

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK ARSHON BLACK,

Defendant-Appellant.

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UNPUBLISHED

March 27, 2007

No. 266831

Wayne Circuit Court

LC No. 05-005848-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of 9 to 15 years for the assault conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of shooting a young man during an altercation between the friends and family of the victim and the friends and family of defendant. Defendant argues that he was denied a fair trial due to several instances of prosecutorial misconduct. Because defendant did not object to the prosecutor's conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Allen*, 466 Mich 86, 89; 643 NW2d 227 (2002).

Defendant asserts that the prosecutor improperly argued to the jury that impeachment evidence used against a defense witness could be considered as substantive evidence. Although we agree that the prosecutor's remarks can be characterized as defendant claims, appellate relief is not warranted because this Court does not find "error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Moreover, the jury was instructed on the proper use of the witness's prior inconsistent statements. Jurors are presumed to follow their instructions, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), and the instruction was sufficient to protect defendant's substantial rights. We also conclude that defense counsel was not ineffective for failing to object to the prosecutor's remarks because, given the trial court's limiting instruction, defendant has failed to show that but for defense counsel's error, the result would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant also contends that the prosecutor's questioning of one of the defense witnesses improperly attacked her credibility. The prosecutor inquired whether the witness was shaping her testimony based on the testimony of other witnesses. The witness denied the allegation. "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant . . . ." *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod 450 Mich 1212 (1995). Thus, the prosecutor's questions were not plain error.

Defendant further asserts that the prosecutor improperly vouched for the credibility of certain witnesses, injected her personal beliefs when she argued that other witnesses lied, and gave explanations for physical evidence. Again, we disagree. Although a prosecutor may not vouch for the credibility of a witness by expressing a personal opinion about the witness's truthfulness or by implying that she has some special knowledge of that truthfulness, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), a prosecutor may argue from the facts that a witness is either credible or unworthy of belief, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). After review of the allegedly improper statements concerning witness credibility, we find no prosecutorial misconduct. The prosecutor did not argue that she had any particular knowledge or personal opinion regarding the witnesses' truthfulness or lack thereof. Rather, the prosecutor based her arguments on the evidence and did not imply that the jury should make its decision on any basis other than the evidence presented.

With regard to the physical evidence, the prosecutor argued that a live shotgun shell found at the scene supported the witnesses' testimony that other gunshots were fired up in the air and offered a reasonable explanation for why the cartridge was not spent. The prosecutor also argued that, given the blood pattern evidence shown in the crime scene photographs that were admitted at trial, the victim's first two wounds likely caused internal bleeding in order to explain why there was not a significant amount of blood in the street where defendant allegedly fired his first two shots. A prosecutor may argue the evidence and draw reasonable inferences from it. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). The prosecutor's questions and remarks did not constitute plain error affecting defendant's substantial rights.

Defendant next argues that defense counsel was ineffective for failing to request jury instructions on assault with intent to commit great bodily harm less than murder and reckless discharge of a firearm. We disagree. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*<sup>1</sup> hearing, our review is limited to mistakes that are apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

First, defendant was not entitled to an instruction on reckless discharge of a firearm because a jury can only be instructed on necessarily included lesser offenses. See *People v Cornell*, 466 Mich 335, 354-359; 646 NW2d 127 (2002). Reckless discharge of a firearm is a cognate lesser offense of assault with intent to commit murder. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). Defense counsel was not ineffective for failing to make a meritless and futile request. *Mack, supra* at 130. Second, defendant maintained at trial that he was not at the scene of the shooting. Thus, with regard to assault with intent to commit great

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

bodily harm less than murder,<sup>2</sup> defendant has not overcome the presumption that defense counsel made a reasonable strategic decision not to request an alternative theory instruction. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). That a strategy does not work does not mean that defense counsel was ineffective for employing it. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant further asserts that the trial court was required to give the lesser offense instruction sua sponte. A trial court's decision to instruct on a necessarily included lesser offense is discretionary, not mandatory. *People v Chamblis*, 395 Mich 408, 417; 236 NW2d 473 (1975) (holding sua sponte instruction on all lesser offenses was discretionary), overruled in part in *Cornell*, *supra* (holding that trial court must instruct on *requested* necessarily included lesser offenses, but cannot instruct, even on request, on cognate lesser offenses). Furthermore, MCL 768.29 states that the failure of the trial court to instruct the jury on a point of law "shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." Therefore, we reject this claim of error.

Lastly, defendant argues that he is entitled to resentencing based on alleged offense variable scoring errors and the trial court's refusal to depart downward from the sentencing guidelines range. We disagree.

Defendant argues that 15 points were improperly assessed for offense variable (OV) 5. Fifteen points may be scored for OV 5 if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). Initially, we reject defendant's argument that MCL 777.35(1)(a) is vague because it does not define "serious." When words are not defined in a statute, they are to be given their plain and ordinary meaning, considering their context. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). The dictionary may be consulted, if needed. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). "Serious" is defined as important or weighty. Black's Law Dictionary (6th ed), p 1367. In this case, the victim's mother stated that she was receiving counseling as a result of the shooting incident. Given this statement, and considering the severe, life-altering nature of the injuries suffered by her son as a result of the shooting, we find no error in the trial court's scoring of OV 5 at 15 points. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) ("[s]coring decisions for which there is any evidence in support will be upheld)."

Defendant also argues that the trial court erred in scoring 25 points for OV 6, intent to kill or injure another individual. MCL 777.36. We conclude that defendant has waived review of this issue because he expressly stated at sentencing that 25 points was the proper score for this variable. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

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<sup>2</sup> Assault with intent to commit great bodily harm less than murder is a necessarily included lesser offense of assault with intent to commit murder. *People v Brown*, 267 Mich App 141, 151; 703 NW2d 230 (2005).

Because the trial court did not err in scoring defendant's guidelines and sentenced defendant within the guidelines range, we must affirm his sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra