed under OV 9 must be based solely on the defendant's conduct during the sentencing offense." *People v Rodriguez*, 327 Mich App 573, 581-582; 935 NW2d 51 (2019). Finally, "[t]he trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable." *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012).

Actions taken by a defendant while fleeing the site of an armed robbery constitute actions taken "in the course of committing a larceny." MCL 750.730; see also MCL 750.729 (establishing that the offense of armed robbery requires conduct proscribed by MCL 750.730 in addition to possession of a dangerous weapon). Consequently, defendant's conduct while fleeing the jewelry counter is part of the conduct we must consider when determining whether defendant put two to nine victims in danger during the armed robbery. See MCL 777.39(1)(c); *Rodriguez*, 327 Mich App at 581-582.

Here, Hall was near the jewelry stand when defendant and Simmons broke into it. Then, after Simmons broke into the jewelry stand, defendant told Hall to "get back" while raising his hatchet in a threatening manner. Furthermore, another Costco employee was about 15 feet away from the jewelry stand when the incident occurred, but he was not threatened by defendant nor was he in the defendants' paths as they fled the scene. Yet another employee, Schweier, however, was in defendant's path as defendant fled the store because Schweier was still at his post by the door to the parking lot as the defendants fled. Indeed, after Schweier heard the glass of the jewelry counter break, he saw "two gentlemen running right at [him]," one of whom was holding a hatchet. Schweier testified that he had to step "out of the way to let [those] gentlemen run past" him. Consequently, defendant ran past Schweier, while holding a hatchet, at such a close distance to Schweier that Schweier had to step out of the way to avoid being run into.

The record thus establishes that at least two individuals were placed in danger of physical injury during the course of the armed robbery. Defendant threatened Hall and approached her while brandishing a hatchet over his head and then ran while continuing to hold the hatchet in front of him, thereby forcing Schweier to step out of the way to avoid a collision. Consequently, defendant's actions at a minimum placed Hall and Schweier in danger of physical injury; because at least two victims were placed in danger of physical injury the trial court properly assessed 10 points for OV 9.

IV. CONCLUSION

Defendant's claims of error regarding deputies in the courtroom and the calculation of OV 9 are without merit. For the reasons stated in this opinion, defendant's convictions and sentences are affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Jonathan Tukel