STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May17, 2007
v	No. 265291 Ionia Circuit Court
QUINCY LAMAR BLAND, Defendant-Appellant.	LC No. 04-012834-FH

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

After a jury trial, defendant Quincy Lamar Bland was convicted of one count of assault with intent to do great bodily harm less than murder, MCL 750.84, and was sentenced as a third-offense habitual offender, MCL 769.11, to 108 to 240 months' imprisonment. He appeals as of right. We remand for further proceedings.

Defendant was incarcerated at the Richard A. Handlon Correctional Facility in Ionia, Michigan. On October 3, 2004, corrections officer Eric Jefferies issued two citations to defendant for his conduct. After receiving the second citation, defendant became insolent and directed profanities at Jefferies. Shortly thereafter, the prisoners were served dinner. After dinner, the inmates were counted and then were permitted to walk in the hallways and common areas of the cellblock.

As Jefferies walked down the hallway of the cellblock to return to the officers' desk, he was struck in the head from behind.[1] Defendant, facing Jefferies, began punching him in the head and face. Jefferies assumed a fetal position in an attempt to protect himself from the blows, and was unable to clearly remember the rest of the incident. From his position at the officers' desk, corrections officer Michael Manley saw defendant strike Jefferies and start beating him in the head. Manley and another officer, Robert Heuer, ran to the scene. Before they could reach Jefferies, an inmate identified only as Freeman attacked them. Freeman possessed a weapon known as a "lock in a sock," consisting of a heavy object placed inside a sock. After attacking

[1] Although Jefferies did not know who caused this initial blow, corrections officer Michael Manley testified that he saw defendant strike Jefferies from behind.

the officers, Freeman also assaulted Jefferies, hitting his body with the lock in a sock as defendant continued to strike Jefferies' head and neck with his closed fists.

Corrections officers Dennis Beecham and Michael Endres heard a distress call over their radios and ran to assist. They arrived at the scene to find Jefferies lying in a fetal position on the ground as defendant, kneeling over him, repeatedly struck him in the head and torso with "full-thrown, hard blows." Beecham and Endres brought the incident to a halt and removed Manley, Heuer, and Jefferies from the scene. Jefferies was treated at a local hospital for various injuries, including facial and scalp lacerations, blunt trauma, a maxillary fracture, and sinus bleeding. Defendant was charged with assault with intent to do great bodily harm less than murder (count 1) or, alternately, with assault of a prison employee (count 2), MCL 750.197c.

I. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence of his intent to support his conviction. We disagree. We review de novo claims of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "This Court has defined the intent to do great bodily harm as 'an intent to do serious injury of an aggravated nature.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

A rational trier of fact could have found that defendant intended to inflict serious injury of an aggravated nature on Jefferies. Viewed in the light most favorable to the prosecution, the evidence demonstrates that defendant attacked Jefferies without provocation, that he repeatedly used his fists to strike Jefferies with as much force as he could muster, that he targeted Jefferies' head, that he continued his attack while other corrections officers were warded off by a fellow prisoner, that he only ceased the attack after Beecham and Endres intervened, and that Jefferies suffered serious injuries as a result of the attack. This evidence circumstantially suggests that defendant intended to inflict serious aggravated injury on Jefferies. *Brown*, *supra* at 147. See also *People v VanDiver*, 80 Mich App 352, 356; 263 NW2d 370 (1977) (concluding that attacks with "[b]are hands are sufficient" to support a conviction under MCL 750.84). Evidence regarding defendant's motive for attacking Jefferies, namely, that Jefferies had disciplined defendant earlier in the day, is also probative and supports a finding that defendant exhibited the requisite intent. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000) (proof of motive supports a "mens rea" determination).

II. Failure to Take Defendant's Plea

Defendant next argues that the trial court erred when it declined to take defendant's plea the day before trial because, he claims, the judge contradicted his previous statement to defense counsel, made in an ex parte phone conversation, that he would take defendant's plea at the

hearing scheduled on July 26, the day before trial. We review a trial court's decision to accept or reject a plea agreement for an abuse of discretion. *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In November 2004, the prosecutor offered defendant a plea agreement in which defendant would plead guilty to assault with intent to do great bodily harm less than murder in exchange for a ten-year maximum sentence, with no habitual offender enhancement. In July 2005, defense counsel contacted the prosecutor to negotiate this offer, but the prosecutor would not vary the terms. On July 19, 2005, defendant told his counsel that he would not accept the offer at that time, but his counsel told him that he would contact the prosecutor and judge to see if they would still permit defendant to accept the offered plea agreement at the July 26, 2005, hearing.

