

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RHASHI ALI HARRIS,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 255424

Wayne Circuit Court

LC No. 03-012776-01

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of assault with intent to commit murder, MCL 750.83, committing a crime involving a violent act while wearing body armor, MCL 750.227f, intentional discharge of a weapon at an occupied structure, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right, and we affirm.¹

Defendant first argues that the trial court erred in scoring his minimum sentencing guidelines. We disagree. Because defendant committed the offense after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review a trial court's decision regarding the points to assess in the sentencing guidelines calculations for whether the court properly exercised its discretion and the record adequately supported the particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). When the trial court's sentence is within the appropriate guidelines range, "the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). The proper construction or application

¹ Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to fifty to seventy-five years' imprisonment for the assault with intent to murder convictions, thirty-two to forty-eight months' imprisonment for the body armor conviction, thirty-two to forty-eight months' imprisonment for the discharge of a weapon at a building conviction, forty to sixty months' imprisonment for the felon in possession conviction, and two years' imprisonment for the felony-firearm conviction.

of statutory sentencing guidelines presents a question of law that is reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Here, defendant's minimum sentence was within the recommended range. Defendant argues that the trial court erred in scoring prior record variable (PRV) 6 and PRV 7 because those scores constitute double counting. PRV 6 should be scored at ten points if "[t]he offender was on parole, probation or delayed sentence status or on bond awaiting adjudication or sentencing for a felony." MCL 777.56(1)(c). The court correctly scored ten points for PRV 6 because defendant was on parole when he committed the instant offenses. PRV 7 should be scored twenty points if [t]he offender has 2 or more subsequent or concurrent convictions." MCL 777.57(1)(a). The court correctly assessed twenty points for PRV 7 because defendant had two or more concurrent convictions. MCL 777.57(1)(a). The plain language of the legislative sentencing guidelines required that the court score defendant ten points for PRV 6 and twenty points for PRV 7. The trial court did not err when it correctly applied the statute.

Defendant also challenges his scores for offense variable OV 1, OV 3 and OV 6. Defendant claims that because OV 1, OV 3 and OV 6 were not submitted to the jury, they may not be scored. He does not assert that the record fails to support these scores. Defendant contends that his sentence was imposed in violation of the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the jury did not make a finding beyond a reasonable doubt regarding these variables. However, the Michigan Supreme Court and this Court have concluded that *Blakely* does not apply to sentences imposed in Michigan. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004); *Wilson, supra* at 399. The standard is whether the record adequately supported the particular score. *Wilson, supra* at 397.²

Defendant was scored fifty points for OV 6 for having the premeditated intent to kill. MCL 777.36(1)(a). The record adequately supports the finding that defendant acted with premeditation. Mohammed Shahib testified that defendant entered a blue van and waited twenty minutes before emerging with a rifle. The shooting started five minutes after Hodges parked in front of Tiffany's. This evidence supports a finding of premeditation because it shows that defendant planned to wait in the van for Hodges to arrive at Tiffany's and then shoot him.

Defendant asserts that he was denied the effective assistance of counsel because defense counsel did not object to the guidelines scoring at sentencing. However, because the sentencing guidelines were scored correctly, defense counsel was not ineffective for failing to object to the guidelines. Counsel is not ineffective for failing to advocate a futile or meritless position. *People v Alvin Walker*, 265 Mich App 530, 546; 697 NW2d 159 (2005).

² Because defendant only challenges the submission of the issue of scoring of OV 1 and OV 3 to the jury, we need not address these scores. Nonetheless, we note that the scoring of OV 1 was proper because of defendant's use of a firearm at a person. Furthermore, OV 3 was scored properly due to the permanent eye injury suffered by one of the three victims. Defendant's reliance on automobile negligence law to contest the degree of the injury is simply inapplicable and without merit.

Next, defendant raises four instances of alleged prosecutorial misconduct. After examining each of the challenged remarks in context, we did not find any instances of prosecutorial misconduct. To preserve an issue of prosecutorial misconduct for appeal, a defendant must timely and specifically object. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Because defendant failed to object to any of the challenged comments, this issue was not preserved. To avoid forfeiture of review of an unpreserved allegation of prosecutorial misconduct, the defendant must demonstrate a plain error that affected his substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Generally, issues of prosecutorial misconduct are reviewed on a case-by-case basis, and this Court must review the pertinent part of the record to evaluate the remarks in context and in light of the defendant's arguments to determine whether defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). If a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant first argues that the prosecutor intentionally tried to scare the jury in order to convict him. A prosecutor may not intentionally inject into trial inflammatory arguments with no apparent justification except to arouse prejudice. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Prosecutors are free to argue the evidence and to draw reasonable inferences from it. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Viewed in context, these remarks were meant to counter defendant's attempt to impeach Shahib's identification testimony by explaining why Shahib may have been hesitant to identify defendant. It was a reasonable inference that Shahib was scared of defendant at the preliminary examination because of the nature of the crime.

Defendant asserts the prosecutor made several improper references to the location of the crime, which was near the Frank Murphy Hall of Justice, in order to frighten the jury. The prosecutor established the location of the crime through testimony at trial. While the emphasis on the crime location may have been redundant and colorful, the prosecutor did not say anything to scare the jury into convicting defendant simply because the assault occurred close to the courthouse. This was not prosecutorial misconduct.

Defendant also challenges the prosecutor's statement during closing that Hodges and Melita Miller could not be present due to "unfortunate circumstances." Defendant contends that, because no other comment about the absence of these witnesses was made before the jury, this remark allowed the jury to speculate that the unfortunate circumstances were that the victims were too scared to testify. While the remark might have been better left unsaid, it was isolated and brief, and nothing in the record indicated that the jury made any assumptions about the absence of the victims. Defendant failed to show that he suffered any actual prejudice from this remark. *McLaughlin*, *supra*. In any case, the court instructed the jury that the attorneys' remarks were not evidence.

Defendant next claims that remarks that the prosecutor made regarding defendant's guilt were improper. Although the prosecutor made a statement about his opinion, he expressed his opinion in terms of the evidence satisfying the elements of the offenses. It is clear from these remarks that the prosecutor was not offering his personal opinion that defendant was guilty. He

was commenting on his belief that he had presented sufficient evidence to support each element of the charged crimes. The prosecutor also stated during his rebuttal that defendant was “a bad guy.” The prosecutor is not required to use the blandest of terms and can use “hard language” when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The evidence supported the assertion that defendant fired into a crowd of people with an assault rifle, arguably making him “a bad guy.” The remark did not constitute an assertion that the jury should convict defendant regardless of the evidence. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

Defendant’s argument that the prosecutor diluted the burden of proof is without merit. Review of the statements reveals that the prosecutor was not referring to the burden of proof, but was referring to the process by which the jury may examine the evidence and reach its verdict. The prosecutor never suggested that defendant had to prove that the evidence was not reasonable. Prior to the comment challenged by the defense, the prosecutor expressly acknowledged that the burden of proof rested with the prosecution and that burden was beyond a reasonable doubt. Further, the court correctly instructed the jury that defendant was not required to prove anything and that the prosecutor must prove each element beyond a reasonable doubt. To the extent that the jury may have misinterpreted any of the prosecutor’s remarks, the instruction given by the trial court would have been sufficient to dispel any prejudicial effect. *Bahoda*, *supra* at 281.

Defendant next claims that the prosecutor improperly implied that the defense was a lie, commented on defendant’s exercise of his right to counsel and denigrated defense counsel during rebuttal. Defendant does not explain exactly how the challenged statement denigrates defense counsel or concerns a comment on his exercise of his right to counsel. An appellant may not merely announce his position and leave it to the appellate court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005). In any case, the remark was not improper because the prosecutor did not attack defense counsel’s personality or character or ask the jury to convict defendant because of defense counsel. See *McLaughlin*, *supra* at 646.

Defendant next argues that a new trial is required because he did not receive the effective assistance of counsel. We disagree. Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A judge must first find the facts and then decide whether those facts establish a violation of the defendant’s constitutional right to the effective assistance of counsel. *Id.* A trial court’s finding of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show: (1) that the defense counsel’s performance was objectively unreasonable in light of prevailing professional norms; and (2) a reasonable probability that, but for the defense counsel’s error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). “‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *Carbin*, *supra* at 600, quoting *Strickland v Washington*, 466 US 668, 687; 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome a strong presumption that counsel’s performance

constituted sound trial strategy. *Matuszak, supra* at 58-59. This Court does neither substitute its judgment for that of counsel regarding trial strategy nor evaluates trial counsel's decisions with the benefit of hindsight. *Id.* at 58.

Defendant's first ineffective assistance claim is predicated on defense counsel's agreement to strike two of the victims from the witness list after he was informed that they were unavailable to testify. However, defense counsel's decision to strike the witnesses was sound trial strategy. If they had appeared, they likely would have described being fired upon and may have offered damaging testimony to explain why defendant wanted to kill them.

Defendant next argues that defense counsel was ineffective for failing to object to the introduction of Hodges' hearsay testimony. He contends that, without that testimony, Hodge's and Miller's presence outside the night club could not be established and two of the counts of assault with intent to commit murder would have been dismissed. Detroit Police Officer Mark Carson testified that he interviewed Miller and Hodges after the shooting, and "[Hodges] stated that they were in front of club Tiffany's." While this statement was arguably inadmissible hearsay, defense counsel's failure to object to its admission did not constitute ineffective assistance of counsel. The victims' presence outside Tiffany's at the time of the shooting was established by testimony from White, Douglas Parson and Carson's non-hearsay testimony. White testified that the bullets targeted Hodges' car. Thus, Hodges' and Miller's testimony was not required to prove the elements of the crime. Defendant failed to demonstrate that, but for defense counsel's decision to strike the witnesses, the verdict would have been different.

Defendant next argues that defense counsel was ineffective because he elicited from two police officers that defendant had exercised his right to remain silent. However, defense counsel elicited that information as a matter of trial strategy to preclude testimony regarding defendant's responses on a gunshot residue test form. Defense counsel objected before the officer could testify regarding the contents of the form and prevented the jury from hearing potentially damaging statements. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.*

Defendant next argues that defense counsel was ineffective because he should not have allowed admission of the gunshot residue expert's report without the raw data. MRE 703 requires that the facts or data in the particular case upon which an expert bases an opinion or inference be in evidence. Here, the expert explained to the jury how the gunshot residue test was performed, testified that he observed gunshot residue in the samples taken from defendant, and stated that he reached the conclusion that three of the four samples were positive for gunshot residue based on his observations. Thus, the facts and data upon which the expert based his opinion were in evidence, and defense counsel was not ineffective for failing to make a meritless objection. *Alvin Walker, supra* at 546.

Defendant asserts that defense counsel was ineffective because counsel should have obtained the raw data underlying the gunshot residue expert's conclusions before trial in order to effectively cross-examine the expert. However, defense counsel vigorously cross-examined the expert. He elicited that the results did not establish when the gun was fired, when the gunshot residue was deposited, or what type of weapon left the residue. Defense counsel also brought out that the presence of residue did not necessarily mean that defendant was the shooter.

Defendant argues that defense counsel should have consulted an expert to discover lines of questions regarding other potential sources of gunshot residue. Because no hearing was held on this issue, review is limited to the existing record. *Ackerman, supra* at 455. The record does not reveal whether defense counsel consulted an expert and determined that such an expert would not be helpful. Counsel's decision whether to call a witness is presumed to be a strategic one for which a court will not substitute its judgment. *Id.* Defendant did not offer any expert's affidavit regarding the gunshot residue results. Thus, defendant failed to establish the factual predicate for his claim because he failed to offer any proof that an expert would have testified in support of defendant. *Id.* Defendant did not establish a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different, especially in light of the overwhelming evidence.

Defendant also argues on appeal that defense counsel should have moved for an evidentiary hearing to determine whether the gunshot residue results were reliable under MRE 702. The trial court has a fundamental duty to ensure that all expert testimony is reliable. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Here, the trial court properly admitted the expert testimony. Steiner described his extensive training and qualifications as a forensic chemist. He also described in detail the method he used to determine the presence of gunshot residue in the samples taken from defendant. The court found that Steiner could testify as an expert.

On appeal, defendant claims that Steiner's opinion about the gunshot residue was unreliable because the gunshot residue questionnaire called for information regarding whether the arresting officer had recently fired a gun, but not whether other officers involved in the arrest had done so. Defendant does not contend that the testimony was based on insufficient data, was the product of unreliable principles or that Steiner did not reliably apply the principles to the facts of the case. The claim that the source of the particles may not have been from firing the rifle affects the weight of the evidence, not its reliability or admissibility. Defendant was not deprived of the effective assistance of counsel because counsel failed to move for an evidentiary hearing on the admissibility of the gunshot residue results.

Defendant contends that defense counsel was ineffective for failing to object to prosecutorial misconduct. As discussed above, the challenged remarks did not constitute prosecutorial misconduct. The failure to assert a meritless objection does not constitute ineffective assistance of counsel. *Alvin Walker, supra* at 546.

Defendant argues that defense counsel was ineffective because he failed to ask for a mistrial after the court read the felonies underlying defendant's felon in possession of a firearm charge to the jury during voir dire. Because counsel stipulated to the fact of the prior conviction, there was no reason for the court to read that information to the jury. *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997). It appears from the record that the court inadvertently read the basis of defendant's previous convictions to the jury. However, defendant failed to establish that defense counsel's failure to ask for a mistrial was prejudicial. Defense counsel may have chose to refrain from calling for a mistrial to avoid drawing attention to defendant's prior convictions. A mistrial should be granted only because of an irregularity, which is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Defendant failed to meet the requirements for a mistrial in light of the fleeting mention.

Defendant's final assertion of ineffective assistance of counsel is defense counsel's failure to object when the trial court read the standard jury instruction for intentionally discharging a firearm at an occupied building, CJI2d 11.26a. Defendant erroneously relies on *People v Wilson*, 230 Mich App 590, 594; 585 NW2d 24 (1998), to support his argument that a prosecutor must prove that occupants of the building were put in fear in order to prove all the elements of MCL 750.234b(1). In *Wilson*, this Court held that evidence that the occupants of the building were put in fear from the shooting and that the defendant intended to put them in fear was sufficient evidence to support the second element of the offense, that the defendant fired a weapon *at* an occupied structure, rather than over it. *Id.* at 593-594. Because the jury was properly instructed, defense counsel was not ineffective for failing to object. See *Alvin Walker*, *supra* at 546.

Defendant's next issue is whether the prosecutor presented sufficient evidence to support his convictions for discharging a firearm at an occupied building and for assault with intent to commit murder. This Court reviews de novo a claim that the evidence at trial was insufficient to support a conviction. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all the elements of the offense proved beyond a reasonable doubt. *Id.*

MCL 750.234b, intentionally discharging firearm at dwelling or occupied structure, provides, in pertinent part:

. . . [A]n individual who intentionally discharges a firearm at a facility that he or she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than \$2,000.00, or both.

Shahib testified that immediately before the shooting he saw defendant standing in the parking lot across from Tiffany's with a rifle in his hand. White's testimony established that, at the time of the shooting, people were entering the building. He also testified that bullets ricocheted off the building near where he stood. Gunshot residue on defendant's hand indicated that defendant fired a gun recently. Thus, the evidence, viewed in a light most favorable to the prosecutor, would allow a rational trier of fact to find that the essential elements of the crime of discharging a firearm at an occupied structure were proved beyond a reasonable doubt. See CJI2d 11-26a.

In order to support a conviction for assault with intent to commit murder, the prosecutor must prove beyond a reasonable doubt that defendant: (1) committed an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). The intent to kill may be proven by inference from any facts in evidence; minimal circumstantial evidence of intent is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant argues that the prosecutor did not prove an intent to kill. However, defendant's intent to kill can be inferred from defendant's waiting in the van, the number of shots fired and the target. Shahib testified that defendant got into the van, waited about twenty minutes and then emerged with a rifle. The shooting started shortly after defendant came out of

the van. White testified that five minutes after Hodges and Miller arrived, the shooting started from the direction of the parking lot. The gunshots seemed to follow Hodges' car as it drove up the street, indicating that Hodge was the intended victim. A police officer found ten shell casings in the area of the parking lot where Shahib saw defendant with the rifle. Under the doctrine of transferred intent, defendant's intent to kill Hodges can be transferred to Miller and White. See *People v Plummer*, 229 Mich App 293, 305-306 n 2; 581 NW2d 753 (1998). Viewed in a light most favorable to the prosecution, the prosecutor presented sufficient evidence to support defendant's convictions of three counts of assault with intent to commit murder.

Finally, defendant argues that the jury was improperly instructed on the elements of discharging a firearm at an occupied building. In *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), this Court held that counsel's affirmative statement that there were no objections to the jury instructions constituted an express approval of the instructions that waived review on appeal. Here, because defendant affirmed that he was satisfied with the instructions given at trial, he waived this issue and appellate review is precluded. *Matuszak, supra* at 57.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood