

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN A. GUSTAFSON,

Defendant-Appellant.

UNPUBLISHED

May 5, 2000

No. 215546

Oceana Circuit Court

LC No. 98-000239-FC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to twenty to sixty years' imprisonment for the armed robbery conviction and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first contends that he was denied the effective assistance of counsel. Because defendant failed to create a testimonial record regarding this claim in the trial court, our review is limited to mistakes apparent on the existing record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant first claims that defense counsel should have objected to photographs and testimony regarding defendant's presence at another convenience store approximately ten miles away from the crime scene on the night of the charged crimes. Our review of the challenged evidence reveals that it was both relevant and more probative than prejudicial, MRE 401; MRE 403; *People v Mills*, 450

Mich 61, 66-67, 74-76; 537 NW2d 909 (1995); *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976), and that therefore defense counsel need not have objected to its admission. *Darden*, *supra* at 605 (Defense counsel need not make frivolous or meritless motions.). Moreover, evidence independent of that challenged by defendant, including the victim's testimony and the testimony of two charged accomplices, demonstrated that defendant committed the instant offenses. In light of the unchallenged evidence, we find no reasonable probability that defendant would have been acquitted had defense counsel sought suppression of the evidence challenged by defendant on appeal. *Pickens*, *supra* at 312.

With respect to defendant's several remaining allegations of defense counsel deficiencies, we conclude that they all involve matters of trial strategy that we will not second guess on appeal. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996) ("The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel."). Moreover, even were we to assume that defense counsel's alleged failures qualified as objectively unreasonable, given the substantial evidence of defendant's guilt presented at trial defendant has failed to demonstrate that these failures prejudiced him. *Pickens*, *supra* at 303, 312.

Defendant next argues that the trial court improperly scored guideline offense variable two (OV 2), and that consequently his sentence was disproportionate. To the extent that defendant challenges the trial court's scoring of OV 2, this claim is not a basis on which we will grant relief. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997) ("The challenge here asserted is directed not to the accuracy of the factual basis for the sentence, but, rather, to the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the unchallenged facts. The challenge does not state a cognizable claim for relief.").

With respect to defendant's contention that the trial court imposed a disproportionate sentence, we review the trial court's imposition of a sentence for an abuse of discretion. A given sentence represents an abuse of discretion if it violates the principle of proportionality, which requires that the sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

We note initially that because defendant's armed robbery sentence fell within the sentencing guidelines' range, the sentence is presumptively proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Moreover, defendant has not set forth any unusual circumstances mitigating this presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Furthermore, given the serious nature of the instant crime, during which the victim testified that defendant held a gun to her head and threatened to kill her if she did not follow his demands, and defendant's lengthy and extensive criminal history, we find no abuse of discretion in the trial court's imposition of sentence.

Lastly, defendant argues that insufficient evidence supported his armed robbery and felony-firearm convictions. We find defendant's argument without merit. Viewed in the light most favorable to the prosecutor, the victim's testimony alone established all the required elements of defendant's armed robbery and felony-firearm convictions. MCL 750.529; MSA 28.797, MCL 750.227b; MSA

28.424(2); *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999) (In determining whether the prosecutor presented sufficient evidence to sustain a conviction, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.). See also *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (Circumstantial evidence and the reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime.).

Affirmed.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

/s/ Donald S. Owens