Defense counsel stated that on July 19, soon after meeting with defendant, he called the prosecutor to request that defendant have until July 26 to accept the plea agreement. Defense counsel claimed that the prosecutor told him that he would agree to the time extension if the court also agreed. Defense counsel then stated that he called the judge's chambers to leave a message with his secretary regarding his request for the extension. The judge answered the phone and, according to defense counsel, "indicated that [defendant] could take the plea [on July 26]."

The prosecutor admitted that he had at least three communications with defense counsel concerning the plea agreement in July 2005. According to the prosecutor, in the first conversation defense counsel told him that he planned to discuss the terms of the plea agreement with defendant, in the second conversation defense counsel told him that defendant "needed some time to think about" the plea agreement, and in the third conversation defense counsel told him that "the court had left open a plea date" on July 26, apparently for defendant to accept the plea agreement. The prosecutor noted, "it was my understanding that we would have some sort of decision from the inmate [regarding whether he would accept the plea agreement] prior than two days before trial," but admitted that the parties' misunderstanding regarding whether defendant could accept the plea agreement on July 26 was likely the result of a "miscommunication" for which he accepted responsibility. He also noted that he had not been "necessarily opposed" to permitting defendant to accept the plea agreement when defense counsel contacted him on July 19. Instead, the prosecutor contested defendant's attempt to accept the plea agreement on July 26 because defendant had been given over six months to accept the offer, well past the deadline established in the scheduling order, and in the absence of an indication that defendant would accept the offer, the prosecutor's office had spent significant time in the previous week preparing for trial.

This does not appear to be an instance in which either party acted in bad faith. During this exchange, neither party directly disputed the other party's version of events or accused the other party of being less than forthright regarding his understanding of the sequence of events involved in the plea and time extension negotiations. In particular, the prosecutor did not dispute defense counsel's assertion that defendant was informed that he could accept the plea agreement on July 26; he merely stated that his understanding was that defendant would accept or reject the plea offer at some point prior to two days before trial.

Notably, the trial court record does not contain an order extending the time period in which defendant could accept the plea agreement, nor does defense counsel provide evidence from the record to support his assertions that the trial court judge told him in an ex parte conversation on July 19 that defendant could accept the plea agreement on July 26. However, the judge did not respond or otherwise comment on the record regarding defense counsel's claims that this ex parte conversation occurred, although he would have known if defense counsel's assertions that they engaged in an ex parte communication were true. Accordingly, a question of fact exists regarding whether the judge agreed in an ex parte communication with defense counsel to take defendant's plea on July 26.

The question whether this ex parte communication occurred is probative of whether the trial court abused its discretion when it prohibited defendant from accepting the plea offer on July 26. If the judge did not agree in an ex parte communication to take the plea on July 26, then the trial court acted within its discretion when it refused to take defendant's plea, because defendant attempted to enter the plea after the deadline established by the scheduling order. A trial court has the discretion to reject a tardy plea agreement proffered in violation of a scheduling order. *Grove*, *supra* at 469. There is "no absolute right to have a guilty plea accepted." *Id.* at 470 (citation omitted). Assuming the judge did not agree to take defendant's plea in the ex parte communication with defense counsel, the trial court did not abuse its discretion when it chose not to take defendant's plea. The court's scheduling order set a deadline for the submission of any plea agreements. Defendant did not indicate a willingness to accept the offer until over six months after this deadline expired. Given this passage of time and the court's authority to manage its docket, the court's decision under these circumstances would be within "the range of reasonable and principled outcomes."[2]

However, if the judge told defense counsel that he would permit defendant to accept the plea agreement on July 26, then the trial court abused its discretion when it refused to take the plea on that date. If the judge told defense counsel that he would take defendant's plea if it were given by July 26, then defendant had the right to take the judge at his word and wait until this time to enter the plea. Although the trial court has the discretion to accept or reject a plea offered in violation of the scheduling order, *Grove, supra* at 469, it does not have the discretion to communicate to a party its decision to permit the late acceptance of a plea agreement and then renege on this decision without warning. Under these circumstances, the trial court's decision not to take defendant's plea would constitute an abuse of discretion, and we would direct the trial court to give defendant the opportunity to accept the plea agreement.

[2] Defendant argues that the policies of docket control and eliminating unjustified delay and expense are not furthered in this case because the trial was succinct, the number of witnesses low, and a trial would have been avoided by accepting his plea. Similar concerns of docket management and elimination of delay and expense were addressed by our Supreme Court in *Grove* when it affirmed a trial court's exercise of discretion to reject a defendant's plea. See *Grove*, *supra* at 464-470. The *Grove* Court reasoned that the trial court's rejection of a plea offered "the day before trial" furthered these policies, *id.* at 470-471, presumably by encouraging criminal defendants to timely accept or reject plea bargains according to applicable scheduling orders.

Accordingly, the resolution of the question of fact regarding whether the trial court agreed, in an ex parte communication with defense counsel on July 19, to permit defendant to accept the plea agreement at the July 26 hearing is necessary to determine whether the trial court abused its discretion when it refused to take the plea on this date. Therefore, we remand to the trial court for a factual finding regarding whether this ex parte communication occurred. If this communication did not occur, then the trial court acted within its discretion when it chose not to take defendant's plea. If this communication occurred, however, the trial court's failure to abide by its earlier agreement to take defendant's plea on July 26 constitutes an abuse of discretion, entitling defendant to an opportunity to accept the plea agreement.

Finally, we note that, although ex parte communications between a judge and counsel regarding a case before the court are not permitted under MRPC 3.5, the prosecutor did not allege that either the judge or defense counsel committed misconduct by engaging in this communication. Further, this does not appear to be a situation in which defense counsel attempted to engage in an ex parte communication with the judge for a malicious purpose or to obtain a tactical advantage. Notably, defense counsel apparently did not *attempt* to directly communicate with the judge, but allegedly talked with the judge regarding the plea agreement because the judge happened to answer the main phone line to his chambers. We do not question that the parties and court believed that they were merely expediting the process of negotiating the extension of time for entering the plea agreement by relying on oral, ex parte conversations to communicate their positions instead of undertaking the more time-consuming process of making a record.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor's various references to the "undisputed" evidence during closing argument violated his Fifth Amendment privilege against self-incrimination. In particular, defendant contends that the prosecutor's argument that the evidence was unrefuted would be proper only if someone other than defendant could have contradicted the evidence. He reasons that, because the prosecutor's comments during oral argument related to the evidence of his intent and he was the only individual competent to testify regarding his intent, he was impermissibly denied his privilege against self-incrimination. We disagree.

Because defendant's counsel failed to challenge the prosecution's closing argument at trial, this issue is unpreserved. We review unpreserved constitutional error for plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006). To establish plain error, a defendant must demonstrate that "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *Id.* at 279. If plain error is established, "reversal is only warranted 'when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . .'" *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor's comments must be examined in context, and their propriety depends on the particular facts of the case. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Prosecutors are generally afforded "great latitude" in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The Fifth Amendment right against self-incrimination precludes prosecutors from commenting on a defendant's failure to testify. *People*

v Fields, 450 Mich 94, 108-109; 538 NW2d 356 (1995). Regardless, "[a] prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment." *Callon*, *supra* at 331. Further, "[i]t is permissible for a prosecutor to observe that the evidence against the defendant is uncontroverted or undisputed even if the defendant has failed to call corroborating witnesses." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

Defendant fails to demonstrate that the prosecutor denied him either a fair trial or otherwise violated his right against self-incrimination by repeatedly referring to the evidence as "unrefuted." The prosecutor's argument proceeded in three phases: discussion of count 1, discussion of count 2, and a general summary of his case. When presenting his argument regarding count 1, the prosecutor made various specific remarks concerning the "undisputed" evidence. He argued that it was "unrefuted" that defendant "punched" Jefferies "over, and over, and over, and over, and over again in the face and head." He argued that the attack itself occurred "beyond a reasonable doubt" and had not been refuted. And he argued that it was "unrefuted" that Jefferies did not want to be "punched in the face." None of these statements concern defendant's intent in committing the assault. Rather, they concern the actual circumstances of the assault, as described by various prosecution witnesses. Defendant's suggestion that these comments related to his "intent" is inaccurate. Regardless, defendant could have offered evidence besides his own testimony (such as the testimony of Freeman or of an inmate or another corrections officer who might have witnessed the attack) to contradict the prosecution's witnesses on this matter.

Defendant did not dispute that all elements of count 2, assault of a prison employee, were established. Further, because defendant was convicted on count 1, he was not convicted of this offense. Accordingly, the propriety of the prosecutor's statements concerning the "unrefuted" nature of the evidence supporting a conviction on count 2 is irrelevant because defendant was not prejudiced by these comments.

Defendant construes the two remaining portions of the prosecution's argument as commenting on his intent. At the close of his argument regarding count 1, the prosecutor argued as follows:

> [T]he proof is unrefuted for that charge. Count one, assault with intent to do great bodily harm less than murder. It's unrefuted. Whatever Freeman did has no bearing. Absolutely zero bearing. What defendant did has every single bearing in this trial. Only what he did has bearing. And what he did was repeatedly try to harm Eric Jefferies. And when he saw the opportunity that the—the Jeffer—excuse me, Freeman was holding off the other officers, he continued. And not once did he offer any sort of compassion, help, human kindness to that man. Not once. That's proven beyond a reasonable doubt, it's unrefuted.

At the close of his entire presentation, the prosecutor summarized his argument and its most salient points as follows:

> It's not a movie. It's not 'Saving Private Ryan', it's not an actor getting up tonight, getting off the floor, being okay. This is real life. This was real violence. This was not a depiction. Eric Jefferies suffered. He still suffers. He's

> got post traumatic stress. And we all can look over and see the person who caused his suffering, on purpose. He's sitting right there.
>
> I have proven to you through each and every witness, unrefuted, each and every witness, all the elements of count one, assault with intent to do great bodily harm—intent. Doesn't have to, just try. Less than murder. And assault on a prison employee.
>
> I put the case before you. I put the case before you with all the evidence that I have submitted to you, and I ask you to do what the evidence shows. I ask you to hold the person who did this predatory attack responsible, guilty for each and every one of his actions. For count one, for count two. I ask you to do that because the evidence asks you to do that.

In both statements, the prosecution argued that evidence established each element necessary for the jury to convict defendant for committing assault with intent to commit great bodily harm. The prosecutor made the first remark when discussing both Freeman and defendant's conduct. Besides making a general assertion that the evidence established each element of count 1, the prosecutor did not discuss defendant's intent when assaulting Jefferies. The prosecutor made the second remark in the context of making a general statement arguing that the prosecution had met its burden of proof. Again, he did not specifically refer to defendant's intent when assaulting Jefferies when making this comment. These were general statements asserting that the prosecution had met its burden of proof. Given the broad latitude afforded prosecutors in closing argument, *Bahoda*, *supra* at 282, these comments cannot be said to have concerned defendant's intent.[3]

IV. Presence of Handcuffs and Leg Restraints

Finally, defendant argues that he was denied a fair trial because the trial court presented him to the jury in handcuffs and leg restraints and chose to keep him in leg restraints throughout the trial. We disagree. Because the trial court record does not indicate that defense counsel requested that defendant's handcuffs and leg restraints be removed before defendant was initially presented to the jury, the question whether this initial interaction between defendant and the jury was proper is unpreserved. Further, defense counsel requested that defendant's handcuffs, but not his leg irons, be removed. Accordingly, defendant's claim that the trial court erred when it required that his leg irons remain on for the duration of the trial is also unpreserved. Because defendant failed to raise these issues below, we review for plain error affecting defendant's substantial rights. *Pipes*, *supra* at 278-279.

[3] Moreover, jurors are presumed to follow a court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). If any error occurred in this case, it would have been mitigated by the following instructions given by the trial court to the jury: "[D]efendant has the absolute right not to testify. When you decide the case, you must not consider that fact, that he did not testify. It must not affect your verdict in any way."

"Freedom from shackling is an important component of a fair trial." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Although freedom from shackling is rooted in a defendant's due process rights, *Deck v Missouri*, 544 US 622, 626-629; 125 S Ct 2007; 161 L Ed 2d 953 (2005), "[t]he right of a defendant to appear at trial without any physical restraints is not absolute." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). Restraints are permitted "to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial." *Dixon*, *supra* at 404.

Although defendant apparently was in handcuffs and leg irons during voir dire, the prospective jurors were informed, and the parties did not dispute, that defendant was incarcerated at the time he committed the assault on Jefferies and remained incarcerated at the time of trial. Further, the parties did not dispute that defendant assaulted Jefferies; the only issue disputed at trial was whether he intended to commit great bodily harm at the time of the assault. In addition, testimony from a corrections officer assigned to transport defendant to court demonstrated that defendant was a security threat. On the basis of this information, the trial court could have reasonably concluded that defendant demonstrated a lack of respect for authority and had a tendency toward violence, see *id.* at 405, and, therefore, that he posed a threat to others in the courtroom and to general courtroom "order." Accordingly, the trial court did not plainly err when it failed to order removal of defendant's handcuffs and leg irons before voir dire or to order removal of defendant's leg irons for the duration of the trial.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens