

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY F. BOWIE,

Defendant-Appellant.

UNPUBLISHED

July 2, 1996

No. 177549

LC No. 93-10673

Before: O’Connell, P.J., and Gribbs and T. P. Pickard,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (felony firearm). MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to two years’ imprisonment for the felony-firearm conviction to be followed by a life term for the armed robbery conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that his sentence information report was scored incorrectly on Offense Variable (OV) 2 and Prior Record Variable (PRV) 2. We will affirm the sentencing court’s scoring where there is evidence on the record supporting the scoring. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). Here, the trial court scored OV 2 at 25 points based on a finding that defendant subjected the robbery victim to terrorism. Terrorism is defined as “conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense.” *Michigan Sentencing Guidelines* (2d ed), p 99. The victim testified that defendant, after robbing him of his Chevrolet Blazer, money and identification at gunpoint, ordered him to run and fired two shots at him as he fled. This testimony concerning the gratuitous discharge of a firearm supports a finding that defendant intended to and did increase the victim’s fear during the crime. Therefore, we affirm the trial court’s scoring of OV 2.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also contests the court's scoring of PRV 2 at 25 points, indicating that the court found that defendant had been convicted of two prior low severity felonies. Prior felonies "are convictions that occur prior to the commission of the instant offense." *Id.*, p 8. The instant offense occurred in November, 1992. The sentencing court incorrectly categorized defendant's December, 1993 conviction for receiving and concealing stolen property as a "prior conviction," when it should properly have been categorized as a "concurrent or subsequent felony conviction" under PRV 7. Therefore, defendant is correct that PRV 2 was scored improperly. However, because, had the 1993 conviction been categorized properly, the recommended minimum sentence range would not have been altered, we find the error to be harmless. See *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993), remanded 447 NW2d 984 (1994).

Defendant next argues that the trial court made impermissible use of the facts surrounding his 1993 arrest on unrelated charges and, therefore, its findings of fact were improper. The finder of fact may not use evidence of other acts or crimes committed by a defendant to infer character or conduct in conformity with that character. However, such evidence may be used for other purposes, such as inferring motive, opportunity, intent, preparation, plan, knowledge or identity. *People v Vandervliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). We have reviewed the court's evaluation of the evidence and find no error to have occurred.

Defendant also challenges several comments made by the prosecutor in his closing arguments. Defendant did not object to the challenged remarks. Therefore, this issue is not preserved for appeal and will not be reviewed absent manifest injustice. We find no manifest injustice. The trial court, which acted as the finder of fact in this case, is presumed to be capable of distinguishing between proper and improper statements of counsel and to be less susceptible to improper argument. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992); *People v Rosales*, 160 Mich App 304, 313; 408 NW2d 140 (1987). The challenged comments were neither so prejudicial nor so numerous so as to deny defendant a fair trial before the bench. We therefore decline to review this issue.

Defendant contends that he was denied due process and was unduly prejudiced by the seven month delay between his identification by the robbery victim and the filing of charges. We disagree. This Court must determine if a delay in filing charges denied defendant due process. However, the defendant carries the initial burden of demonstrating that he was prejudiced by the delay. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). Defendant argues that he was unable to locate several alibi witnesses by the time charges were filed. However, defendant did not present any evidence of his attempts to locate these witnesses or the difficulties that he encountered. Further, defendant was on notice that he might be charged with this crime from the time he was positively identified by the victim and could have contacted his witnesses at that time. Defendant did not carry his burden of demonstrating prejudice from the delay in filing charges.

Finally, defendant argues that he was denied effective assistance of counsel on grounds paralleling his first four arguments on appeal. This Court will find ineffective assistance of counsel only where the trial counsel's errors were "so serious that counsel was not functioning as an attorney as

guaranteed by the Sixth Amendment;" the defendant was prejudiced by that error; and, but for the error, the trial would likely have had a different outcome. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). As set forth above, we have found no material errors in the proceedings below. Therefore, we do not find that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Timothy P. Pickard