STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YVONNE E. TULLIS,

Defendant-Appellant.

UNPUBLISHED
May 31, 2002

No. 228041
Wayne Circuit Court
LC No. 99-003315

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals by right from her convictions by a jury of five counts of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced her to five concurrent terms of one to four years' imprisonment for the felonious assault convictions and to a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecutor committed misconduct requiring reversal by making certain comments during closing arguments. However, defendant did not object below to the comments she challenges on appeal. Accordingly, we review defendant's claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To warrant relief, defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the trial. *Id.*; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721.

Defendant contends that certain of the prosecutor's comments improperly appealed to the jurors' sense of civic duty. A prosecutor may not urge jurors to convict a defendant as part of their civic duty. See *People v Bahoda*, 448 Mich 261, 283-285; 531 NW2d 659 (1995). Such civic duty arguments are condemned because they inject issues into the trial that are broader than the defendant's guilt or innocence and also "because they encourage the jurors to suspend their own powers of judgment." *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Here, although the prosecutor's comments approached the level of an improper civic duty argument, the comments were brief and the prosecutor mainly focused on the elements of the particular case at hand. Under these circumstances, we discern no *clear* or *obvious* error with respect to the comments. *Carines, supra* at 763. Moreover, in light of the evidence introduced

at trial, the comments did not likely affect the outcome of the case. *Id.* Finally, any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra* at 721. Appellate relief is unwarranted.

Defendant further contends that the prosecutor improperly appealed to the jurors' sympathy for the victims, as prohibited by *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). Once again, we do not believe the prosecutor's comments approached the level of a *clear* or *obvious* error. *Carines, supra* at 763. Moreover, the comments did not likely affect the outcome of the case, and any prejudicial effect could have been cured by a timely instruction. *Id.*; *Schutte, supra* at 721. Accordingly, appellate relief is once again unwarranted with respect to defendant's argument.

Defendant further contends that the prosecutor improperly vouched for the credibility of her witnesses, as prohibited by *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Once again, we disagree that appellate relief is warranted. A prosecutor may argue facts that are supported by the evidence and all reasonable inferences arising from the evidence as they relate to her theory of the case, and prosecutors in general are accorded great latitude regarding their arguments and conduct. *Bahoda, supra* at 282. Here, the prosecutor was simply arguing from the evidence that defendant's story was not worthy of belief. See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). She did not communicate that she had special knowledge that the witnesses were testifying truthfully or use the prestige of her office to urge a conviction. *Bahoda, supra* at 277, 286-287. Moreover, the trial court instructed the jury to consider only the evidence presented in the case in making its decision and informed the jurors that the attorneys' arguments were not evidence. Jurors are presumed to follow the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, no clear or obvious error occurred that likely affected the outcome of the case. *Carines, supra* at 763.

Defendant further contends that her attorney rendered ineffective assistance of counsel by failing to object to the aforementioned instances of alleged prosecutorial misconduct. Defendant waived this issue, however, by failing to raise it in the statement of questions presented on appeal and by failing to develop her argument with respect to it. See *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998), and *Orion Twp v State Tax Comm*, 195 Mich App 13, 18; 489 NW2d 120 (1992). At any rate, defendant has not established an ineffective assistance claim because she cannot show that her attorney's failure to object to the comments likely affected the outcome of the case. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Finally, defendant argues that resentencing is necessary because of errors in the scoring of her sentencing information report (SIR).[1] MCL 769.34(10) states, in part:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in

[1] Because the offense in question occurred after January 1, 1999, the Legislative sentencing guidelines apply. MCL 769.34(1) and (2).

> determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Here, defendant raised the issue of improper scoring in a motion for remand filed in this Court. However, her motion to remand was denied, and we decline to revisit that decision. See *People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999), aff'd 462 Mich 71 (2000) (discussing the law of the case doctrine).

Even if we *were* to revisit the sentencing issue, we would discern no error requiring resentencing. Defendant contends that her prior record variable (PRV) level was improperly marked as level "E" and that the correct level was "A" because she had no prior convictions. While an SIR in the lower court file shows the PRV at level "A," an SIR submitted by defendant on appeal shows the PRV at level "E." It appears that the SIR submitted on appeal was the SIR actually used at sentencing, because at sentencing the parties operated under the assumption that the guidelines range was twelve to twenty-four months, and only a PRV level of "D," "E," or "F" could produce such a range under MCL 777.67. Accordingly, the SIR actually used was indeed incorrect, because nothing in the record supported a PRV level "E." However, the correct PRV level was not "A," as contended by defendant, but rather "C," because defendant had two or more concurrent convictions. See MCL 777.57.

Defendant additionally contends that offense variable (OV) 1 should have been scored at fifteen points instead of twenty-five points because she did not discharge a firearm toward a victim but merely pointed a firearm toward a victim. See MCL 777.31. Defendant's argument is without merit because the evidence clearly indicated that defendant not only aimed but also discharged her shotgun toward the victims, who were practicing a dance routine in the adjoining backyard. See *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000) (explaining that in reviewing scoring issues, this Court reviews the entire record to determine if the trial court's scoring of the guidelines was supported by the evidence).

Defendant additionally contends that (1) OV 10 should have been scored at zero points instead of five points because she did not exploit a vulnerability of the victims as described in MCL 777.40, and (2) OV 17 should have been scored at zero points instead of five points because the assault did not involve the use of a vehicle, vessel, aircraft, or locomotive. See MCL 777.47 and 777.22(1). Even assuming the correctness of defendant's arguments with regard to OV 10 and OV 17, however, we discern no basis for appellate relief. Indeed, the SIR used indicated fifty OV points. Subtracting ten points for OV 10 and OV 17 results in forty OV points. A PRV level "C" combined with an OV score of forty results in a guidelines range of two to seventeen months. The trial court sentenced defendant to one to four years' imprisonment, stating:

> The state of Michigan calls for individualized sentencing, and, Miss Tullis, I must say that the court was definitely inclined, and, in fact, I wrote it down to give you 24 to 48 months in the first offense. I'm not going to do that, and only for the reason for your children. I think that the time spent away from you, if you can change your life, and show very needed self-control, the time away from them should be a little shorter than four years.

In light of the court's statements and in light of the fact that defendant's sentence fell within the newly calculated guidelines range of two to seventeen months, no error requiring resentencing is apparent.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter