STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 271808 Genesee Circuit Court
ODRECUS RYZAN CLEMENTS, Defendant-Appellant.	LC No. 06-017719-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of unarmed robbery, MCL 750.530. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 9 ½ to 25 years in prison. We affirm.

Defendant entered a restaurant and asked the cashier, Bonnie Elrod, for change for a dollar. When Elrod opened the register, defendant grabbed $20 bills and $50 bills and ran out the door. Elrod chased defendant to the parking lot, where he jumped in a truck driven by Lynette Woods. Elrod tried to grab the keys out of the ignition from the driver's side, but defendant pushed Woods aside, put the truck in gear, and sped off, injuring Elrod's knee.

Defendant argues that the trial court erred in calculating his offense variable (OV) 9 score at 10 points because the evidence did not support the finding that there were two to nine victims. We disagree. In reviewing the number of points scored at the trial level, this Court determines whether there was an abuse of discretion. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Id*. "Scoring decisions for which there is any evidence in support will be upheld." *Id*. (internal citation and quotation marks omitted).

Offense variable 9 covers the number of victims. MCL 777.39. A defendant should receive 10 points under OV 9 if there were two to nine victims. MCL 777.39(1)(c). A victim is a "person who was placed in danger of physical injury or loss of life . . . ." MCL 777.39(2)(a).[1]

[1] The definition of "victim" on the date of the instant offense did not include the adjective
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The trial court concluded that, in addition to Elrod, there were several others outside when defendant was leaving with the truck, including one witness who was standing right by the driver's side front end of the truck.

There was sufficient evidence on the record that two to nine people were placed in danger by defendant's manner of leaving the parking lot. The testimony showed that defendant put the truck in gear. The truck went in reverse and dragged Elrod across the parking lot, injuring her knee. Then, the truck went forward and left Elrod on the ground. Some of the workers and customers had followed Elrod to the parking lot and helped her back into the building. Gerald Long, a customer in the restaurant at the time of the incident, testified that he followed Elrod to the parking lot and saw the robber's face from about eight to ten feet away.

In addition, Woods testified that defendant jumped in the truck on the passenger's side, started the ignition, and nearly pushed Woods out of the truck. Defendant backed the truck up and took off, with Woods hanging partially out the door. The evidence shows that at least two people were in danger of getting hit by the truck when defendant threw the truck in reverse and then sped out of the parking lot to escape. The trial court did not err in assessing 10 points for OV 9.

Defendant argues that, under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he is entitled to be sentenced on the facts actually found by the jury. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding, and, therefore, not to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).[2] Accordingly, this argument is without merit, and we again hold that the trial court did not err in assessing 10 points under OV 9.

Next, defendant argues that his trial counsel was ineffective for failing to object when the trial court required the jury to determine whether Woods was an accomplice before applying the instruction on accomplice testimony. We disagree. Defendant did not file a motion for a *Ginther*[3] hearing below. Therefore, this Court must review this issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination of whether defendant received ineffective assistance of counsel is a question of both fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *Id*.

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"physical." The change in the definition is of no import here.

[2] The Michigan Supreme Court has recently reaffirmed its holding in *Drohan* and determined that *Blakely* also does not apply when a defendant's minimum sentence range falls within an intermediate sanction cell. *People v Harper*, 479 Mich 599; ___ NW2d ___ (2007); see also *People v McCuller*, 479 Mich 672; ___ NW2d ___ (2007).

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A defendant seeking a new trial based on ineffective assistance of counsel bears a heavy burden to overcome the presumption that counsel provided effective assistance. See *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). The defendant "must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must also establish a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have different. *Id*. He must also demonstrate that the result of the proceedings was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). "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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Jury instructions are reviewed in their entirety to determine if an error occurred requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Reversal is not required if the instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. The credibility of an accomplice is a question for the jury. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). "However, our courts have recognized that an accomplice may have a special interest in testifying, thus raising doubts concerning his veracity. It is therefore well established that when an accomplice testifies for the prosecution, the testimony is suspect and must be received only with great care and caution." *Id*. It is defense counsel's role to expose the problems with the accomplice's credibility. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

In the discussions regarding the jury instructions, the prosecutor, defense counsel, and the trial court agreed that there was a dispute regarding whether Woods was an accomplice to the offense. The court gave the jury the disputed accomplice instruction, CJI2d 5.5, followed by the cautionary instruction for accomplice testimony, CJI2d 5.6, instructing the jury to consider an accomplice's testimony more cautiously than that of an ordinary witness. The use note for CJI2d 5.5 provides, "If there is a dispute as to the status of the witness as an accomplice, this fact should be submitted to the jury as a separate question for its determination." The trial court interpreted this note to mean that the first question on the verdict form should be whether Woods was an accomplice, so that this Court would know how her testimony was treated if the issue should arise on appeal. The jury concluded that Woods was not an accomplice and then found defendant guilty of unarmed robbery.

Defendant argues that submitting the question of Woods's status as an accomplice to the jury in this manner necessarily meant that the jury had to agree beyond a reasonable doubt that Woods was an accomplice before viewing her testimony with caution. However, when the court explained the verdict form to the jury, it never used the words "beyond a reasonable doubt." The court specifically stated that the answer to the question would determine how the jury should treat Woods's testimony based on the court's instructions, and it then summarized the instructions for accomplice testimony. Juries are presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In addition, after explaining the verdict form, the court asked the jurors to raise their hands if they did not understand, and there were no hands raised. The trial court did not err in following the directions provided in the notes for the standard jury instructions, and there is no indication that the jury did not follow the instructions.

Because there was no error in the jury instructions as given, defense counsel was not ineffective for failing to object to the instructions. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In addition, defense counsel attacked Woods's credibility throughout the testimony by establishing that Woods accepted a plea agreement to testify against any codefendant and complete a drug rehabilitation program in exchange for dismissal of the charges against her. The evidence shows that trial counsel's performance did not fall below an objective standard of reasonableness, and defendant was not deprived of a fair trial.

Defendant next argues that the prosecutor committed misconduct by failing to turn over a photographic lineup to the defense and thereby violating the discovery order, by using perjured testimony, and by using an unduly suggestive identification process.[4] We disagree. To preserve this issue for appeal, defendant must have moved for a mistrial or objected when the trial court still had time to correct the errors. *People v Pipes*, 475 Mich 267, 277-278; 715 NW2d 290 (2006). Defense counsel moved to suppress the photographic lineup because he had not received it before trial. However, defense counsel did not object to Detective Mark Schmitzer's testimony or to Woods's identification of defendant, so the issue as applied to this evidence is unpreserved.

"Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief with respect to an unpreserved error, a defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) the error affected substantial rights, i.e, it affected the outcome of the trial. *Id.* at 763.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Upon request, a party must provide to the opposing side any document, any photograph, or other tangible physical evidence that the party intends to introduce at trial. MCR 6.201(A)(6). The prosecutor, upon request, must provide a defendant with any exculpatory information known to the prosecutor; police reports and interrogation records; written or recorded statements by a defendant, codefendant, or accomplice; affidavits, warrants, and returns related to a search or seizure in the case; and any plea agreement, grant of immunity, or other agreement for testimony in the case. MCR 6.201(B).

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). To obtain any relief, the defendant must have suffered actual

[4] Defendant also makes an unclear argument about pretrial statements made by Woods and by another witness, Gerald Long. Defendant makes no citations to the record in support of this argument and otherwise fails to develop it. We conclude that the argument has been waived due to inadequate briefing. See *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003).

prejudice, and the exclusion of otherwise admissible evidence should occur only in egregious cases. *People v Greenfield*, 271 Mich App 442, 455 n 10; 722 NW2d 254 (2006).

In this case, the police questioned Woods regarding her involvement in the robbery, and Woods gave them the name "Worm." The police discovered booking records of defendant, with the street name of Worm, and arranged a photographic lineup. Evidence indicates that two detectives presented a six-photograph lineup to Woods and that Woods immediately identified the photograph of defendant as Worm. However, contrary to Detective Schmitzer's testimony, Woods claimed that she was only shown two pictures, both of defendant.

Defense counsel objected to the admission of the photographic lineup on the grounds that he was never provided a copy of the lineup prior to trial, despite a request for all discovery relevant to the case. The prosecution admitted that a mistake had been made and was not discovered until trial. The case was reassigned from one detective to another, and the final detective in charge believed a copy of the lineup had been made and handed over, but it was never done. The trial court concluded that a mistrial was not warranted and that defendant did not suffer extreme prejudice by the mistake. It noted that defense counsel had the opportunity to talk with both detectives, had not presented the issue in his opening statement, and would be able to cross-examine both Woods and Schmitzer at trial.

The trial court properly balanced the interests of the parties in allowing admission of the evidence of the photographic lineup. *Banks*, *supra* at 252. The circumstances of the case showed that the lineup was not turned over during discovery due to an inadvertent mistake by the detectives. At the time of the court's decision, neither Woods nor Schmitzer had testified, so both parties had the opportunity to examine the witnesses regarding the identification process. Despite knowing about the lineup for only one day, defense counsel was able to elicit contradictory testimony between the two witnesses regarding the photographs shown and use that testimony to attack the credibility of the identification in his closing argument. There is no indication that the failure to turn over the photographic lineup before trial was willful on the part of the prosecutor or that defendant was actually prejudiced by receiving the photographic lineup at trial. *Greenfield*, *supra* at 455 n 10. Reversal is not warranted.

Moreover, defendant's contention that his conviction was based on perjured testimony is without merit. Prosecutors "may not knowingly use false testimony to obtain a conviction." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). However, a prosecutor's failure to correct false testimony only warrants a new trial if there is a reasonable probability that it affected the judgment of the jury. *Id*. at 280. A prosecutor's line of questioning is reviewed to determine whether the prosecutor elicited the testimony in good faith. *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007).

Woods's assertion that she saw only two photographs, both of defendant, does not conclusively establish that Schmitzer lied about presenting a six-photograph lineup. It is just as possible that Woods lied about the photographs or did not accurately remember the event. It was up to the jury to decide which witness was more credible. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). There is no indication that the prosecutor elicited the testimony in bad faith or knew it to be false. *Dobek*, *supra* at 70-71; *Lester*, *supra* at 276. Once again, reversal is not warranted.

Defendant asserts that the use of a single photograph in the pretrial identification process conducted with Woods was unduly suggestive. A photographic identification procedure that is impermissibly suggestive, such that there is a substantial likelihood of misidentification, violates the defendant's right to due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). If the pretrial procedure was impermissibly suggestive, testimony regarding that identification is inadmissible at trial, but the witness may make an in-court identification if she has an independent basis for the identification. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Again, the use of two photographs, both of defendant, was not conclusively established merely because Woods's testimony contradicted that of Schmitzer. In addition, despite her testimony regarding the photographs, Woods identified defendant in court as the perpetrator and testified that there was no question in her mind regarding his identification. Significantly, Woods was with defendant from around 6:30 p.m. until 6:00 a.m. on the two-day span in question, giving her a long time to observe his appearance. We emphasize that the credibility of identification testimony is a question for the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 181 (2000). Defendant has not shown that there was a substantial likelihood that the pretrial identification process led to a misidentification of defendant as the robber, and reversal is not warranted.

Next, defendant argues that the trial judge erred in instructing the jury that there was some evidence that defendant ran away after the crime. Defendant contends that the trial court admitted, after the fact, that the instruction was erroneous. We disagree. Issues of law arising from jury instructions are reviewed de novo, but the determination of whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

As stated earlier, jury instructions are reviewed in their entirety to determine if an error requiring reversal occurred. *Aldrich*, *supra* at 124. In viewing the instructions as a whole, this Court must balance the general meaning of the instructions "against the potential misleading effect of a single sentence isolated by a defendant." *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Evidence of flight from the scene is admissible to show consciousness of guilt. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A court may give a particular instruction to the jury when the evidence supports the giving of that instruction. See *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

The instruction defendant objects to is the following:

> There's been some evidence that the Defendant ran away after the alleged crime he was accused of. The crime, the police arrested him – let me go back here. There's been some evidence that the Defendant ran away after the alleged crime he was accused of. The police tried to arrest him. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake or fear. However, a person may run or hide because of a consciousness of guilt. You must decide whether the evidence is true. And if true, whether it shows the Defendant had a guilty state of mind.

