STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286016 Wayne Circuit Court
JOSHUA MURPHY, Defendant-Appellant.	LC No. 08-000004-FC

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for armed robbery, MCL 750.529, following a bench trial. Defendant was sentenced to 225 months to 40 years' imprisonment. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues that his motion to quash his bindover after the preliminary examination was wrongly denied. We review for an abuse of discretion a district court's determination that probable cause exists to support a bindover. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). A "district court must bind over a defendant if the evidence presented at the preliminary examination establishes that a felony has been committed and there is probable cause to believe that the defendant committed the crime." *Id.*

The armed robbery statute, MCL 750.529, provides:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

This Court has interpreted the statute and held that in order to prove a charge of armed robbery, the prosecutor must show:

> (1) the 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, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7-8; 742 NW2d 610 (2007).]

The statute defines "in the course of committing a larceny" to include "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 attempting to retain possession of the property." MCL 750.530(2); *Chambers*, *supra* at 7 n 5.

Defendant does not dispute that a knife is a dangerous weapon, or that he committed a larceny and, while doing so, used force against the victim, William Brown, in hitting Brown on the head, knocking Brown to the ground, and kicking Brown in order to take Brown's wallet. Thus, defendant used force or violence against Brown "in the course of committing the larceny," i.e., taking Brown's wallet. MCL 750.530(1). Moreover, contrary to defendant's position, he was not required to threaten Brown with the knife in order to take his property. Rather, defendant was merely required to, "in the course of committing the larceny . . . possess[] a dangerous weapon[.]" *Chambers*, *supra* at 7-8; MCL 750.529. The evidence at the preliminary examination supported a finding of probable cause for all elements of the crime. *Terry*, *supra*. We conclude that the trial court did not abuse its discretion in binding over defendant on the armed robbery charge. *Id.*

Defendant also argues that there was insufficient evidence produced at trial to support his armed robbery conviction. We disagree. In reviewing the sufficiency of the evidence in a bench trial, we examine the evidence de novo to determine whether the elements of the offense were proven beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution and resolving any conflicting evidence in favor of the prosecutor. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

The record reflects that defendant followed Brown out of the store after watching Brown purchase money orders, and then he hit Brown on the head, knocking him to the ground, and kicked Brown to get at his wallet. Defendant used a knife to cut the pocket of Brown's pants off in order to get at the wallet, and stated "I'll kill you," when he was kicking Brown. Thus, in the course of committing the larceny of Brown's wallet, defendant used force against Brown. *Chambers*, *supra* at 7-8. Defendant also, "in the course of committing the larceny," i.e., attempting to obtain or while obtaining the property, "possessed a dangerous weapon," i.e., the knife, and he actually used it to obtain the wallet. *Id.;* MCL 750.529; CJI2d 18.1.[1] We conclude

[1]Although defendant argues on appeal that the trial court initially held that defendant committed unarmed robbery and then "reversed" itself to conclude that he committed armed robbery, this mischaracterizes the record. The trial court specifically rejected defense counsel's
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that the trial court did not err in finding that there was sufficient evidence to find defendant guilty of armed robbery beyond a reasonable doubt. *Wilkens, supra*.

Defendant also asserts that the photographic lineup shown to the victim and a clerk in the store was unduly suggestive because the people in the photographic array lacked sufficient common features. We note that defendant waived any claim of error on appeal when he not only failed to object when Brown was questioned about the lineup, but he affirmatively indicated he had "no objection" to the admission of the photographic array that Brown was shown, and also specifically questioned Brown about the lineup during his cross-examination. A defendant may not waive objection regarding an issue during trial and then subsequently raise it as an error on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Nonetheless, we conclude that the photographic lineup was not so suggestive that there was a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993). The lineup participants all had short dark hair, dark eyes, dark eyebrows, and a goatee and were roughly the same age. Three wore white T-shirts, including defendant, and two others wore brown coats. Defendant's skin tone matched the skin tone of two other participants and his other facial features matched several of the other participant's features. Because the photo spread contained photographs that were fairly representative of defendant's physical features, we conclude that it was sufficient to reasonably test the witness identification and, therefore, it was not suggestive. *Id.* at 304.

Lastly, defendant challenges the trial court's decision to score 15 points for offense variable (OV) 10, MCL 777.40, for predatory conduct. Defendant preserved this challenge because he objected to this scoring during sentencing. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10). We review the scoring decision for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The trial court's decision must be supported by adequate evidence on the record. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Where there is any evidence in support of the scoring decision, it will be upheld. *Id.*

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characterization at sentencing that unarmed robbery was its "initial verdict," and clarified that it merely allowed further argument before rendering a final decision after the prosecutor noted the amendment to the armed robbery statute.

Further, defendant also argues that the jury instructions were revised in 2004 and the prosecutor erroneously informed the trial court that they were revised in 2007. However, the record reflects that the prosecutor merely told the trial court that there was an amendment to the armed robbery statute in the prior two years. The amendment to the armed robbery statute took effect on July 1, 2004, and was therefore applicable to defendant because the robbery occurred in 2007. *Chambers, supra* at 7 n 3. The *Chambers* Court noted that the model jury instruction for armed robbery, CJI2d 18.1, was also amended in 2004 to reflect the change in statutory language. *Id.* at 7-8. That instruction supports that possession of a dangerous weapon, alone, is sufficient. Because all elements were proved beyond a reasonable doubt, defendant is not entitled to relief.

The sentencing variable OV 10 relates to "exploitation of a vulnerable victim." MCL 777.40(1). Fifteen points are scored where "[p]redatory conduct was involved." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In interpreting OV 10, the Michigan Supreme Court held that points should be assessed "only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). The predatory conduct must have occurred before the commission of the offense, it must have been "directed at a victim," and its primary purpose must have been victimization, i.e., "causing that person to suffer from an injurious action or to be deceived." *Id.* at 160-161.

The trial court determined that defendant's conduct was "definitely predatory" because Brown "looked like you could blow him over and he'd fall over. He was about as big as a matchstick. He looked very feeble." Further, defendant "watched [Brown] inside the store, watched him buy the money orders, knew he had the money and followed him out there, outside. It's classic predatory conduct." The trial court's scoring decision was supported by adequate record evidence, given that defendant stood one step away from Brown as he purchased the money orders, then followed Brown out of the store and robbed him once they were outside. *Hornsby*, *supra*. The record supports that Brown was vulnerable given his age and feeble state. *Cannon*, *supra* at 158-159. The predatory conduct occurred before the robbery. *Id.* at 160. Further, it was directed at a specific victim, Brown. *Id.* The record also supports that defendant's conduct was primarily to victimize Brown, i.e., targeting him as the victim of an injurious action, being beaten and robbed. *Id.* at 161. Therefore, we find that the trial court did not abuse its discretion in scoring 15 points for predatory conduct under OV 10 in the present case. *McLaughlin*, *supra*.

However, defendant is nevertheless entitled to resentencing. Defendant's total OV score, including the 15 points for OV 10, was 35. The sentencing information report underreported his total OV score as 30, and erroneously calculated 30 points as falling within OV level III. In fact, OV level II encompasses 20 to 39 points. Given defendant's total prior record variable (PRV) score of 30, the corresponding guidelines recommended minimum sentencing range with his OV score of 35 is D-II, 81 to 135 months. MCL 777.62. Thus, defendant's minimum sentence of 225 months falls outside the applicable guidelines range. Although defendant failed to raise this error, because defendant's sentence was outside the correct applicable guidelines range, appellate review is not precluded. *Kimble*, *supra* at 310; *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006); MCL 769.34(10).

We affirm defendant's conviction, but remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro