STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARKEY LAMONT WALKER,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 185334
Ingham Circuit Court
LC No. 94-067676-FH

Before: Michael J. Kelly, P. J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of one count of second-degree murder, MCL 750.317; MSA 28.549, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to three concurrent terms of 75 to 120 years for the murder and assault convictions, to be served following his completion of a two-year sentence for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion in failing to adjourn his trial because of the pre-trial publicity it generated. Although defendant cites other authorities, he relies chiefly on *People v Tyburski*, 445 Mich 606; 518 NW2d 441 (1994), for the proposition that the court should have granted him a continuance rather than impaneling a jury. While *Tyburski* does not expressly stand for this proposition, it is useful by analogy for evaluating whether the trial court correctly probed the extent of the media's influence on prospective jurors.[1] Our review of the record leads us to conclude that the trial court complied fully with the dictates of *Tyburski*. *Id.* at 623-624 (Mallett, J.). First, the court took potentially biased jurors into its chambers and conducted a full voir dire with both attorneys present. If the court found a hint of bias, both attorneys were consulted and asked whether they believed the juror could be impartial. Furthermore, the court conducted voir dire in open court, allowing both attorneys to ask questions as they wished. Unlike the court in *Tyburski*, which had as its chief objective to "qualify jurors, rather than discern bias," *id.* at 627, the trial court in this case conducted a thorough inquiry of the jury pool with the assistance of both attorneys, and without hesitation excused any juror who harbored even the slightest prejudice against defendant.. The most

recent precedent on the issue, *People v Jendrezejewski*, 455 Mich 495; 566 NW2d 530 (1997), reinforces our view that the trial court complied with existing precedent and anticipated the pretrial publicity rules that evolved since defendant's trial. The impaneled jurors here swore that they could be unbiased after an extensive voir dire. It was not error to proceed with defendant's trial. See *id.* at 516-521. The trial court did not abuse its discretion in denying defendant's motion for a continuance.

Next, defendant argues that he was denied his right to an impartial jury and the equal protection of the laws where the prosecutor exercised his peremptory challenges to strike male venire persons from the jury. Since defendant failed to object to the prosecution's use of its peremptory challenges, the issue is unpreserved,[2] and we are limited to a determination of whether the prosecution used its peremptory challenges in a clearly discriminatory fashion. *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993). The lower court record yields no such finding. Rather, the record indicates that of the six male jurors excused by the prosecution, two of the jurors were excused with good reason. During a portion of the voir dire, which took place in chambers, one male juror indicated that he was familiar with defense counsel and was quite impressed with his abilities as a practitioner. Again, in chambers, another male juror indicated that he had been falsely accused of criminal sexual conduct and wrongly charged by the prosecutor's office. Assuming arguendo that an objection had been lodged at trial, the prosecution surely would have been able to articulate a gender neutral explanation for excusing these two jurors. This portion of the record seems to refute the notion that the prosecution had a clearly discriminatory purpose in excusing six male jurors. Accordingly, we decline review. Moreover, in response to defendant's cursory argument that his attorney's failure to object to the prosecutor's use of peremptory challenges amounted to ineffective assistance of counsel, we note that there is nothing to suggest that had defense counsel objected to the prosecution's use of its peremptory challenges, there was a reasonable probability that the outcome would have been different. See *People v Johnson*, 451 Mich 115, 122, 124; 545 NW2d 637 (1996).

Next, defendant argues that he was denied his right to an impartial jury where a juror was impaneled despite her admission that she was acquainted with a prosecution witness. Here, the lower court record reveals that the court thoroughly probed Juror Gardi's relationship with the detectives who investigated the present matter. Actually, this situation is very much like *People v Wise*, 18 Mich App 21; 170 NW2d 487 (1969). In that case, we held that where a juror was familiar with a prosecution witness, a promise to be fair and impartial and to listen to the evidence "without regard to any bias, prejudice, or sympathy" was sufficient to impanel the juror. *Id.* at 23. A similar promise was elicited here, so we do not find that it was error for Juror Gardi to be seated. Here, again, defendant appends a claim of ineffective assistance based on counsel's failure to use a peremptory challenge to excuse Juror Gardi. Ineffective assistance of counsel requires a finding of incompetence and prejudice and a determination that but for counsel's error, the result would have been different. *Johnson, supra*, 451 Mich 122. We cannot say that but for counsel's failure to exercise a peremptory challenge to Juror Gardi, the result would have been different. Accordingly, we find no error.

Next, defendant argues that he was denied his due process rights, maintaining that the prosecution elicited testimony from a witness that she was testifying truthfully and then vouched for her testimony in closing argument. We find that the instant matter presents a situation much like that

contemplated in *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). *Bahoda* makes clear that the prosecution's questions to a witness must be read in light of the entire trial to discern whether misconduct was committed. *Id.* As *Bahoda* instructs, our review is limited to a determination whether the prosecution's questions "were fatally prejudicial or entirely without provocation." *Id.* at 278-279. When the instant questions are so evaluated, the only conclusion that can be drawn is that they were not fatally prejudicial but merely an attempt to rehabilitate a witness whose credibility had been called into question by defense counsel. On the other hand, the prosecutor's comment concerning Terri Williams' willingness to testify was improper since he injected his personal opinion into the matter. Nevertheless, this statement, alone, was not sufficient to warrant reversal. As *Bahoda* makes clear, such statements must be viewed in light of the evidence offered against a defendant to determine whether a new trial should be granted. Here, there was overwhelming evidence of defendant's guilt and, thus, the statement does not require reversal. *Id.* at 276-277.

Next, defendant argues that the trial court's sentence of three concurrent terms of 75 to 120 years in prison, to be served following his two year sentence for the felony firearm conviction, was an abuse of discretion. He maintains that the sentence was a departure from the sentencing guidelines and violated the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We would tend to agree, except it appears that a sentencing judge has carte blanche to exceed guidelines where it finds the crime "egregious," without regard to whether the sentence is, by any rational or sensible analysis, a consignment to die in prison. See *People v Kelly*, 213 Mich App 8, 14-16; 539 NW2d 538 (1995). As was discussed in *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995), "the 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether [a sentence] reflects the seriousness of the matter." This Court continued, stating, "where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted." *Id.* We are convinced that our Supreme Court would interpret this sentence as passing muster under the *Milbourne* proportionality rule because of its analysis in *People v Lemons*, 454 Mich 234, 255-260; 562 NW2d 447 (1997). Here, defendant assisted in the ambush of two families peacefully enjoying a warm summer evening in a residential neighborhood. There was testimony that defendant provided the shooter with a gun, drove him to the scene of the crime on his motorcycle, watched as he shot two helpless children and one adult, and then shuttled him away, leaving one child dead and two other victims seriously injured. These facts, coupled with defendant's past record of violence as a juvenile and the gloomy prospects for his rehabilitation, lead to but one conclusion: an upward departure from the guidelines was warranted. Moreover, defendant's claim of miscoring of the guidelines for assigning his prior record variable a score of 25 fails since the scoring was wholly supported by the record. See *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Accordingly, we find no abuse of discretion.

Finally, defendant argues that the minimum sentence imposed is impossible to serve during his lifetime, and thus an abuse of the trial court's discretion. See *People v Moore*, 432 Mich 311; 439 N W2d 684 (1989). We are persuaded, as was a panel of this Court in *Kelly*, *supra*, 213 Mich App 14-16, that *Moore*, *supra*, in that respect, has been overruled. Accordingly, our inquiry is limited to whether defendant's sentence was disproportionate. As previously discussed, defendant's sentence

cannot be set aside as disproportionate under existing precedents such as *People v Lemons*, *supra*, where a sentence of 60 to 90 years for a defendant aged 45 was approved, and *People v Hansford*, 454 Mich 320; 562 NW2d 460 (1997), where a habitual offender sentence of 40 to 60 years was affirmed, although the guidelines for the underlying offense provided for 1 to 3 years' incarceration.[3]

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] Customarily, a claim that an impartial jury is threatened by media exposure is accompanied by a request for a change of venue. Here, defendant sought a continuance until the media attention surrounding the case abated.

[2] Defendant had moved to remand for further proceedings to allow the trial court to determine whether the prosecution had a nondiscriminatory purpose in exercising its peremptory challenges. On November 19, 1996, a panel of this Court denied defendant's request in order to review the record for prejudice. In his brief on appeal, defendant again requests that this case be remanded in order to allow the prosecution to articulate a nondiscriminatory purpose and for a hearing to determine whether his counsel provided effective assistance. After reviewing the record below and finding no clearly discriminatory purpose, we see no reason to require these evidentiary hearings.

[3] The Supreme Court is resolutely divided on this issue as indicated by the dissent in *People v Woods*, 454 Mich 874; ___ NW2d ___ (1997), where leave to appeal was denied a defendant who claimed his 75 to 100 year sentence exceeded his life expectancy. The dissent suggested: "it is high time for Rushlow and it's implications to be reconsidered" on this question of sanctioning so-called basketball score sentences.