Contrary to defendant's suggestion in his appellate brief, the trial court did not admit that the instruction regarding defendant's flight was improper. Instead, after defense counsel objected to the wording regarding an arrest, the court merely stated that it probably should have left out the sentence concerning an arrest. At any rate, the evidence supported a conclusion that defendant ran from the scene, and the sentence stating that the police tried to arrest him did not render the entire instruction improper. The court specifically and properly indicated that the jurors "must decide whether the evidence is true" and "whether it shows the Defendant had a guilty state of mind." Viewing the jury instruction as a whole, there was no error requiring reversal. *Freedland*, *supra* at 766.

Defendant next argues that his trial counsel was ineffective for failing to object to Woods's testimony and in-court identification, failing to offer a photograph of Alex Williams into evidence, and failing to object to the admission of evidence regarding Elrod's injuries. We disagree. Defendant's motion to remand for an evidentiary hearing for factual development of his claim of ineffective assistance of counsel included each of the reasons enumerated in this issue. However, because the motion was denied, this Court must review this issue on the basis of the existing record. *People v Clements*, unpublished order of the Court of Appeals, entered March 2, 2007 (Docket No. 271808); *Rodriguez*, *supra* at 38.

Defendant argues that trial counsel was ineffective for failing to object to the prosecutor's forcing Woods to testify. Defendant's only argument in his appellate brief with regard to this issue is that there could be no sound trial strategy for counsel's inaction. However, the record demonstrates that defense counsel addressed this issue on several occasions and made an effort to bring out evidence that Woods was charged with possession of cocaine and accessory after the fact to the robbery in this case. Woods accepted a plea agreement to testify against any codefendant and complete a drug rehabilitation program in exchange for dismissal of the charges against her. When Woods was less than forthcoming regarding her plea agreement, defense counsel spoke to the administrator of the program and worked with the prosecutor to put a stipulation on the record regarding the agreement. Defense counsel used this information to attack the credibility of Woods's testimony throughout the trial. Therefore, defendant's assertion on appeal that counsel was dilatory in dealing with Woods's testimony is without merit, and defendant has certainly not demonstrated that the police or prosecutor somehow acted unethically in reaching the agreement with Woods.

Next, defendant contends that counsel was ineffective for using a photograph of Alex Williams, who looked remarkably like defendant, in the questioning of Woods but failing to offer the photograph as an exhibit. During her testimony, Woods vehemently denied that she could have mistaken defendant for the man in the photograph. We note that defense counsel has a duty to consult with the defendant regarding important decisions, such as the overall defense strategy, but not regarding every tactical decision. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565, 578 (2004). Defense counsel's decision not to offer the photograph into evidence after Woods testified that she was positive the man in the photograph was not the perpetrator was a minor tactical decision. Given Woods's testimony, we conclude that there is no reasonable probability that the admission of the photograph would have affected the outcome of the trial, *Rogers*, *supra* at 714, and reversal is thus unwarranted.

Defendant also contends that counsel was ineffective for failing to object to testimony regarding Elrod's injuries because, according to defendant, Woods caused those injuries as the

driver of the vehicle. However, there was evidence presented that defendant was the one who actually started the ignition, put the truck in gear, and drove the truck out of the parking lot. Even if Woods actually drove the truck, it was defendant's actions of robbing the restaurant and fleeing the scene that caused Elrod to be in danger, and testimony that Elrod hurt her knee was merely incidental to evidence of defendant's flight. The jury is entitled to hear the complete story of the event. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). In addition, defendant does not explain how this evidence is prejudicial. Unfair prejudice exists where a jury is likely to give marginally probative evidence undue or preemptive weight, and it would be inequitable to allow its admission. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212 (1995). There is no indication that the jury gave undue weight to the evidence of Elrod's injuries.

Defendant also alleges two errors that have already been addressed: failure to object to the pretrial and in-court identification of defendant by Woods, and failure to request a curative instruction after the trial judge gave the jury instruction on flight. We have concluded above that defendant's arguments regarding these issues are without merit. We further conclude that trial counsel was not required to advocate these positions. See *Snider*, *supra* at 425. The evidence shows that trial counsel's performance did not fall below an objective standard of reasonableness and that defendant was not deprived of a fair trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher