STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DESHUN JOHNSON,

Defendant-Appellant.

UNPUBLISHED
August 24, 2004

No. 247227
Wayne Circuit Court
LC No. 02-012133-01

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 75.227b. He was sentenced to concurrent prison terms of thirty-five to sixty years for the murder conviction, and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

I

Defendant claims that the trial court violated his right to a public trial. We disagree.

At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

Because defense counsel did not object to the exclusion of spectators, this issue is not preserved and, therefore, is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id*. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*. The plain error rule extends to unpreserved claims of both constitutional and nonconstitutional error. *Id*. at 764.

Both the federal and state constitution guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, the right to complain about an order of exclusion is waived where the defendant consents or fails to object. *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981); *People v Sylvester Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979). In the instant case, defendant expressly waived his right by assenting to the trial court's decision to close the courtroom during the three witnesses' testimony.

Moreover, the right to a public trial is not absolute, and, under certain circumstances, higher interests may take precedence. In *Kline*, *supra* at 169, this Court, quoting *Waller v Georgia*, 467 US 39, 45; 104 S Ct 2210; 81 L Ed 2d 31 (1984), and *Press-Enterprise Co v Superior Court of California, Riverside Co*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984), observed:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

The Court in *Kline* held that a trial court must satisfy four requirements before ordering a total closure.[1] These are:

> (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Waller*, *supra*], quoting *Press-Enterprise Co*, *supra*. [*Kline*, *supra* at 169.]

Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in *Kline* restricts courtroom closures to circumstances involving very young witnesses or direct threats. We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety.

Defendant also contends that his waiver was not knowingly or intelligently made because the trial court did not advise him of his rights. He analogizes to the requirements for accepting a defendant's waiver of the right to counsel or to a jury trial, and to the requirements surrounding guilty pleas. Defendant's argument is inconsistent with *Gratton*, *supra* at 478, wherein this Court held that the right to a public trial may be waived not only affirmatively, but also by a failure to object. Defendant cites no authority supporting his argument that a right to a public trial warrants the same safeguards as the right to counsel, a jury, or a trial, and therefore waives this argument. See *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

In sum, we conclude that the trial court did not plainly err when it ordered a brief closure of the trial to protect the safety of three witnesses. Further, defendant has not shown that the court's decision affected his substantial rights.

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[1] The *Kline* Court distinguished between total closures and partial closures, and noted that a partial closure requires a showing of only a substantial, rather than a compelling reason. *Id*. at 179, citing *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). Although the closure affected only three witnesses in the instant case, the fact that all spectators, including the defendant's family members, were excluded renders the closure total. See *Davis v Reynolds*, 890 F2d 1105, 1108-1110 (CA 10, 1989).

II

Defendant raises several claims of prosecutorial misconduct. A defendant must preserve his claim of prosecutorial misconduct by making a timely and specific objection. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Review of unpreserved claims of misconduct is limited to whether the alleged misconduct constituted plain error affecting the defendant's substantial rights. *Id*.

A

Defendant claims that the prosecutor denigrated his counsel's veracity by suggesting that defense counsel concocted defense witnesses' testimony. The prosecutor's argument referred to seven defense witnesses, mostly related to defendant, who testified that they were at the party with defendant, but who did not contact the police or come forward with their information until defense counsel contacted them shortly before trial. Trial counsel did not object to the prosecutor's argument, so our review is for plain error.

A prosecutor may not question a defense counsel's veracity, or suggest that defense counsel intentionally sought to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). The prosecutor may, however, point out the deficiencies in a defendant's case, and argue from the facts that a witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). The prosecutor's arguments here were not improper under these principles. The defense witnesses' failure to come forward sooner, following a violent event that led to serious criminal charges against a relative, cast doubt on their credibility and undermined the defense. Defendant has failed to establish plain error.

B

Defendant claims that the prosecutor repeatedly injected the element of fear in the trial; specifically, when: (1) he commented during opening statement that Richards was not available to testify, and that the jury would learn more about this during the trial; (2) he commented during closing argument that Lewis was still afraid; and (3) he suggested that Ramsuer changed his story and tried to avoid testifying because he was afraid. Prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999).

Defendant did not object to these specific incidents, but he moved before trial to preclude the prosecutor from questioning witnesses about their fear. The trial court agreed. Even if defendant's general objection can be viewed as sufficient to preserve his claims of prosecutorial misconduct, the challenged remarks did not deprive him of a fair and impartial trial. The remark about Richards' unavailability was too vague to suggest to jurors that Richards had been killed, or that his death was related to the trial. Only a person fully informed of the circumstances of Richards' death—and the jurors were not—could give the statement such an interpretation. The comment about Lewis' fear was based directly on Lewis' testimony that he still felt "mental pain to continue to relive this night over and over again for no reason at all." The prosecutor's remark

did not invoke the element of fear; the prosecutor merely observed that Lewis, like other victims of violent crimes, continued to feel anguish long after the event.

We also find no improper invocation of fear or emotion where the prosecutor asked the jury to "[t]hink about why [Ramsuer] wouldn't [identify defendant] in court" and to "[t]hink about the reasons why we had to lock him up to bring him to court to tell on his own friend, Mr. Davis, how he was murdered." Ramsuer was an important witness who denied making prior inculpatory statements or previously identifying defendant as the shooter. Asking the jurors to draw reasonable inferences as to why he would do so was highly relevant to the issue of whether Ramsuer's trial testimony was credible. The prosecutor's argument was not made to appeal to the jurors' emotions, nor did it ask the jurors to convict defendant for any reason other than that the evidence established his guilt.

C

Defendant claims that the prosecutor improperly shifted the burden of proof to the defense, and commented on defendant's right to remain silent, during the cross-examination of a defense witness, Janard Thomas, and again during closing argument. We review these claims for plain error, inasmuch as defendant did not object at trial.

The prosecutor may not comment on a defendant's failure to testify, because such an argument undermines the presumption of innocence and the defendant's right against compelled self-incrimination. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor also may not suggest that a defendant is obligated to prove something, because such an argument tends to shift the burden of proof. *Id*. at 113-115. However, the prosecutor may argue from the facts that a defendant's positions are not worthy of belief. *Howard*, *supra* at 548. Additionally, the prosecutor's arguments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Janard Thomas testified that he was hit in the head with a bottle, and defendant was hit in the back with a chair during the fight. Thomas claimed that defendant then helped him up from the floor, and the two fled from the hall and drove home. On cross-examination, the prosecutor questioned Thomas about his and defendant's failure to report the assaults to the police, though defendant might have been able to identify the person who hit Thomas. These questions did not implicate defendant's right to remain silent, but instead highlighted a weakness in Thomas' testimony.

Defendant also objects to the prosecutor's statement during closing argument that Richards' testimony about seeing defendant fire the gun repeatedly was uncontroverted. A prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Here, Richards' testimony was uncontroverted. Denise Chatman testified that she saw another person fire a gun, but she also testified that there seemed to be two shooters. Because persons other than defendant could have disputed Richards' testimony, but did not, the prosecutor's remark was proper.

Defendant's final claim of prosecutorial misconduct challenges the prosecutor's statement that there was no explanation for why defendant would possess a loaded magazine, but no gun. This was not a burden-shifting argument, but rather a comment on the evidence. The argument did not focus on defendant's failure to explain the evidence; instead, it implied that the evidence was inculpatory because a likely explanation was that defendant disposed of the gun.

In sum, the prosecutor did not make improper references to defendant's right to remain silent, or make improper attempts to shift the burden of proof in any of these alleged instances of misconduct. We therefore find no plain error.

III

Defendant argues that he was unfairly prejudiced when the trial court informed the jury that Richards' preliminary examination testimony would be read because Richards was deceased. Defendant opines that the jury must have realized that Richards was murdered, and inferred that his murder was connected to defendant's case. He argues that he was further prejudiced when Lewis stated, "My friends are dead," which could have signaled to the jury that defendant was involved in the murder of others, including Richards.[2] Defendant preserved this issue by twice requesting the trial court to indicate only that Richards was "unavailable." Because this issue is in the nature of an evidentiary issue, we review the trial court's decision for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

We find no abuse of discretion. When the trial court informed the jury that Richards was deceased, it also instructed the jurors "to make no inferences or draw any conclusions from that circumstance." Jurors are presumed to understand and follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the trial court's use of the innocuous term "deceased" in reference to Richards was not calculated to convey that his death was attributable to a homicide, or that it was connected to defendant. The statement did not allow the jury to infer that Richards likely was murdered, or that defendant was involved in his death. Similarly, Lewis' comment about his friends being dead was too fleeting and vague to be deemed prejudicial to defendant.

IV

Defendant raises several claims of ineffective assistance of counsel. Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *Rodriguez, supra* at 38. Here, defendant moved in the trial court for a *Ginther* hearing, but the trial court denied the motion.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have

[2] Defendant unsuccessfully moved for a mistrial based on Lewis' statement. He does not challenge the denial of his request for a mistrial on appeal.

resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

A

First, defendant contends that counsel was deficient for agreeing to the closure of the courtroom during the testimony of three prosecution witnesses. As discussed in part I above, the trial court's decision to exclude spectators was justified under the circumstances. Accordingly, trial counsel's acquiescence was neither objectively unreasonable, nor outcome-determinative.

B

Next, defendant claims that trial counsel was deficient for calling Janard Thomas and Letrulia Johnson as defense witnesses. Thomas and Johnson both testified that they saw defendant get hit with a chair during the fight in the hall. Defendant maintains that this testimony helped the prosecution establish that defendant had a motive to shoot Lewis, Mathis, and Davis. Lewis had testified that he swung a folding chair at the crowd of people attacking Robinson, and that he carried the chair out of the hall with him for protection. The prosecutor asked during closing argument whether it was a coincidence that defendant shot the person who held the chair.

Defendant has not overcome the presumption that calling Thomas and Letrulia was sound trial strategy. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). All of the witnesses who described the fight portrayed the eruption as a donnybrook, in which numerous persons were pushed and hit with chairs and bottles. Letrulia testified that defendant was "down" after being hit with the chair, suggesting that he could not have left the hall in time to commit the shooting. Thomas' testimony indicated that defendant took Thomas home and helped dress a head wound he sustained when he was hit with a bottle. To the extent being hit by a chair could be viewed as a motive for this shooting, defendant was only one of several persons with that motive. Also, the jury could have inferred that defendant was struck during the fight even without the witnesses' testimony. Under these circumstances, Thomas' and Letrulia Johnson's testimony provided only negligible evidence of a motive, and their testimony cannot be characterized as only harming defendant's interests.

C

Defendant claims that trial counsel was ineffective because he opened the door to allowing the prosecutor to question Ramsuer about his fear of defendant. At the start of trial, defense counsel asked the trial court to preclude the prosecutor from questioning witnesses about their fear of defendant. The trial court agreed, unless the prosecutor could show some special need to explore a witness' fear. Subsequently, during defense counsel's cross-examination of Ramsuer, Ramsuer reiterated that he never told the police that he saw the shooter and never identified defendant as the shooter from the party photographs, notwithstanding the statement he signed. Defense counsel then elicited that Davis was Ramsuer's friend, and that Ramsuer had no reason not to reveal who killed his friend, if he knew.

The trial court agreed with the prosecutor that trial counsel's questions opened the door to allow the prosecutor to elicit testimony that Ramsuer was fearful of defendant. On redirect

examination, the prosecutor did not specifically question Ramsuer about his fear, but elicited Ramsuer's admission that he had no reason to lie to the police in the investigation of his friend's murder, and reviewed Ramsuer's subsequent lack of cooperation throughout the case.

By focusing only on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to the police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

D

Defendant claims that counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed in part II above. Because we have already concluded that none of these claims constituted plain error, counsel's failure to object did not constitute ineffective assistance.

E

Defendant contends that trial counsel was ineffective for failing to call Jason Hodgson to testify. Defendant raised this issue in his motion for a new trial. Hodgson told the police that he was driving past the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have a sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs.

Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was willing and able to testify at trial consistent with his statement. Consequently, he has failed to show either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

V

Defendant challenges the trial court's failure to hold an evidentiary hearing on his claim that the police used an impermissibly suggestive procedure when Richards identified him from a group photograph taken by a hired photographer during the party before the fight broke out. Defendant moved to suppress the identification, and for an evidentiary hearing on this claim.

Although the trial court did not believe that an evidentiary hearing was warranted, it agreed to hold a hearing and scheduled it for December 20, 2002. For reasons that are not clear from the record, the hearing was never held.

It is not necessary to determine why a hearing was never held, or to address the prosecution's claim that defendant effectively abandoned the issue by failing to renew his motion for a hearing. The record is sufficient to review this issue on the merits. The police officer's use of the photographs for identification purposes did not trigger concerns about unduly suggestive procedures.

An unduly suggestive identification procedure that is conducive to "irreparable misidentification" constitutes a denial of due process. *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993); *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness identifies a defendant through an impermissibly suggestive identification procedure, evidence concerning the identification is inadmissible at trial unless an independent basis for an in-court identification can be established "that is untainted by the suggestive pretrial procedure." *Kurylczyk*, *supra* at 303; *Williams*, *supra* at 542-543. Our Supreme Court stated in *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998):

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness is told or believes that the police have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *Id*.

In *Gray*, the Court further emphasized that "the exhibition of a single photograph 'is one of the most suggestive photographic identification procedures that can be used.'" *Id*., quoting Sobel, *Eyewitness Identification* (2d ed), § 5.3(f), p 5-42.

The use of the party photographs in the instant case did not trigger the suggestiveness concerns in *Gray* and *Kurylczyk*. By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for purposes unrelated to a criminal investigation.

The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if they have detained the correct person. This Court stated in *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997):

> Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether

> there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. . . . Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability. [Citations omitted.]

In *People v Libbett*, 251 Mich App 353, 360-363; 650 NW2d 407 (2002), this Court approved an on-the-scene identification, despite a two-hour lapse between the crime and the identification, where there "was nothing in the record to suggest that the police made any suggestive comments at the identification or that the police were acting for reasons other than to determine 'whether there [was] a reasonable likelihood that the suspect [was] connected with the crime and subject to arrest, or merely an unfortunate victim of circumstances.'" *Id*., quoting *Winters*, *supra* at 728.

The use of the party photographs in the instant case do not precisely fit the on-the-scene identification scenario of *Winters* and *Libbett*, but the analysis in these cases is apt nonetheless. The police used the photographs to determine which person from a large pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

VI

Defendant challenges the sentencing court's scoring of the sentencing guidelines, and its decision to exceed the guidelines by forty-five months with respect to his sentence for second-degree murder.

Defendant objected to the sentencing court's scoring of offense variables 4, 5 and 9 at sentencing; therefore, these issues are preserved. MCL 769.34(10); MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable (OV) 4, psychological injury to a victim, assigns a score of ten points where the victim sustains "[s]erious psychological injury requiring professional treatment."

MCL 777.34(1)(a). The sentencing court is directed to score ten points "if the serious psychological injury may require professional treatment," but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Defendant received ten points for this variable. We conclude that the evidence supported the score of ten points because Lewis testified that he was still suffering "mental pain" and continued "to relive this night over and over again."

OV 5 assigns fifteen points where the victim's family member suffers "[s]erious psychological injury requiring professional treatment." MCL 777.35(1)(a). As with OV 4, the fact that treatment has not been sought is not conclusive. MCL 777.35(2). Ruby Davis, Davis' "adopted aunt," stated at the sentencing hearing that Davis' mother and other family members were "a nervous wreck" and unable to go about their everyday lives. His mother was taking medication, she could not sleep, and she was afraid to leave the house. This evidence was sufficient to support a score of fifteen points for OV 5.

The sentencing court scored twenty-five points for OV 9, number of victims, which is appropriate where there are ten or more victims. MCL 777.39(b). Each person who is placed in danger of injury or loss of life is considered a victim for purposes of scoring this variable. MCL 777.39(2)(b). The sentencing court reasoned that defendant randomly fired into a crowd of at least ten people, all of whom could be considered victims of the assault. We agree that the evidence was sufficient to support the trial court's score. Several witnesses testified that there were at least one hundred persons in the hall, and that most of them exited the hall during the fight. This would have placed most of them outside the hall at the time of the shooting. It is reasonable to infer, as the sentencing court did, that the randomness of the shooting placed all of them in danger of injury, and thus they were victims of the shooting spree.

The guidelines minimum sentence range for defendant's second-degree murder conviction was 225 to 375 months or life in prison. The sentencing court commented, however, that the guidelines did not "look at and score the impact of that kind of offense where someone shoots other persons in this particular way." The court explained:

> Here, I think that what bothers me about this case and so many that I see like this, and you know this happens all the time: Someone is upset, angered because of something that happened; and they want to take the ultimate revenge in that for whatever reason, whether it be bad judgment or just wanting to establish one's self in terms of what their reputation may be, whatever it may be.

The sentencing court commented that defendant shot randomly into a large crowd out of anger after being hit with a chair in the brawl, and killed a person who had done nothing to victimize defendant. The court asserted that these circumstances warranted an upward departure from the guidelines, and sentenced defendant to thirty-five to sixty years in prison for second-degree murder. The minimum sentence exceeded the guidelines by three years and nine months.

MCL 769.34 requires a sentencing court to sentence a defendant within the guidelines range, but allows for departures from the guidelines for substantial and compelling reasons. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich App 247, 255; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing court must articulate its reasons for the departure on the record, and its reasons must be "objective and verifiable." MCL 769.34(3); *Babcock*, *supra* at 257-259. The sentencing court may not base a

departure on a factor already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the record that the factor has been given inadequate or disproportionate weight. *Id*. at 258 n 12. Departures from the guidelines are appropriate where a sentence within the guidelines range is not proportionate to the seriousness of the offense. *Id*. at 264. The determination whether a particular factor is objective and verifiable is reviewed as a matter of law, whereas the determination that objective and verifiable factors constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id*. at 264-265.

We find no error in the court's upward departure. In explaining why a departure from the guidelines was warranted, the court stated that the guidelines did not account for the depravity displayed by defendant's conduct of unleashing deadly force against an entire crowd of people merely because he was angry that one person had hit him with a chair. Contrary to defendant's argument, these circumstances were not adequately accounted for by the guidelines. Neither OV 9, multiple victims, nor OV 6, intent to kill, adequately addressed the circumstance of defendant avenging a comparatively minor incident with a shooting spree against dozens of persons. This reason is also objective and verifiable, and consistent with the evidence. The court did not abuse its discretion in determining that these circumstances presented a substantial and compelling reason to depart from the guidelines. *Id*. at 264.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad