STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT LEE SANDERS,

Defendant-Appellant.

UNPUBLISHED
October 28, 2021

No. 352949
Lenawee Circuit Court
LC No. 19-019248-FC

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of two counts of armed robbery, MCL 750.529, two counts of felonious assault, MCL 750.82, and three counts of use of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth offense habitual offender, MCL 769.12(1)(a), to serve 25 to 90 years of imprisonment for each count of armed robbery, 4 to 15 years of imprisonment for each count of felonious assault, and two years of imprisonment for each count of felony-firearm. Defendant's sentences for felony-firearm were to be served consecutive to defendant's other convictions and concurrent to each other. On appeal, defendant argues that the trial court erroneously admitted evidence of a suggestive identification procedure; he was denied his right to the effective assistance of counsel, and offense variables (OV) 4 and 13 were not properly scored. Finding no errors warranting reversal, we affirm.

I. BACKGROUND

This case arises out of the armed robbery of two victims who were boyfriend and girlfriend. On August 23, 2018, at approximately 11:00 p.m., the two victims drove to a convenience store, and the boyfriend went into the store while the girlfriend slept in the car. The girlfriend woke up when a person, whom both of the victims identified as defendant, reached through the open car window and took her boyfriend's backpack. The girlfriend followed defendant and found him behind a building searching the contents of the backpack. When she asked defendant what he was doing, he pointed a gun at her, and she screamed for help. The boyfriend heard the screams; he

went to check on her, and defendant pointed the gun at him. The victims retreated into the store and called the police.

Before the arrival of the police, one of the victims called her sister and described the assailant. The sister stated that the person matched the description of a friend whom she called "Q," and she texted the victim a photograph of this person. The victim recognized "Q" as the person who had robbed her and relayed this information to the police. A police dog picked up a track that led it to the discovery of the boyfriend's backpack, which was missing his marijuana pipe, and a BB gun, which was later discovered to have defendant's DNA present on it. Meanwhile, an off-duty police officer who was walking with his girlfriend, saw defendant walking away from the store shortly after the robbery was committed. Police executed a search warrant of defendant's home, where they found the victim's missing marijuana pipe. Following a jury trial, defendant was found guilty of two counts of armed robbery, two counts of felonious assault, and three counts of felony-firearm. At sentencing, over defendant's objections, 10 points were assessed for OV 4 based on the boyfriend's testimony that he was afraid to leave his window open. Without objection, 25 points were assessed for OV 13.

II. ANALYSIS

A. IDENTIFICATION EVIDENCE

Defendant argues that the trial court erred by admitting evidence of a suggestive identification procedure. Because the procedure used was not deployed by law enforcement personnel, this argument is without merit.

Evidentiary challenges are reviewed for abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). "The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls outside the range of principled outcomes. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id.* at 251-252 (cleaned up). Because defendant did not raise an objection in the trial court, this issue is unpreserved, and we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that his due-process rights were violated because he was identified through the use of an unreasonably suggestive procedure. Defendant was identified by the victim after her sister sent her a picture of defendant and suggested that it might have been he who had robbed her. "[I]t is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Due process protects criminal defendants against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *People v Sammons*, 505 Mich 31, 41; 949 NW2d 36 (2020) (cleaned up). Identification evidence must be excluded if "(1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *Id.*

Defendant's argument fails because the procedure now challenged was not used by the police. The caselaw discussing suggestive identifications involve police procedures, such as lineups, and are therefore inapplicable to this case. Defendant has failed to cite a single case where

an identification procedure used by a civilian was excluded for being too suggestive. This issue is one of weight not admissibility. Defendant acknowledges that the police did not initiate the procedure that he now challenges and argues that the police violated his rights by failing to mitigate any harm arising from the identification; however, defendant cites no authority in support of the assertion that police have a duty to take affirmative steps to alleviate any possible taint caused by a civilian-initiated identification procedure. See *Van Hook v Anderson*, 488 F3d 411, 422 n 8 (CA 6, 2007) (explaining that due process protects a person against government action, not the actions of a private person). Similarly, defendant's related ineffective assistance of counsel claim fails because counsel is not required to make a meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel because defense counsel declined to call two witnesses in his defense and failed to request a jury instruction pertaining to the dog-tracking evidence.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Id*. Because this Court earlier denied defendant's motion for a remand,[1] our review is limited to mistakes that are apparent from the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (cleaned up). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). This Court presumes counsel was effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Traver*, 328 Mich App 418, 422-423; 937 NW2d 398 (2019).

Defendant argues that defense counsel's performance fell below an objective standard of reasonableness because he failed to call two witnesses to testify on defendant's behalf. The first witness, defendant's ex-wife, stated in an affidavit that she went to bed between 9:00 p.m. and 9:30 p.m. Defendant allegedly woke her up asking her to take him to the store, and the trip to the store took approximately 20 minutes. She could not recall what time this happened. She promptly went back to bed and believed that defendant was in bed with her. Defendant also argues that defense counsel should have called the girlfriend of the police officer who saw defendant walking away from the store so she could testify as to whether she also saw him. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed

[1] *People v Sanders*, unpublished order of the Court of Appeals, entered January 15, 2021 (Docket No. 352949).

to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Concerning the ex-wife, it was reasonable for defense counsel to decline to call a witness who could not account for defendant's location at the time of the offense and could only speculate that he was in bed. Concerning the officer's girlfriend, she did not submit an affidavit, so this Court cannot know whether she would have even testified that she did not see defendant. Moreover, there was no evidence that she had ever even met defendant. Therefore, if she had failed to notice him, it could simply have been because she did not know who he was.

With respect to the dog-tracking evidence, an instruction limiting the jury's use of that evidence should have been given, M Crim JI 4.14, and defense counsel erred by failing to request it. Defendant has failed to establish, however, that this instruction would have resulted in a different outcome at trial. The dog-tracking evidence appeared to serve the limited purpose of establishing how the police discovered the weapon and backpack—it was not used directly to connect defendant to the robbery. There was a substantial amount of evidence independent of the dog-tracking evidence that connected defendant to the robbery. For example, both victims identified defendant as the perpetrator of the robbery. The boyfriend's marijuana pipe was missing from his backpack when the backpack was found near the crime scene, and the police found the pipe in defendant's home. A BB gun was found near the scene of the robbery, and defendant's DNA was found on the BB gun. And, a police officer saw defendant near the scene of the robbery around the time the robbery was committed.

C. SENTENCING GUIDELINES

As noted, defendant also challenges the scoring of his guidelines at sentencing. When reviewing the scoring of the sentencing guidelines, the trial court's factual findings are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012) (cleaned up). "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." *Id*. (cleaned up).

Criminal defendants are entitled to a sentence that is based on accurate information and accurate scoring of the sentencing guidelines. *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). Sentencing courts must determine the applicable minimum sentence range under the sentencing guidelines and take such calculations into account when imposing a sentence; however, the guidelines are advisory only and not mandatory. *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). A defendant is entitled to resentencing if there is a scoring error that alters the defendant's recommended minimum sentence range under the guidelines. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

1. OV 4

Defendant argues that zero points should have been assessed for OV 4 because insufficient evidence was presented to establish a serious psychological injury requiring medical treatment.

"Offense variable 4 is psychological injury to a victim." MCL 777.34. It is appropriate to assess 10 points for OV 4 if a "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Additionally, 10 points can be scored "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). "The trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014). A psychological injury must actually occur, and OV 4 cannot be scored based on a belief that a serious psychological injury would ordinarily be suffered as a result of the defendant's crime. *People v White*, 501 Mich 160, 162; 905 NW2d 228 (2017). Moreover, while it is a relevant consideration, the fact that the victim experienced fear *during* the commission of the sentencing offense is not alone sufficient to justify assessing 10 points for OV 4. *People v Lampe*, 327 Mich App 104, 114; 933 NW2d 314 (2019).

In the present case, neither victim spoke at sentencing nor submitted an impact statement. At trial, however, the boyfriend was asked if he believed he was "at all traumatized after this incident," and he responded, "Oh, I believe so. I don't leave my windows down anymore definitely." The victim's statement that he was traumatized and that he had stopped leaving his window open suggested an ongoing psychological injury that stemmed directly from the armed robbery. Given our deferential standard of review, we find the trial court's decision to assess ten points for OV 4 was not a clear error.

2. OV 13

Finally, defendant argues that zero points should have been assessed for OV 13 because defendant's convictions arising from this case were his only felony convictions in the previous five years. Because this case included three distinct criminal acts, defendant's argument is without merit.

"Offense variable 13 is continuing pattern of criminal behavior." MCL 777.43(1). It is appropriate to assess 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). "Before any alleged crimes may be used to score OV 13, the prosecution must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they are properly classified as felony crimes against a person, and that they occurred within a 5-year period of the sentencing offense." *People v Nelson*, 502 Mich 934, 935; 914 NW2d 917 (2018) (cleaned up). The criminal offenses cannot arise from the same felonious act because "a single felonious act cannot constitute a pattern." *People v Carll*, 322 Mich App 690, 704; 915 NW2d 387 (2018).

Multiple felonious acts can arise from a single criminal episode. *People v Gibbs*, 299 Mich App 473, 487-488; 830 NW2d 821 (2013). Defendant is correct that all of his felony convictions within the relevant five-year period arose from this criminal episode; however, this criminal episode consisted of several felonious acts. First, defendant, while armed with what appeared to be a firearm, stole the boyfriend's bag out of the car—this constituted an armed robbery. Then,

defendant pointed his gun at the girlfriend—this constituted a felonious assault. Finally, defendant pointed his gun at the boyfriend—this constituted a second felonious assault. Thus, the trial court did not err in assessing defendant 25 points under OV 13. Finally, because defense counsel was not required to assert or raise a futile objection, defendant's ineffective assistance of counsel claim involving OV 13 fails. *Goodin,* 257 Mich App at 433.

Affirmed.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Brock A. Swartzle