

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES MURPHY,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 245266

Wayne Circuit Court

LC No. 02-004382

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of assault with intent to rob while armed, MCL 750.89, and one count of felony-firearm, MCL 750.227b. The trial court sentenced defendant to ten to twenty years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

On March 16, 2001, at approximately 8:00 a.m., the victim was outside of her house removing the rear seats from her vehicle when she saw defendant and another individual walking down the middle of the street. A few minutes later, the victim observed the same two men, wearing ski masks, walking towards her and she saw that defendant had what she believed to be a rifle behind his back. Defendant walked to within inches of the victim, put the rifle against the victim's chest, threatened her, and demanded the keys to her vehicle. When the victim responded that she did not have the keys with her, defendant searched the victim's pockets, and after finding no keys, motioned to the second individual and the two proceeded to walk away. Defendant was apprehended a short while later. At trial, defendant denied assaulting the victim, and claimed that he was at the Embassy Coney Island at the time of the alleged assault. The jury apparently rejected defendant's alibi.

Defendant first argues on appeal that the trial court erred in scoring fifty points for offense variable 7 (OV 7) when calculating the legislative sentencing guidelines for the assault conviction. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted). "Scoring decisions for which there is any evidence in support will be upheld." *Hornsby*, *supra* at 468, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

We find the trial court did not err in scoring fifty points for OV 7. Under MCL 777.37, the trial court must score fifty points for OV 7 if the court finds the victim was treated with terrorism, which is defined as “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”¹ See *Hornsby*, *supra*. The victim testified that defendant walked up to within inches of her and pointed a rifle at her so that she could feel the muzzle of the gun pressed against her chest. Defendant then told the victim to be quiet, threatened to kill her and demanded the keys to her vehicle. When told that she did not have the keys, defendant searched the victim’s pockets and then left. As in *Hornsby*, the defendant did more than simply produce a weapon and demand the victim’s keys. Defendant’s actions in pressing the weapon against the victim’s chest, threatening the victim’s life, and searching the victim’s pockets supported the court’s finding that defendant deliberately engaged in “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.” *Hornsby*, *supra* at 469, quoting *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993). Accordingly, we find no error in the trial court’s scoring decision.

Defendant next argues the trial court erred in its instruction to the jury concerning felony-firearm because the instruction given did not set forth the definition of a firearm. Defendant failed to preserve this issue with a proper objection to the jury instruction at trial. See *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). This Court should reverse only if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Defendant argues that because the victim was unable to describe in complete detail the weapon that defendant used during the assault, it was nearly impossible for the jury to properly determine that the weapon was a firearm without being instructed on the definition of a firearm. We find no error with the court’s instruction. The trial court instructed the jury on the felony-firearm charge as follows:

The defendant is also charged with a separate crime of possessing a firearm at the time that he committed assault with intent to rob while armed. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant committed the crime of assault with intent to rob while armed, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime. Second, that at the time the defendant committed the crime, he knowingly carried or possessed a firearm. A shotgun is a firearm.

¹ Pursuant to 2002 PA 137, effective April 22, 2202, terrorism was deleted from the list of enumerated conduct that would warrant a score of fifty points for OV 7, and the statute now reads that fifty points should be scored if the victim was treated with “sadism, torture or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”

This instruction mirrored CJI2d 11.34. The victim described the weapon as a rifle. The fact that the trial court instructed that a shotgun is a firearm as opposed to a rifle being a firearm is of no import. Accordingly, we find no plain error.

Defendant finally argues that statements made by the prosecution during its rebuttal argument were improper and worked to deny defendant a fair trial. Defendant failed to preserve this issue with the proper objections at trial. Unpreserved issues of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Again, reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

In his closing argument, defense counsel stressed that most of the time, “innocent people do not have an alibi.” He also attempted to downplay the victim’s identification of defendant and stated that the description given of defendant fit “about 200 thousand [sic] black males in the City of Detroit.” In rebuttal, the prosecution stated

But counsel also had a slip of the tongue when he was talking. He said: “Innocent people don’t have an alibi.” Well, the natural implication is that guilty people do. And who put on an alibi in this case? He did. Talk about a Freudian slip. Innocent people don’t need alibis, guilty people need [sic] do.

The prosecution also stressed the difference between common sense and nonsense. Defendant argues that the prosecution’s rebuttal constituted improper denigration of defense counsel. However, “prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Schutte, supra* at 721. Reading the prosecution’s rebuttal argument as a whole in light of defense counsel’s closing argument, we find no error requiring reversal. Instead, the prosecution’s rebuttal argument was a proportionate response to comments and assertions made during defense counsel’s closing argument.²

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

² Defendant also asserts as part of this issue that he was denied the effective assistance of counsel by defense counsel’s failure to object to the prosecution’s statements. Defendant did not list ineffective assistance of counsel as an issue in his statement of the questions presented and has given virtually no support for his assertion. Consequently, defendant has failed to properly present the issue for our review. See *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Regardless, finding no error with the prosecution’s conduct, we likewise find no merit to defendant’s argument that he was denied the effective assistance of counsel by counsel’s failure to challenge the alleged misconduct.