STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012
v	No. 305604 Wayne Circuit Court
TAMERRA WASHINGTON, Defendant-Appellant.	LC No. 10-009903-FC

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and assault with intent to rob while armed (AWIRA), MCL 750.89. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 32 to 50 years' imprisonment. We affirm.

I. BASIC FACTS

On April 10, 2010, defendant gave Sarah Turner, a "professional" gambler, $400 worth of casino chips to gamble. Turner played two hands of blackjack, but "busted" both hands and lost defendant's $400. On April 13, 2010, defendant and her girlfriend, Destiny, came to the home Turner shared with her girlfriend, Suronda Hall. Defendant said, "I'm a bounty hunter. I get what I want." Defendant and Turner exchanged words, and defendant threatened to kill Turner if she did not return the $400. They argued for approximately five minutes, but defendant and Destiny left after a neighbor and her children came outside. Later that same day, Turner went to Greektown Casino. After about 30 to 45 minutes, defendant came in and tapped Turner on the shoulder and said, "You winning our money back?" Again, they argued for about five minutes until the casino supervisor spoke with Turner.

Turner was back at home at approximately 11:30 or midnight when she heard a lot of noise coming from her front porch area. Defendant was on her front steps. Suronda Hall was in between the front and screen doors. Defendant said, "I came to get my money" or "I came to get my mother-f****** money." At this point, Henry Harrison ran up with a gun, which he pointed at Turner. Defendant ran up the stairs and charged at Turner. She started punching Turner in the chest and kicking her in the head, face, and side. Harrison was holding the gun to Turner's head. Harrison then pointed the gun at Hall and snatched a chain off of Hall's neck and took $50 out of Hall's pockets. Harrison again turned the gun on Turner, saying, "I'm fixin' to kill her now" or

"I'm fixin' to kill this b****." Defendant said, "Naw, bro, don't kill her now. I'm going to give her one more chance to get my money." Then Harrison and defendant left.

Over the next three days, defendant drove by Turner's house repeatedly. On April 20, 2010, Turner was driving with Hall on I-94 in Detroit. They got off at Conner to go to Wayne County Community College. Turner saw defendant and Destiny driving the other way. Defendant turned around and followed Turner and then came up next to her at a stop light. Defendant pointed a gun at Turner. Turner thought it looked like the same gun used in the robbery. Defendant said, "B****, I'm going to get my money from you."

Turner had reported all of these instances to police, but Turner only knew defendant as "Amir." She agreed to a "sting" operation where she would get defendant to talk to her and have her meet Turner at a location. Turner told defendant that if she wanted the $400, she should come to a gas station on JoAnn and Seven Mile. When defendant arrived, Turner identified her and defendant was arrested. No gun, jewelry, or money were recovered.

The jury acquitted defendant of the charges of felonious assault, MCL 750.82, and felony firearm, MCL 750.227b, but found defendant guilty of armed robbery and AWIRA. The trial court denied defendant's motion for judgment notwithstanding the verdict, rejecting defendant's claim that the verdicts were inconsistent. Defendant was sentenced as outlined above. She now appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

Initially, defendant claims that she was denied due process where the prosecution failed to prove guilt beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a reasonable juror could find the elements of the crimes proven beyond a reasonable doubt. Witness credibility, weight of the evidence, and inferences to be drawn from the evidence are questions for the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011).

Armed robbery requires evidence establishing that the defendant (1) assaulted the victim or put her in fear of an assault, (2) committed the assault while committing a larceny, and (3) used a dangerous weapon. *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991) (citation omitted).

The evidence in this case was sufficient to support defendant's convictions. Complainants Sarah Turner and Suronda Hall testified that defendant came to their house with Henry Harrison, demanded money from Turner, and beat and kicked Turner multiple times while Harrison pointed a gun at Turner and Hall. Harrison then took $50 from Hall's pocket and snatched a gold chain from her neck. The testimony of Turner and Hall was consistent regarding the important facts from the night of the crime. Whether to believe a witness's testimony, even

if impeached, is a matter solely for the jury. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 306 (1998).

Defendant also argues that the verdicts were inconsistent where the jury acquitted defendant of felonious assault and felony firearm. Inconsistent jury verdicts are permissible, *People v Vaughn*, 409 Mich 463, 466-467; 295 NW2d 354 (1980), however, the jury's verdicts in this case was not inconsistent. The two charges of which defendant was acquitted allegedly occurred at a different time and place, not at Turner's home on April 13, 2010, but on April 20, 2010, while Turner and Hall were exiting I-94 at Connor and defendant pulled up alongside them at a stoplight and pointed a gun. Under these circumstances, we are not convinced that the jury rendered inconsistent verdicts. Clearly the jury concluded beyond a reasonable doubt that the April 13, 2010, incident occurred as Turner and Hall testified, but that a reasonable doubt existed as to the events of April 20, 2010.

III. DEFENDANT'S SENTENCE

Next, defendant argues that her sentences were disproportionate to the crimes and to her prior record, resulting in a cruel and unusual punishment. We disagree.

Defendant's sentences were within the guidelines range of 126 to 420 months (10.5 to 35 years). MCL 769.34(10) provides that an appellate court "shall affirm" a minimum sentence that is within the appropriate sentencing guidelines range absent an error in scoring the guidelines or inaccurate information relied on in sentencing. Here, defendant does not challenge the guidelines scoring. While "MCL 769.34(10) cannot constitutionally be applied to preclude relief for sentencing errors of constitutional magnitude," *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006), "a sentence within the guidelines range is presumptively proportionate," *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate cannot constitute cruel or unusual punishment." *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

During sentencing, the trial court noted that defendant was charged as a fourth habitual offender and the crimes carried a potential life sentence. Defendant had nine prior felonies, including weapons and drug offenses, and recently spent over three years in prison. She committed the instant offenses less than six months after being discharged from probation, and her previous offenses within 60 days of being placed on probation. Moreover, the evidence showed that these crimes were planned and that defendant clearly acted in concert with Harrison. Although defendant did not carry the gun, she beat and kicked Turner repeatedly while Harrison aimed the gun at Turner and Hall and robbed Hall of money and property. The crimes easily could have resulted in death or serious injury to more than one person. Before and after the crimes, defendant stalked and threatened Turner. There was also ample evidence that she committed the crimes of which she was acquitted. In sentencing a defendant, a court may consider crimes of which the defendant is acquitted, because of the different standard of proof. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Under these circumstances, defendant's sentences were not disproportionate or cruel or unusual punishment.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

In a Standard 4 brief, defendant argues that she was denied the effective assistance of counsel at trial. We disagree.

An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*. This Court reviews a trial court's decision to either grant or deny a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Id*.

Both the United States and Michigan Constitutions guarantee the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced the defendant's case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel performed deficiently if his performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). To establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel's error, the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defense counsel is afforded wide latitude on matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and this Court will not substitute its judgment for that of defense counsel, review the record with the added benefit of hindsight on such matters, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), or second-guess defense counsel's judgment on matters of trial strategy. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant claims that her attorney failed to investigate and call crucial witnesses. The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A defense is substantial if it is one that might have made a difference at trial. *Hyland*, 212 Mich App at 710. Additionally, defense "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 US at 691. Here, defense counsel had an investigator appointed to assist him. There has been no showing that any of the suggested witnesses would have had information relevant to the alleged robbery/assault. One of the witnesses, Harrison, could have used the privilege against self-

incrimination to refuse to testify, while the other witnesses appear not to have been present at the time and place of the robbery and assault of which defendant was convicted.

Defendant also claims that her attorney erred in failing to obtain a surveillance tape from the Greektown Casino, which would allegedly show that defendant and Turner did not gamble together. However, defendant has failed to show that such a tape exists, much less that it would contain information bearing on the alleged crimes or supporting a substantial defense. Accordingly, defendant has not demonstrated that she received ineffective assistance of counsel at trial.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly