STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 6, 2014
v	No. 306187 Wayne Circuit Court
TYWANN LUCAS-GEE, Defendant-Appellant.	LC No. 11-000489-FC

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

PER CURIAM.

Defendant appeals his jury conviction of armed robbery under MCL 750.529, and his sentence of 85 months to 20 years in prison. He asserts that (1) there was insufficient evidence to support his conviction; and (2) his sentence constitutes cruel and unusual punishment. For the reasons stated below, we affirm.

A. INSUFFICIENT EVIDENCE CLAIM

We review de novo a criminal defendant's challenge to the sufficiency of the evidence supporting his conviction. *People v Harverson*, 291 Mich App 171, 175–177; 804 NW2d 757 (2010); *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). To determine whether sufficient evidence exists "to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399–400; 614 NW2d 78 (2000) (internal citation omitted).

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id*. at 400 (internal quotation marks and citation omitted).]

"[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind," which the factfinder may "infer[] from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "It is for the trier of fact, not the appellate court,

to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In *People v Gibbs*, 299 Mich App 473, 490–491; 830 NW2d 821 (2013), our Court summarized the elements necessary to sustain a conviction of armed robbery under MCL 750.529:

> (1) [T]he defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, . . . possessed a dangerous weapon . . . . [Internal quotation and citation omitted.]

The phrase "in the course of committing a larceny" encompasses "acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). In the context of MCL 750.530, the elements of larceny include: (1) "an actual or constructive taking of goods or [personal] property"; (2) "a carrying away or asportation" of the property; (3) "with a felonious intent"; and (4) "without the owner's consent." *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Felonious intent means a specific "intent to steal another person's property." *Id*.; see also *Harverson*, 291 Mich App at 177.

Defendant unconvincingly claims that he did not take the victim's property with the intent to steal it. The victim testified that while he walked along Cortland Street in Detroit, defendant and another assailant attacked him from behind, knocked him to the ground, and hit and kicked him. Defendant repeatedly told the victim to give defendant his money and then produced a knife and thrust it toward the victim, prompting the victim to remove his cash from a pocket and give it to the second assailant. Defendant also demanded the victim's wallet. When the victim protested, defendant thrust his knife toward the victim again, following which the victim gave defendant his wallet. Defendant then reached into a pocket and removed the victim's cell phone. At trial, the victim identified the Assurance Wireless cell phone that defendant had removed from his pocket, and remembered that a police sergeant had returned his wallet. A Detroit police officer testified about his encounter with the victim near Dexter Avenue and Cortland Street, his pursuit of defendant in a police car and on foot, his capture of defendant, his search of defendant that produced a pocket knife and cell phones, including a black Assurance Wireless phone, and his observation of his partner's recovery from the second assailant of cash inside a wallet later determined to belong to the victim.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant participated in taking the victim's cash, cell phone, and wallet with the specific intent to steal the property. *Nowack*, 462 Mich at 399–400; *Cain*, 238 Mich App at 120; *Harverson*, 291 Mich App at 177. Although defendant asserts that shortly before the first scheduled trial date the victim was admitted into a psychiatric hospital, defendant notably offers no specific explanation of any mental infirmity or other concern that conceivably could have cast doubt on the victim's credibility. Though defendant references other aspects of the victim's conduct—namely, his psychiatric

hospitalization, an inconsistency between his trial testimony and police statement on the weapon used by defendant, his argument with defense counsel, and his inability to recall reading his statement to the police—the jury was informed of all of these matters and still credited the victim's testimony, an assessment we will not revisit. *Hardiman*, 466 Mich at 428.

B. CRUEL AND UNUSUAL PUNISHMENT CLAIM

A minimum sentence that is within the appropriate guidelines range qualifies as presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Further, a proportionate sentence cannot rise to the level of "cruel and unusual punishment[]," under the federal or Michigan constitutions. *Id.*; *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006).

Defendant acknowledges that the minimum term of imprisonment imposed by the trial court is within the appropriate sentencing guidelines range of 51 to 85 months, and he identifies no error in the scoring of the guidelines. However, he contends that his 85-month to 20-year sentence constituted cruel and unusual punishment prohibited by the federal and Michigan constitutions, because of: (1) the supposed absence of reliable evidence supporting his conviction; and (2) the potential that the trial court retaliated against his for previously withdrawing a guilty plea and proceeding to trial. Because defendant did not raise this issue before the trial court, we review this unpreserved claim of constitutional error only to ascertain whether any plain error affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

As noted, there is ample evidence to support defendant's conviction, and there is no merit to his claim otherwise. His assertion that the trial court improperly considered his decision to request a jury trial when it made its sentence is equally unconvincing. A trial court may not consider that a defendant "exercised his right to trial in imposing his sentence." *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), aff'd 441 Mich 496; 495 NW2d 534 (1992). When a defendant has pursued pretrial plea bargaining, but subsequently proceeds to trial and receives a higher sentence than offered during plea bargaining, this Court will affirm the ultimate sentence unless the record contains some indication that "the higher sentence was imposed as a penalty for the accused's assertion of his right to [a] trial by jury." *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987).

There is no suggestion in the record that the trial court imposed the 85-month minimum term of imprisonment in retaliation for defendant's decision to proceed to trial. The trial court's references at sentencing to the prior plea offer occurred during a discussion—prompted by a letter from defendant and a correction to the presentence information report—that aimed to clarify the pretrial course of proceedings. The trial court made no additional references to the prior plea offer during sentencing. And, when it imposed the 85-month minimum term, the court specifically stated: "[t]he reason . . . [that] we had a senior citizen [the victim] trying to just do what he does, had a right to go to any grocery store he wants to go to and he ends up being assaulted by two young thugs in the hood where we all grew up." Therefore, defendant has failed to overcome the presumptive proportionality of his sentence. He accordingly has not shown any plain constitutional error in his sentence. *Powell*, 278 Mich App at 323.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly