STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 247510 Wayne Circuit Court
LUIGI GUYDONALD RAY, Defendant-Appellant.	LC No. 01-011850-02

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced to 10 to 25 years' imprisonment on the murder conviction, 5 to 20 years' imprisonment on the assault conviction, and 2 years' imprisonment on the felony-firearm conviction. On appeal, defendant argues that the prosecutor engaged in misconduct during trial, that improper bad acts evidence was presented to the jury, that the convictions for both assault with intent to rob and murder, which resulted from the assault, violate double jeopardy protections, and that a sentencing variable was scored incorrectly, skewing the minimum guidelines range. We disagree and affirm.

I. BASIC FACTS

This case involves the March 1994 murder of James Childers in which he was shot one time from close range while near the front doorway of his home. The .32 caliber bullet entered and exited Childers' left arm and then pierced the left side of his chest cavity, killing him. A single .32 caliber shell casing was found on the front, outdoor porch of the house. The porch is attached directly to the front of the home, a bungalow. Blood was found on the door.

Through the testimony of a codefendant-accomplice, Eric Goleniak,[2] and a statement made by defendant to police, it was established that defendant, Goleniak, Brian Brown, and an

[1] Defendant was acquitted of felony-murder, MCL 750.316(1). The felony-murder charge was predicated on the underlying crime of larceny.

[2] Goleniak pled guilty to second-degree murder and agreed to testify against defendant in (continued…)

individual named "Paco" were at Brown's home drinking when they decided to steal drugs from Childers. Childers allegedly had a large quantity of marijuana in his possession. All four of the perpetrators, including defendant, were armed with various firearms, and they proceeded to Childers' home in Goleniak's vehicle. Once at Childers' home, a physical confrontation between the group and the victim occurred on the porch and in the front doorway of the house, and Childers was shot. The police found Childers' lifeless body in the living room of the home eight to twelve hours after the shooting. The police also discovered an overturned chair and coat rack in the living room.

According to Goleniak, all four of the perpetrators, including defendant, were on the porch of Childers' home when Childers attempted to push them away and keep them out of the house. Goleniak testified that Brown then shot Childers. Goleniak, Brown, defendant, and Paco immediately fled the crime scene. Goleniak testified that he was carrying a shotgun, Brown was carrying a .32 caliber weapon, and that defendant and Paco were carrying .38 caliber weapons.

According to the statement given by defendant to police, defendant did not go on the porch with the other three during the commission of the crime but remained nearby, close to some bushes on the side of the house. Defendant claimed that he acted as a lookout, and he asserted that Goleniak was the shooter. Defendant informed police that he was carrying a weapon, he knew the others were carrying weapons, and that he had gone along with the plan to go to Childers' home to commit a robbery.

II. ANALYSIS

A. Prosecutorial Misconduct

Defendant presents two claims of alleged prosecutorial misconduct. A claim of prosecutorial misconduct is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). This Court examines the entire record in context to determine whether the defendant was denied a fair and impartial trial because of the alleged misconduct. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Defendant first argues that the prosecutor elicited testimony concerning Goleniak's plea deal, including Goleniak's agreement to provide truthful testimony, in a manner that suggested to the jury that the prosecutor had personal knowledge of Goleniak's truthfulness and was vouching for him. We disagree.

The relevant testimony given by Goleniak during the prosecutor's direct examination, which defendant maintains offended his constitutional rights, was as follows:

Q. Did you make an agreement to testify here?

(…continued)

exchange for a sentence recommendation of 10 to 20 years' imprisonment and the dismissal of other pending charges.

A. Yes.

Q. Can you outline the terms of that agreement for the jurors?

A. Ten to twenty years, second-degree murder.

Q. You pled guilty to second degree murder?

A. Yes.

Q. All the other charges were dismissed?

A. Yes.

Q. In exchange for your truthful testimony?

A. Right.

Defendant objected on the grounds that the questioning was leading, but there was no vouching objection. The prosecutor proceeded to present the details of the plea agreement form executed by Goleniak, which included a statement that Goleniak agreed to "testify truthfully against Luigi Ray, Brian Brown and Paco."

A prosecutor cannot vouch for the credibility of witnesses to the effect that he or she has some special knowledge concerning the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Testimony regarding a plea agreement containing a requirement that the individual testify truthfully does not, in itself, constitute grounds for reversal. *Id.* Generally, such testimony does not insinuate governmental possession of information not heard by the jury, and the prosecutor cannot be taken to have expressed a personal opinion on the witness' truthfulness. *Id.* It is improper, however, for the prosecutor to suggest that he or she has some special knowledge that the witness is testifying truthfully. *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988).

We find no improper conduct by the prosecutor in eliciting Goleniak's testimony regarding the plea agreement. The questioning does not suggest that the prosecutor had special knowledge or inside information unknown to the jury that Goleniak was testifying truthfully. Rather, the testimony merely recited in a straightforward manner the nature of the plea agreement, including Goleniak's pledge to testify truthfully. There was no improper vouching. We conclude that defendant has failed to show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant next argues that the prosecutor made improper comments during closing argument, including statements denigrating defense counsel. A prosecutor may not denigrate defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), nor may the prosecutor suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Prosecutors are permitted to argue on the basis of the evidence presented and all reasonable inferences arising from the evidence as it relates to the theory of the case. *Bahoda, supra* at 282. Moreover, prosecutors

are given wide latitude and need not confine their arguments to the blandest of all possible terms. *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant challenges the following comments made during the prosecutor's rebuttal argument:

> Think about even what Mr. Cripps had said in opening statement regarding what you were going to hear, that this was an inside job and that the crime occurred inside the house.
>
> Well, that obviously wasn't the case. You've got physical evidence and Mr. Cripps didn't bring that up again because that wasn't the truth anymore and it became obvious that it wasn't.
>
> The same way that he had asked questions of, this I think was probably the most telling one, was with Dr. Kanluen. He was somehow suggesting that because Dr. Davidson had been fired for falsifying documents that we didn't know Mr. Childers had been shot at close range and the bullet had entered his arm and exited and reentered.
>
> So, I had to on redirect enter a morgue photo, a morgue photo of Mr. Childers because of this red herring, an attempt to hide the truth, attempt to hide the truth. Well, that's part of what the defense attorney does, to hide the truth. But this is about the truth --.

Defense counsel objected to the conceived personal attack, which the trial court overruled, stating "[h]e's rebutting what was said during the defense's closing argument."

For the most part, the statements by the prosecutor were permissible as they reflected commentary on the evidence presented at trial, reasonable inferences arising therefrom, and on defense counsel's opening statement as it related to the actual proofs submitted. The prosecutor was not so much saying that defense counsel was lying as he was saying that counsel tried to deflect the jury's attention from the pertinent facts to inconsequential matters and was misinterpreting the evidence. To the extent that the prosecutor crossed the line by stating that a defense attorney's job includes hiding the truth, we find the error to be minimal and harmless, and it did not prejudice defendant's right to a fair trial. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NWd 607 (1999). A miscarriage of justice did not result from the prosecutor's comments.

B. Prior Bad Acts

Defendant argues that error occurred when evidence of defendant's outstanding child support warrant was admitted contrary to MRE 404(b). Defendant contends that the prosecutor failed to show that any probative value attached to the evidence outweighed its inherently prejudicial character under MRE 401-403 analysis. Defendant further claims that evidence of his arrest for a warrant on outstanding child support payments, and verification of the existence of the warrant, was in no way probative in regard to whether defendant actually committed the crimes charged. Defendant's argument not only lacks merit, it is disingenuous.

The admission of prior acts evidence pursuant to MRE 404(b) is reviewed for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). If the admission of evidence involves a preliminary question of law such as whether a particular rule of evidence precludes admissibility, this Court reviews the issue de novo. *Lukity, supra* at 488. The *Knapp* panel stated:

> Pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith." However, other acts evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b). Other acts evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. [*Knapp, supra* at 378-379, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

Defendant focuses on the following questioning of a police witness by the prosecutor during trial:

> *Q*. And when Mr. Ray was placed under arrest, what was he told about the, what was he told was the basis for the arrest?
>
> *A*. He had an outstanding child support warrant. And that's what we told him we were arresting him for in front of his home.
>
> *Q*. And why did you tell Mr. Ray he was being arrested for a child support warrant?
>
> *A*. Well, when you say the word homicide, that raises everything. People's emotions get elevated and the potential for conflict raises. And I didn't want to raise that issue at that time.
>
> *Q*. You were concerned about what would happen for the arrest?
>
> *A*. Yes.
>
> *Q*. Did Mr. Ray in fact have a child support warrant outstanding for him?
>
> *A*. Yes. He did.

There was no objection to the elicited testimony by defendant. Unpreserved appellate claims of error are reviewed for plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764. We find, however, that the doctrine of waiver, as opposed to forfeiture, is applicable here. A defendant who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver is defined as the intentional relinquishment or abandonment of a known right. *Id.*

During opening statements, defense counsel, without any reference to the child support warrant being made during the prosecutor's opening statement, remarked:

> And that's all going to go in terms of how much weight, if any, you should give to the paper that my client signed that they later claimed that he made, statement that he made to the police. Because you're going to hear when the police go out and arrest him, they go out and arrest Mr. Ray, they don't come out and arrest him and say you're under arrest as a suspect in a homicide case of James Childers. They don't tell him that.
>
> They don't come out and honestly tell him that. *What they do is they say we're coming to arrest you for a child support warrant.* They're conducting a ruse from the start.
>
> Because why? Well, obviously, they don't have enough belief or reason to arrest him for the homicide at that point in time or they would have arrested him for the homicide.
>
> They obviously have some questions in their own mind about this Goleniak version of events that was given to them. *But they arrest him on this child support.* [Emphasis added.]

Additionally, during cross-examination of police witnesses, defense counsel emphasized the so-called police ruse and trickery used in detaining defendant, focusing on the issue of the child support warrant. Clearly, defendant made a tactical decision from the beginning to attack the police reasoning for the arrest in an attempt to minimize and call into question the legitimacy of defendant's incriminating statement. Defendant brought out the issue of the outstanding child support warrant before the matter was raised by the prosecutor. Defendant cannot now claim on appeal that error occurred where the jury was subjected to information about the child support warrant. The issue was effectively waived by defendant.

Moreover, the evidence of defendant's failure to pay child support, when considered in the context of a murder prosecution and the facts of this particular case, did not prejudice defendant's right to a fair trial and was harmless, MCL 769.26; *Lukity, supra* at 495, nor did the evidence affect defendant's substantial rights assuming plain error, *Carines, supra* at 763-764.

C. Double Jeopardy

Defendant argues that his convictions and sentences for both assault with intent to rob while armed and second-degree murder violate the protection against double jeopardy because both crimes arose out of the same assault. Defendant maintains that the Legislature did not intend multiple punishments for a single assault. Defendant raised the issue at sentencing, and the trial court rejected the argument on the ground that the crimes have different elements.

A double jeopardy challenge presents a question of constitutional law that is reviewed de novo by this Court. *People v Nutt,* 469 Mich 565, 573; 677 NW2d 1 (2004). The United States and Michigan Constitutions protect individuals from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *Nutt, supra,* 574 "The prohibition against

double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Id.* (citations omitted). Here, we are addressing a claim asserting multiple punishments for the same offense.

In *Nutt,* our Supreme Court addressed the meaning of the term "same offense." The Court concluded that the same-elements test is to be applied, and it overruled *People v White,* 390 Mich 245; 212 NW2d 222 (1973), which had required use of the same-transaction test. *Nutt, supra,* 574-575. The same-elements test focuses on the statutory elements of the crimes, and if each requires proof of a fact that the other does not, the test is satisfied and the offenses are not the same, notwithstanding a substantial overlap in the proof offered to establish the crimes. *Id.,* 576. The *Nutt* Court, however, limited it analysis to cases involving successive prosecutions, noting that "[w]e wish to stress at the outset that we are not here concerned with the meaning of the term 'offense' as it applies to the double jeopardy protection against *multiple punishments.*" *Id.,* 575 n 11, citing, in part, *People v Herron,* 464 Mich 593; 628 NW2d 528 (2001) and *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984)(emphasis in original). Accordingly, we shall not render our ruling predicated on *Nutt.*

In *Herron, supra* at 600, the Supreme Court stated that the concept of multiple punishment in regard to double jeopardy analysis has as its purpose the avoidance of more than one punishment for the same offense arising out of a single prosecution. "The Double Jeopardy Clause prohibits a court from imposing more punishment that that intended by the Legislature." *Robideau, supra* at 469. Whether punishments are unconstitutionally multiple is essentially a question of legislative intent. *Id.*[3]

When ascertaining the legislative intent, relevant considerations include whether the criminal statutes involve violations of distinct social norms,[4] the amount of punishment expressly authorized by the Legislature, the elements of the offenses and distinguishing or comparable features of the crimes, whether compound and predicate offenses are at issue, and whether the

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[3] In *People v Calloway,* 469 Mich 448, 450-451; 671 NW2d 733 (2003), the Supreme Court, quoting *People v Sturgis,* 427 Mich 392, 400; 397 NW2d 783 (1986), explained the difference between successive or multiple prosecution situations and multiple punishment cases, stating:

> The Court can enforce the constitutional prohibition against multiple prosecutions through judicial interpretation of the term "same offense" as intended by the framers of the constitution. Judicial examination of the scope of double jeopardy protection against imposed multiple punishment for the "same offense" is confined to a determination of legislative intent. In the latter case, the core double jeopardy right to be free from vexatious proceedings is simply not present . . . .

[4] Where distinct social norms are addressed by the two statutory prohibitions, it can generally be determined that multiple punishments are permissible. *Robideau, supra* at 487.

statutes are hierarchical.[5] *Robideau, supra* at 487-488; *People v Walker,* 234 Mich App 299, 311-313; 593 NW2d 673 (1999).

With respect to the crime of assault with intent to rob while armed, the elements are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant being armed. *People v Akins,* 259 Mich App 545, 554; 675 NW2d 863 (2003).

With respect to the crime of second-degree murder, the elements are (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *People v Mendoza,* 468 Mich 527, 534; 664 NW2d 685 (2003). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Aaron,* 409 Mich 672, 728; 299 NW2d 304 (1980).[6]

We conclude that there is no double jeopardy violation in allowing the second-degree murder and assault convictions and sentences to stand. Distinct societal norms are addressed in the relevant statutes in that the second-degree murder statute, MCL 750.317, clearly reflects the Legislature's intent to protect life and prohibit unjustifiable killings, while the "assault with intent to rob while armed" statute reflects the Legislature's intent to prohibit robberies or theft through the use of assaultive, violent behavior and weaponry. Although in general, both crimes seek to prohibit assaultive behavior, the focus differs as to the intent of the perpetrator in committing the crimes, i.e., an intent to kill or cause great bodily injury and an intent to rob. The distinct societal norms sought to be protected by the Legislature are society's desire to be free of unjustified killings and society's desire to be free of violent robberies and theft.

Next, in regard to the authorized punishments, second-degree murder and assault with intent to rob while armed are both punishable by a maximum term of life imprisonment. However, concerning the elements of the crimes, it is clear that the crimes are distinct with varying elements and features as cited above. The assault offense is not a necessarily lesser included offense of second-degree murder considering the need to show an intent to rob and the necessity of a defendant being armed, and the assault offense is not a predicate offense for establishing second-degree murder. Finally, the murder and assault statutes are not hierarchical in nature.

Taking into consideration the relevant factors in their totality, we hold that the Legislature intended multiple punishments where a defendant is guilty of assault with intent to rob while armed and second-degree murder despite a single underlying assault being the basis to support both crimes.

D. Sentencing Guidelines

[5] Hierarchical offenses exist where one statute incorporates most of the elements of a base statute and then increases the penalty based on the presence of aggravating conduct. *People v Walker,* 234 Mich App 299, 313; 593 NW2d 673 (1999).

[6] We note that the prosecution pursued the convictions under an aiding and abetting theory.

Defendant contends that the trial court incorrectly scored an offense variable, which, if scored correctly, would result in a lower minimum guidelines range – 60 to 180 months as opposed to 120 to 300 months – with regard to the second-degree murder sentence. Defendant was sentenced to 10 to 25 years' imprisonment on the murder conviction.

The judicial sentencing guidelines control because the charged offenses occurred before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). In 1994, when the murder took place, offense variable 3 (OV 3) of the judicial sentencing guidelines dealt with the offender's intent to kill or injure.[7] Ten points is scored where the offender had an intent to injure or the killing was committed in an extreme emotional state or where the death occurred because of gross negligence amounting to an unreasonable disregard for life. A score of ten points is mandatory if the killing is intentional within the definition of second-degree murder but the death occurred in a combative situation. Twenty-five points is scored if the offender had an unpremeditated intent to kill, the intent to do great bodily harm, or where the offender knowingly created a very high risk of death or great bodily harm. The trial court scored OV 3 at twenty-five points. Defendant argues on appeal that OV 3 should have been scored at ten points because the death occurred in a combative situation. At sentencing, defendant challenged the twenty-five point score, arguing only that gross negligence was involved. The particular argument raised on appeal, combative circumstances, was not raised at sentencing, thus defendant must show plain error affecting his substantial rights. *People v Kimble*, 252 Mich App 269, 277-278; 651 NW2d 798 (2002), lv gtd 468 Mich 870; 659 NW2d 231 (2003).

A sentencing court has discretion in determining the number of points scored provided there is evidence that adequately supports a particular score. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). Scoring decisions for which there is any supporting evidence will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

There was sufficient evidence to support a score of twenty-five points for OV 3, where the testimony established that defendant and his three accomplices went to the victim's home each carrying a firearm with the intent to commit an armed robbery, and where the victim was shot dead in the attempt. Defendant aided and abetted the crime, and a reasonable inference arising from the evidence is that defendant and the others were prepared and intended to use deadly force to consummate the robbery. With respect to defendant's claim that the shooting occurred in a combative situation, there was evidence that the victim tried to push the perpetrators out of the doorway, and the overturned furniture could suggest a struggle. However, there was no evidence that the victim was armed while at the door, and he was outnumbered. The evidence can just as easily be interpreted as the victim attempting to simply prevent his demise and prevent the four intruders from entering the home. The overturned furniture could suggest that the victim was either fleeing or that he struck the furniture after being shot. We find it difficult if not impossible to believe, on the basis of the evidence, that defendant and his accomplices killed the victim because they were in a combative posture defending themselves, especially where they planned and prepared to commit a robbery, went to

[7] This factor is now addressed in OV 6, MCL 777.36, of the legislative sentencing guidelines.

the victim's home armed, and surprised the victim. There was no scoring error, plain or otherwise.

III. CONCLUSION

Defendant argues that the prosecutor engaged in misconduct during trial, that improper bad acts evidence was presented to the jury, that the convictions for both assault with intent to rob while armed and murder, which resulted from the assault, violate double jeopardy protections, and that a sentencing variable was scored incorrectly. Defendant's arguments lack merit for the reasons stated by us above. There is no legal basis to reverse defendant's convictions and sentences.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper