

Order

Michigan Supreme Court
Lansing, Michigan

May 28, 2010

Marilyn Kelly,
Chief Justice

139413

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 139413
COA: 283954
Ingham CC: 07-000500-FH

LEDELL MARVIN MUSHATT,
Defendant-Appellant.

On March 10, 2010, the Court heard oral argument on the application for leave to appeal the June 23, 2009 judgment of the Court of Appeals. MCR 7.302(H)(1). In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, we VACATE the sentence of the Ingham Circuit Court, and we REMAND this case to the sentencing court for resentencing. The prosecutor has conceded that the scoring of 5 points for offense variable 3 (bodily injury not requiring medical treatment), MCL 777.33(1)(e), was erroneous under *People v McGraw*, 484 Mich 120 (2009), and that correction of this error would render the defendant's current sentence in excess of the corrected minimum sentence range. On remand, the "[o]ffense variables must be scored giving consideration to the sentencing offense alone," *id.* at 133, but the sentencing court may consider the injury to the victim "when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation." *Id.* at 129.

Further, we clarify that the retroactive effect of *McGraw* is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved.¹ The appeal in this case was pending when *McGraw* was decided, and the issue was raised and preserved.

¹ See, e.g., *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002).

CORRIGAN, J. (*concurring*).

I concur with the remand order because the prosecutor has conceded that defendant's OV-3 score was erroneous under *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). Nonetheless, I continue to adhere to the views expressed in my dissenting opinion in *McGraw*, *supra* at 136.

YOUNG, J. (*concurring*).

I concur with the remand order because the prosecutor conceded that the defendant's OV-3 score was erroneous under *People v McGraw*.² Although *McGraw* controls the scoring of OV-3, I continue to adhere to the position stated in Justice CORRIGAN's dissent in *McGraw*,³ with which I concurred.

WEAVER, J. (*dissenting*).

This Court heard oral argument on whether to grant the application for leave to appeal or take other preemptory action in this case. I would grant leave to consider whether *People v McGraw*, 484 Mich 120; 771 NW2d 665 (2009), was wrongly decided as per the dissent in that case. I continue to believe that *McGraw* was wrongly decided in a 4 to 3 decision, and I believe that a remand in this case based on *McGraw* is a waste of judicial resources.

² 484 Mich 120; 771 NW2d 655 (2009)

³ *Id.* at 136 (CORRIGAN, J., dissent).



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I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 28, 2010

Corbin R. Davis

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEDELL MARVIN MUSHATT,

Defendant-Appellant.

UNPUBLISHED

June 23, 2009

No. 283954

Ingham Circuit Court

LC No. 07-000500-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant Ledell Mushatt of larceny in a building¹ and fleeing and eluding a police officer in the fourth degree.² The trial court sentenced Mushatt as an habitual offender³ to a prison term of 46 to 180 months on each count, to be served consecutively. Mushatt now appeals as of right. We affirm the convictions but remand for a finding on Mushatt's ability to repay attorney fees in the amount of \$500.

I. Basic Facts And Procedural History

Mushatt stole a wallet from an employee's purse in a professional office. He then left the building and got into a vehicle in the parking lot. As he was trying to leave the lot, he yanked the wheel and hit a woman on the side of her leg. Witnesses tried to follow the vehicle on foot but then informed a nearby police officer of the situation. The officer followed the suspect vehicle in his patrol car. At one point, the suspect vehicle pulled over, but then continued moving and turned around before the officer could approach it. The officer continued following in his patrol car. At another point, he lost visual contact of the suspect vehicle for about ten seconds. He then caught up with and pulled over Mushatt's vehicle after traveling at approximately 90 miles an hour with the patrol car sirens and lights activated. The stolen wallet was found about 15 to 20 minutes later in an area where Mushatt had been driving.

¹ MCL 750.360.

² MCL 257.602a(2).

³ MCL 769.12.

II. Sufficiency Of The Evidence

A. Standard Of Review

Mushatt argues that his convictions are not legally supported by sufficient evidence. When determining whether sufficient evidence has been presented to sustain a conviction in a criminal case, we must view the evidence de novo in a light most favorable to the prosecution and determine whether a rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.⁴

B. Legal Standards

Mushatt challenges the identification procedures used to identify him, given that he was the only black male at the preliminary examination. In a criminal case, “the prosecutor must identify the accused as the person who committed the alleged offense[,]”⁵ and a witness’s positive identification of the defendant may be sufficient to support a conviction of a crime.⁶ We do not review anew the credibility of identification testimony, which is a question for the trier of fact.⁷

Mushatt suggests that the in-court identification was “unduly suggestive” and violated his due process rights. Absent manifest injustice, which Mushatt has not shown or alleged here, we will not review a claim of an unduly suggestive pretrial identification procedure on appeal unless the defendant objected or moved the trial court to suppress the identification.⁸ Similarly, issues regarding the propriety of an in-court identification are waived absent objection.⁹ Mushatt made no such objection, and this Court is obliged only to review for plain error.¹⁰

C. Applying The Standard

We conclude that Mushatt has not shown plain error because he has not demonstrated that he is actually innocent or that the fairness of the trial was affected.¹¹ The record here shows that the witnesses who positively identified Mushatt observed him closely. Even if Mushatt had objected to the identification, he would bear the burden of showing that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial

⁴ *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007).

⁵ *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

⁶ *People v Thomas A. Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

⁷ *Id.*

⁸ *People v Melvin Tim Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985).

⁹ *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995).

¹⁰ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹¹ *Id.* at 763.

likelihood of misidentification.¹² The prosecutor would then have to show by clear and convincing evidence that the in-court identification was based on a sufficiently independent basis to purge the taint of the illegal identification.¹³ Appropriate factors to consider include: (1) the witness's prior knowledge of the defendant, (2) the witness's opportunity to observe the criminal during the crime, (3) the length of time between the crime and the disputed identification, (4) the witness's level of certainty at the prior identification, (5) discrepancies between the pretrial identification description and the defendant's actual appearance, (6) any prior proper identification of the defendant or failure to identify the defendant, (7) any prior identification of another as the culprit, (8) the mental state of the witness at the time of the crime, and (9) any special features of the defendant.¹⁴

Mushatt has not shown that his identification was so suggestive that there was a substantial likelihood of misidentification. Even if he had made such a showing, there was independent evidence to support the identification. Although the two witnesses saw Mushatt at the preliminary examination, while he was sitting at the defense table with no other black men in the room, they had ample prior contact with him and were able to positively identify him at trial. One witness watched Mushatt for 10 to 15 seconds when she first noticed him at the time of the theft, was later "face-to-face" with him as he was coming out of her cubicle, and directly asked him a question, which he answered before walking away. Another witness observed Mushatt, who had his head up, for 30 seconds as he walked toward the front door and left the building. In addition, this same witness observed Mushatt while standing outside the untinted, driver's side window of his car for 30 to 45 seconds. The preliminary examination was only two weeks after the incident. Moreover, four witnesses identified Mushatt's vehicle as a large burgundy or maroon car.

Mushatt also questions the officer's identification because he lost sight of the fleeing vehicle for ten seconds. However, the officer testified that his patrol car was going about 90 miles an hour in order to catch up with Mushatt's vehicle after he had lost sight of it. Mushatt's vehicle matched the description of the car at the office parking lot, and it had the same license plate number as the car the officer was pursuing earlier. Moreover, Mushatt matched the witnesses' descriptions of the suspect: he was wearing a dark leather coat and dress pants. Accordingly, we conclude that these facts provided a sufficient basis for a proper identification of Mushatt.

III. Scoring Of The Sentencing Guidelines

A. Standard Of Review

Mushatt argues that the sentencing guidelines were improperly scored. The trial court scored Offense Variable 3 (OV 3) five points because "[b]odily injury not requiring medical

¹² *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

¹³ *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

¹⁴ *Id.* at 116.

treatment occurred to a victim[.]”¹⁵ Here, one individual suffered a bruise as a result of being hit by Mushatt’s car. Mushatt argues that he was acquitted of the felonious assault charge and that this individual was therefore not a “victim” under OV 3. Therefore, Mushatt argues that his sentence score should be reduced to zero.

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld.”¹⁶ This Court reviews de novo as a question of law the interpretation of the statutory sentencing guidelines.¹⁷ “When construing a statute, this Court’s primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. Where the language is unambiguous, we give the words their plain meaning and apply the statute as written.”¹⁸

B. Legal Standards

Although MCL 777.33 does not define the term “victim,” this Court has held that, “for purposes of OV 3, the term ‘victim’ includes any person harmed by the criminal actions of the charged party.”¹⁹ This Court reasoned, in part, that “if the Legislature had intended to limit the application of OV 3 to the victim of the charged offense, it could have expressly included such a provision in the statute.”²⁰

C. Applying The Standards

Although the injured woman was not injured by the criminal actions that were the subject of Mushatt’s convictions (fleeing and eluding and larceny), a preponderance of the evidence established that Mushatt committed a criminal action by assaulting her with his car. A sentencing court is permitted to review all record evidence when making a decision.²¹ In addition, “the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense. A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.”²² Therefore, even though the jury acquitted Mushatt of the charge of assault because it was not established beyond a reasonable doubt, the sentencing court could determine that an assault occurred for purposes of sentencing.

¹⁵ MCL 777.33(1)(e).

¹⁶ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (internal citations omitted).

¹⁷ *Id.*

¹⁸ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

¹⁹ *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003).

²⁰ *Id.*

²¹ *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (2005).

²² *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

IV. Attorney Fees

A. Standard Of Review

Mushatt argues that the trial court failed to consider his ability to repay attorney fees before ordering him to pay \$500 in such fees at his sentencing. Mushatt failed to object to the order at sentencing; therefore, we review his claim for plain error.²³

B. Legal Standards

“A person who was afforded appointed counsel might be ordered to reimburse the county for the costs of that representation, if such reimbursement can be made without substantial hardship.”²⁴ In *People v Dunbar*,²⁵ this Court stated:

The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant’s *foreseeable* ability to pay. A defendant’s apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant’s capacity for future earnings may also be considered.

Although a formal finding of an indigent defendant’s ability to pay attorney fees is not necessary unless the defendant objects at the time of the order, “the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant’s presentence investigation report or, even more generally, a statement that it considered the defendant’s ability to pay.”²⁶

MCL 769.1k provides, in pertinent part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(i) Any fine.

²³ *Carines, supra* at 763-764.

²⁴ *People v Trapp (On Remand)*, 280 Mich App 598, 600; 760 NW2d 791 (2008).

²⁵ *People v Dunbar*, 264 Mich App 240, 255; 690 NW2d 476 (2004) (emphasis in original).

²⁶ *Id.* at 254-255.

- (a).
 - (ii) Any cost in addition to the minimum state cost set forth in subdivision
 - (iii) The expenses of providing legal assistance to the defendant.
 - (iv) Any assessment authorized by law.
 - (v) Reimbursement under section 1f of this chapter.

* * *

(5) The court may provide for the amounts imposed under this section to be collected at any time.

C. Applying The Standards

Here, the sentencing transcript does not show, as is required, that the sentencing court considered Mushatt's ability to pay prior to ordering reimbursement. Although Mushatt should have objected to the order at the time of sentencing, the trial court's silence on this matter constitutes plain error.²⁷

We affirm the convictions, but vacate the order to repay attorney fees and remand with instructions to consider Mushatt's present and future ability to repay attorney fees. An evidentiary hearing is not required on remand. The trial court may rely on an updated report from the probation department.²⁸ We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

²⁷ *Id.* at 251.

²⁸ *Id.* at 255 n 14.