

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY DARNELL BROWN,

Defendant-Appellant.

UNPUBLISHED
February 24, 2004

No. 243961
Oakland Circuit Court
LC No. 2002-182618-FC

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of assault with intent to commit murder, MCL 750.83. He was sentenced to fifteen to fifty years' imprisonment. We affirm.

Defendant first claims that statements of the prosecutor in his rebuttal argument impermissibly appealed to the jurors' sense of civic duty and sympathy for the victim's family, and that his attorney's failure to object constituted ineffective assistance of counsel. We disagree.

Appeals to the jury to sympathize with the victim constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Civic duty "arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence of the charges and they encourage the jurors to suspend their own powers of judgment." *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). No error requiring reversal will be found if the prejudicial effect could have been cured by a timely objection and curative instruction. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the representation so prejudiced him that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To prove ineffective assistance based on defense counsel's failure to object, a defendant must overcome the presumption that his counsel's actions were the result of sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant did not request a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

In *Crawford, supra* at 354, the prosecutor finished his closing argument and said, “I’m asking you because justice demands it, because it is the right thing to do.” *Id.* This Court found the prosecutor’s last sentence could possibly be construed as an appeal to the jurors’ sense of civic duty, but concluded it was “relatively innocuous for a civic duty argument and any resultant prejudice could have been cured had an instruction been requested.” *Id.* As a result, this Court found no grounds for reversal based on the prosecutor’s remark. *Id.* at 355. In the instant case, the prosecutor’s comment was equally innocuous:

I thank you again for listening to all of the evidence. *I know it’s an important case for the Carnes family and they wanted me to thank you as well. We trust you’ll make a fair and just verdict* and a verdict based on the evidence in this case shows that the Defendant is guilty of assault with intent to murder.

While the prosecutor’s remark that the victim’s family wanted to thank the jury could be interpreted as an appeal for sympathy, when viewed in context, the comments asked the jury to decide the case on the basis of the evidence, and not on the basis of sympathy. We thus conclude that there was no misconduct warranting reversal, and that defendant cannot show the deficient performance or prejudice required to show ineffective assistance of counsel.

Defendant next argues that the trial court prevented him from receiving a fair trial when it improperly questioned him and emphasized his incriminating testimony to the jury. To determine whether the trial court was biased against defendant, we review the record as a whole. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court pierces the veil of judicial impartiality if the court’s comments or conduct unduly bias or influence the jury, thus preventing the defendant from receiving a fair and impartial trial. *Id.*

When defendant’s testimony is reviewed in context, it is obvious that plaintiff, defense counsel, and the trial judge all had difficulty hearing defendant’s testimony. Defendant was repeatedly urged to keep his voice up. A judge may properly question witnesses in order to elicit a more exact testimony or additional facts, or to clarify points. *People v Smith*, 64 Mich App 263, 266-267; 235 NW2d 754 (1975). Here, the record reflects the trial court interrupted defendant and questioned him in an attempt to ensure that it had heard defendant’s answers correctly. Where, as here, a court’s questions are posed in a neutral manner and its comments and questions do not add to or distort the evidence, the defendant is not deprived of a fair trial. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996).

Defendant next argues that the trial court erred in scoring OV 4, OV 5, OV 6, and OV 7. This Court is required to affirm sentences within the legislative guidelines’ range unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information in determining the defendant’s sentence. MCL 769.34(10).

According to the PSIR, the victim suffered a diminished mental capacity as the result of brain injuries. Under OV 4, psychological injury to a victim, the instructions provide for the scoring of ten points “if the serious psychological injury may require professional treatment.” MCL 777.34. During sentencing, the prosecutor informed the court that the victim’s family had informed him of the therapy the victim is undergoing and will continue to undergo, including psychological counseling. Further, the victim’s father gave a victim impact statement during

sentencing that defendant's actions had caused the victim a tremendous amount of emotional pain and suffering. Therefore, the trial court's scoring of ten points for OV 4 was not an abuse of discretion.

Under OV 5, fifteen points are scored "if the serious psychological injury to the victim's family may require professional treatment." MCL 777.35. Assuming that the evidence was insufficient to support the trial court's scoring of OV 5, any such error was harmless. An error in scoring the sentencing guidelines that does not affect the total offense variable score enough to change the level of the applicable sentencing guidelines' range is harmless error. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Even if the trial court had assessed defendant zero points for OV 5, his minimum sentence under the legislative guidelines would have been unaffected. An error in the scoring of a defendant's sentence under the legislative guidelines does not require reversal where the error was harmless. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002), *aff'd* 468 Mich 50; 658 NW2d 154 (2003).

Defendant also argues the trial court erred in scoring OV 6 at fifty points. However, the record shows that defendant was only scored twenty-five points. Twenty-five points are scored under OV 6, the intent to kill or injure another person if the offender "had the unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(a). Because there was sufficient evidence showing that defendant acted with an intent to kill, and that defendant's acts of beating the victim with a baseball bat and leaving him in the snow created a very high risk of death and that great bodily harm was the probable result, the trial court did not err in scoring twenty-five points for OV 6.

Defendant next argues the trial court erred in scoring OV 7 at fifty points. Fifty points are scored under OV 7, aggravated physical abuse, if the "victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a).¹

People v Hernandez, 443 Mich 1; 503 NW2d 629 (1993), abrogated in part on other grounds *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997), is a case directly on point. This Court in *Hernandez* upheld the trial court's scoring of fifty points under OV 7 after the defendant repeatedly struck the victim with a baseball bat. *Id.* at 17-18. This Court found the defendant had "all but admitted he used excessive brutality several times when using 'good swings' of the baseball bat to hit the victim on the head." *Id.* In addition, the PSIR reflected that the defendant "continued to beat the victim with the baseball bat after the victim was down." *Id.* at 17. In reviewing the evidence in this case, the trial court found defendant had concealed the bat in his coat and then confronted and struck the victim without notice or opportunity for him to protect himself. Once the victim was down, defendant continued to kick him and hit him four to

¹ Pursuant to 2002 PA 137, effective April 22, 2002, terrorism was deleted from the list of enumerated conduct that would warrant a score of fifty points for OV 7. Terrorism is now defined in OV 20 to include behaviors associated with the use or the threat to use biologically, chemical, or radioactive devices or substances, or incendiary or explosive devices. MCL 777.49a. The prior version of MCL 777.37 applies to this case. See MCL 769.34(2).

five times with the baseball bat. As a result, the victim suffered a broken nose, a punctured lung, and brain damage. Therefore, the trial court did not abuse its discretion.

Affirmed.

/s/ Stephen L. Borrello

/s/ Helene N. White

/s/ Michael R. Smolenski