STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 284887 Wayne Circuit Court
DEANGELO BENNETT, Defendant-Appellant.	LC No. 07-020818-FC

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions on eight counts: armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); felon in possession of a firearm, MCL 750.224f; larceny in a building, MCL 750.360; three counts of felonious assault, MCL 750.82; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 25 to 40 years on the armed robbery count; 10 to 20 years on the home invasion count; one to five years on the felon in possession count; one to four years each on the larceny and felonious assault counts; and a consecutive two-year term on the felony-firearm count. We affirm.

I

Defendant's convictions arose out of a midnight assault against Denard Williams and his family. At about midnight on October 12, 2007, Denard drove home from his job at Pizza Hut. He parked under a streetlight and got out of his car, carrying pizza. His wife Sharon Williams was waiting for him in the front room. Their three young children were in the home as well. The youngest child, four-year old Denard Williams Jr. (hereafter "Junior"), was awake, and another child was asleep on the couch. Denard placed a container of soda on top of his car, and called to Sharon to help him by carrying in the soda. As Sharon approached the car, a man placed her in a chokehold and put a pistol to her neck. The lower part of the man's face was covered with a loose shirt. The man then walked backward, taking Sharon toward the house.

Defendant appeared from behind a tree, holding an assault rifle, and approached Denard. He came within three feet of Denard and placed the barrel of the rifle within two inches of Denard's face. Although defendant's face was partially covered, Denard saw some of his face and his eyes, and Sharon noticed that he was wearing a style of jeans that she referred to as

"Neyce,"[1] which had distinctive stitching on the back pocket. Defendant told Denard to move, and placed the rifle on Denard's back. With the rifle touching his back, Denard walked to his front door where the other man was still holding Sharon. The men told Denard and Sharon to go into the house. Concerned for the safety of his children, Denard did not want to go inside the house. Defendant pushed Denard backward into the house, and Denard saw defendant's face when whatever was covering it fell down past his lips.

Once they were inside, the two men put Denard and Sharon on the floor, facing the couch, with their heads down. A third man entered the house. At gunpoint, the assailants ordered Denard to get up and led him out of the room. The assailants demanded money, and Denard removed $400 from his pocket, which he was instructed to drop onto the floor. The men asked Denard where his "chopper" was located, which Denard understood to mean his assault rifle. Denard told them where the rifle was, and defendant walked Denard into the hallway and instructed him to lie down. Defendant held the rifle to Denard's head and continued to demand money. The assailants also asked him where his "weed plant"[2] was located. Denard responded that there were none in the house. Denard had previously kept a marijuana plant upstairs, but the plant had died.

One of the men ran upstairs, and shortly thereafter defendant called up to him, "come on, come on, cousin." The man came back downstairs, and said "give me the money, I'm not playing." Denard heard the cocking of a gun, and turned over his wallet, which contained approximately $150.

Defendant went to the front room and touched the rifle to Junior's stomach. He asked Sharon and then Junior where the money was, and Junior began to cry. Denard heard running and he started to get up. One of the men said, "I'm still here, don't get up." Denard returned to the floor. About five minutes later, Denard got up and went to the front room; Sharon and Junior were in the same place they had been. Denard called the police.

Detroit Police Investigator Philip Wassenaar, among others, responded to the call. Officer Wassenaar testified that Sharon, who appeared traumatized, tried to describe the events. She described the first man who pointed a pistol at her, indicating she thought she recognized him from down the street. Officer Wassenaar testified that Sharon described the distinctive stitching on the second man's jeans and noted that he had "craters" in his face.[3] Sharon testified, however, that it was the first assailant—the one who had pulled a pistol on her—that had the "craters" in his face. Sharon also testified that the man in the Neyce jeans was armed with an assault rifle. Officer Wassenaar recounted that she said this man was armed with a pistol. Sharon testified that she believed "the investigator probably mixed up my descriptions." Denard described the assailants and told the police he thought they might be men he regularly saw outside down the street when he arrived home from work every night.

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[1] "Neyce" is a phonetic spelling of Sharon's testimony. Sharon identified Neyce jeans as "a designer who design this kind of jeans with the flip flop stitches." Enyce is a clothing company.

[2] The record is unclear as to whether the assailants asked about a "weed plant" or "weed plants."

[3] Sharon described "craters" as the remnants of blackheads.

The police arrested defendant and another man at a house down the street from the Williams' house. When arrested, defendant had $160 in cash and the other man had $423 in cash. About two days after the incident, the police called Denard at work and asked him to view a lineup of six men. Within a minute of viewing the lineup, Denard identified defendant.[4] Denard stated, "I know it's him, I know his face, his nose and his complexion."

II

Defendant first argues that the evidence was insufficient to identify him as one of the assailants. The identity of the defendant is an essential element in every criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). We review this claim de novo. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). We examine the record to determine whether a rational juror could have found that the prosecutor established defendant's identity beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We consider the evidence in the light most favorable to the prosecution. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

The record reveals that there were some discrepancies between the descriptions of the assailants that the Williams' gave to the police after the incident and their trial testimony. To the police, Denard described the assailant with the assault rifle as being five feet, nine inches tall, and Denard signed the police report containing that description. In contrast, at trial, Denard acknowledged that defendant appeared to be about the same height as him, which is five feet, six inches. There was also some discrepancy regarding the degree to which defendant's face was obscured. Further, Officer Wassenaar testified that Sharon described the second assailant as having "craters" in his face, and she signed the police report with this description. At trial, Sharon testified that it was the first assailant who had the markings, not the man later identified as defendant.

The above discrepancies do not require reversal, however, as sufficient evidence of identity exists. Officer Wassenaar testified that when he took Sharon's statement on the night of the crime, she had clearly been victimized. She was visibly upset and very shaken as she tried to tell the officer what happened, and was "all over the place" in giving him a lot of information and jumping around a bit. Officer Wassenaar did his best to accurately document her descriptions. The officer testified that in his experience, people often become confused in giving descriptions to the police. Sharon testified at trial regarding her recollection of the assailants, taking issue with parts of Officer Wassenaar's written description of her statement, which she had admittedly signed. During Sharon's testimony the prosecutor had defendant display the back pocket of his jeans (he was purportedly wearing the same clothes at trial that he had on at the time of his arrest the night after the incident). Sharon testified that, although they were not Neyce jeans, the stitching was similar to the stitching she saw on the second assailant the night of the crime.

[4] Sergeant Charles Rogers, who observed the line-up, testified that Denard identified defendant in less than ten seconds, at which time Sergeant Rogers told him to take his time and look at all six people in the line-up. Denard took additional time, and again identified defendant.

Denard's identification of defendant at the corporeal lineup and at trial was definitive. At the lineup, Denard singled out defendant, as described above, and told police, "he [defendant] was armed with a rifle. He was most aggressive out of the three. He pointed his gun at me, and my family. He did most of the talking. He was definitely the aggressor." Denard testified that he looked fully at defendant's face three times during the robbery. He acknowledged on cross-examination that his views of defendant's face lasted approximately 15 to 20 seconds, ten seconds, and eight seconds, respectively. Despite the brevity of his views of the assailant, Denard testified that he was confident in his identification of defendant:

> *Q.* . . . For the record, was there any doubt in your mind that this defendant was one of those individuals in that line-up?
>
> *A.* I knew it was him.
>
> *Q.* Put it in your own words; do you know him?
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> *A.* Just his face. I now had his face branded in my head. I wasn't going to forget. As soon as I walked in there I knew it was him.
>
> *Q.* . . . Are you a hundred percent sure that this man right here is the man who held you up in your house?
>
> *A.* Yes, I am.
>
> *Q.* And any doubt in your mind, whatsoever, Mr. Williams?
>
> *A.* Ain't no doubt.

The trial court instructed the jury concerning the dependability of identification testimony, advising the jury to consider "how good a chance the witness had to see the offender at the time" and "how long the witness was watching." The court further instructed the jury that they could consider "any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with identification during trial." After receiving these instructions, the jury concluded that defendant was the perpetrator of the crimes.

Given Denard's definitive identification of defendant at the lineup and trial, along with the other evidence presented, we conclude that a rational jury could have found that the prosecutor established defendant's identity beyond a reasonable doubt.

III

Defendant next argues that his sentence constitutes cruel and unusual punishment. Given that defendant's sentence was within the sentencing guidelines, his argument is meritless. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). A sentence that is within the guidelines range is presumed proportionate, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995), and a proportionate sentence does not violate the constitutional

prohibition against cruel and unusual punishment, *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Similarly meritless is the argument in defendant's Standard 4 brief,[5] in which defendant challenges the trial court's assessment of 25 points for offense variable (OV) 13. By statute, OV 13 requires the imposition of 25 points if the sentencing offense was "part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The statute mandates that "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) (emphasis added). Concurrent convictions are included when calculating a defendant's score under OV 13. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

Here, defendant's current convictions include three or more crimes against a person: felonious assault, home invasion, and armed robbery. MCL 777.16d, .16f, and .16y. In addition, defendant had a 2007 conviction for home invasion. These convictions plainly constitute more than three crimes against a person within a five-year period. The trial court was thus correct to score 25 points against defendant for OV 13.

IV

Lastly, defendant argues that his constitutional rights were violated when his appellate counsel refused to give him access to the trial transcripts. We disagree.

To preserve equal justice, an indigent defendant is entitled to obtain a copy of trial transcripts without cost in order to pursue appeal of a conviction. *Griffin v Illinois*, 351 US 12, 18-19; 76 S Ct 585; 100 L Ed 891 (1956); MCR 6.433. Here, defendant acknowledges that his appointed appellate counsel has received the trial transcripts. Defendant contends, however, that his counsel has refused to give him access to the transcripts, which impedes his to right to file a Standard 4 brief. In support, defendant has attached to his brief an unauthenticated copy of a letter in which his appellate counsel informs defendant as follows:

> You have . . . requested that the transcribed record of your case be sent to you so that you could prepare your own in pro per supplemental pleading. Unfortunately I am unable to honor your request as I must maintain the transcript until my work on your behalf before the Michigan Court of Appeals is completed. That will occur after the Court hears oral arguments in your case.
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> Enclosed please find a copy of the opinion issued by the Michigan Supreme Court in *Larkin v Kent Circuit Judge*, 397 Mich 611[;] 246 NW2d 827 (1976).[6] The court held that when an indigent defendant is represented by

[5] Administrative Order No. 2004-6.

[6] The issue in *Larkin* pertained to the proper interpretation of GCR 1963, 785.13, which was essentially the 1974 precursor to MCR 6.433, governing the right of indigent defendants to obtain copies of documents and transcripts for postconviction proceedings. In *Larkin*, two defendants, who were represented by appointed counsel, were seeking copies of their transcripts from the court. *Larkin, supra* at 612-613. Our Supreme Court held that the language of GCR
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> counsel on appeal he is entitled to receive his transcript only after his appeal of right has been concluded.

We find no published Michigan opinion that considers whether an indigent defendant has a right to access trial transcripts that are in the possession of his or her appointed appellate counsel. The interplay of two relevant court rules, however, is helpful to our analysis. MCR 6.425(G), which addresses the appointment of appellate counsel, requires trial courts to direct the preparation of the trial and sentencing transcripts at the time of appointment. MCR 6.425(G)(2). The rule provides that "[i]f the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request." *Id*. The transcript is provided to appellate counsel to facilitate his or her pursuance of an appeal on the defendant's behalf. MCR 6.433, relating to postconviction proceedings, requires trial courts to order preparation of a transcript if an indigent defendant so requests, "unless the transcript has already been ordered as provided in MCR 6.425(G)(2)." MCR 6.433(A). Taken together, these two rules indicate that once a transcript has been provided to appellate counsel, the defendant is not entitled to additional copies of the transcript. With respect to a defendant's right to access the transcript that is in the possession of his or her appointed counsel, the court rules are silent.

Notwithstanding, defendant argues that he was denied equal protection and due process of law by his appellate counsel's failure to give him access to the trial transcripts, thus impeding his ability to prepare and file a Standard 4 brief. We disagree. The right to file a Standard 4 brief is an administrative creation, Administrative Order No. 2004-6, not a constitutional right. A defendant has either a constitutional right to counsel or to proceed in propria persona, but not both. *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996), overruled in part on other grounds *People v Williams*, 470 Mich 634; 683 NW2d 597 (2004); *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994).

Administrative Order No. 2004-6, Standard 4, provides in pertinent part:

> When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims *in propria persona*. Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court.

Although the phrase "clerical assistance" as set forth in Administrative Order No. 2004-6 may imply allowing the defendant access to his or her transcript, the preamble of the order specifically states: "Criminal appellants are not constitutionally entitled to counsel's adherence to these guidelines." Although the better practice may be to allow defendants access to versions (electronic or otherwise) of the transcripts, there is no authority indicating that lack of access to

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1963, 785.13 should be interpreted to mean that a defendant is entitled to copies of the transcript and other documents to facilitate his or her pursuit of post-conviction remedies: "(1) if he is represented by counsel on appeal, only after his appeal of right has been concluded; or (2) upon failure to exercise his appeal of right or right to assigned counsel." *Id*. at 613.

the transcripts is a violation of a constitutional right in a situation where the defendant is represented by appointed counsel.[7] In this case, defendant is represented by appointed appellate counsel, *Adkins*, *supra*; *Dennany*, *supra*, and his counsel has obtained a free copy of the trial transcripts, *Griffin*, *supra*. There is no constitutional requirement that defendant be given access to the transcripts to prepare and file a Standard 4 brief. Therefore, we hold that in this instance, defendant's constitutional rights were not violated.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering

[7] Administrative Order No. 2004-6, Standard 8 implies that defense counsel may retain the records and information until his or her representation terminates, at which time he or she is required to "cooperate promptly and fully with the defendant and any successor counsel in the transmission of records and information." This standard does not, however, address a defendant's right to access the records and information during the appeal.