

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN WILLIAMS, JR.,

Defendant-Appellant.

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UNPUBLISHED

November 27, 2007

No. 272779

Wayne Circuit Court

LC No. 06-002283-01

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

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 80 months to 10 years' imprisonment for the assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm.

I. Right to Counsel

Defendant first argues that he was denied the assistance of counsel at his preliminary examination. We disagree. "The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). A preliminary examination is a critical stage in the proceedings. *Coleman v Alabama*, 399 US 1, 9-10; 90 S Ct 1999; 26 L Ed 2d 387 (1970); *People v Thomas*, 96 Mich App 210, 218; 292 NW2d 523 (1980).

In this case, original defense counsel notified the trial court that defendant was requesting the appointment of new counsel. Another attorney who was present agreed to serve as defendant's new counsel if original counsel would conduct the preliminary examination. The trial court agreed to allow original counsel to withdraw after conducting the preliminary examination. The trial court stated, without objection, "The record should reflect that both attorneys are present and will remain so during this examination so that [defendant] has the benefit of both counsels." Thus, the trial court effectively ruled that original counsel's withdrawal was not effective until after the preliminary examination. Because defendant was

represented by counsel at the preliminary examination and does not raise any issue regarding the effectiveness of counsel's performance at the preliminary examination,<sup>1</sup> we reject this claim of error.

## II. Prior Acts Evidence

Defendant next argues that the trial court abused its discretion by allowing evidence of his prior bad acts pursuant to MRE 404(b)(1). Although this issue was raised in a pretrial motion, we note that the evidence actually presented at trial differed from the prosecution's pretrial offer of proof, on which the trial court based its decision to allow the evidence. Despite the variance in the evidence, defendant did not object to the evidence at trial. Because the evidence at trial varied from the prosecutor's pretrial offer of proof and because defendant did not object to the evidence, we conclude that this issue is not preserved. Therefore, we limit our review to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

At trial, two witnesses, Tiko and Albert,<sup>2</sup> testified about an incident in April 2003, when defendant pulled out a gun as the three of them were sitting around a table, and then pointed the gun at the witnesses. Defendant's action was sudden and not precipitated by any argument. When defendant aimed the gun directly at Albert's head, Albert hid behind his chair. Defendant then pointed the gun directly at Tiko's head and shot Tiko in the head. Albert left to inform his friends what had happened, while defendant stayed and called 911.

Tiko and Albert also testified about when they saw defendant with the gun for the first time the previous day. Both testified that defendant displayed it as they were walking home from swimming. Tiko testified that defendant just had the gun in his hand, while Albert stated that defendant waved it at the people in the group.

MRE 404(b)(1) governs the admission of evidence of prior bad acts:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of prior acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*,

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<sup>1</sup> Defendant asserts in his brief on appeal that he was prejudiced by some of the testimony admitted at the preliminary examination, but he does not tie this alleged prejudice to counsel's actual performance.

<sup>2</sup> The witnesses were identified by first name only because they were minors.

457 Mich 490, 495; 577 NW2d 673 (1998); *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). To be admissible under MRE 404(b), prior acts evidence generally must satisfy three requirements: (1) it is offered for a proper purpose, (2) it is relevant, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In this case, defendant argues that the prior acts evidence was not admitted for a proper purpose and that its probative value was substantially outweighed by its prejudicial effect. We disagree.

Although defendant asserts that the prosecutor improperly argued during closing argument that the evidence could be considered for propensity purposes, the record discloses that the prosecutor argued that the evidence showed intent and defendant's particular way of assaulting someone, and that the jury could not use the evidence as an indicator that defendant was a bad person. Additionally, the trial court instructed the jury that the evidence was admissible only to show a common scheme and defendant's intent, which are proper purposes under MRE 404(b)(1).

Evidence of prior misconduct is logically relevant to show a common plan, scheme, or system in doing an act if the prior misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *People v Dobek*, 274 Mich App 58, 90; 732 NW2d 546 (2007). The plan, scheme, or system need not be unusual or distinctive, but a general similarity between the charged and prior acts alone is not sufficient. *People v Ackerman*, 257 Mich App 434, 440-441; 669 NW2d 818 (2003).

Defendant argues that the only similarity between the 2003 shooting and the charged offense was that someone was shot. In each instance, however, defendant assaulted the victim by suddenly aiming a gun at the victim's head for no apparent reason. This similarity supports an inference that the prior act and the charged offense were manifestations of a common system of assault.

We also reject defendant's assertion that the probative value of the prior acts evidence was substantially outweighed by its potential for unfair prejudice. Proffered evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). The evidence in this regard was indicative of a common system by which defendant would suddenly point a gun at another person's head with no warning or apparent reason, and therefore cannot be characterized as only marginally probative. We find no plain error.

### III. Prosecutorial Misconduct

Defendant next argues that the prosecutor's conduct during closing argument denied him a fair trial. Because defendant failed to object to the prosecutor's conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Defendant first argues that the prosecutor impermissibly vouched for the credibility of the police. A prosecutor may not suggest that she has special knowledge regarding the veracity of witnesses. *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004). However, a prosecutor's argument from the facts and testimony that certain witnesses are not worthy of belief does not constitute improper vouching for the credibility of witnesses. See *Dobek, supra* at 67.

The prosecutor stated that the police did their investigation and followed up on every angle. This remark was a fair comment based on the evidence presented at trial. A prosecutor is free to argue the evidence and all reasonable inferences arising from it. *Id.* Investigator Fisher testified that he conducted an investigation, which included verifying the accuracy of the witnesses' numerous statements. As a result, he was comfortable in determining that defendant was the shooter. The prosecutor also stated that the police would never jeopardize their case by threatening a witness in the manner described by a witness at trial. At trial, Sergeant Jaafar and Investigator Fisher both testified that they did not threaten the witness. Sergeant Jaafar also testified that he did not arrest the witness on an outstanding misdemeanor warrant because the witness had valuable information about a homicide. Considered in context, the prosecutor's comments were based on the evidence and reasonable inferences arising from the evidence. The prosecutor did not suggest that she had special knowledge of the witness's veracity.

Defendant also argues that the prosecutor impermissibly argued facts not in evidence when she referred to statements by two non-testifying witnesses. We disagree. The prosecutor did not divulge any information that was not either contained in Investigator Fisher's testimony or reasonably inferred from it. Lastly, defendant argues that the prosecutor improperly appealed to the jury's sympathy when she stated, "Sal can't be here today to tell us who did this to him and you are going to have to stand up and be his voice today." We do not characterize this remark as an improper appeal to sympathy. In fact, the prosecutor specifically urged the jury to decide the case based on the evidence, not sympathy.

Finally, contrary to the assertion made in defendant's brief on appeal, any prosecutorial misconduct of the type alleged by defendant in this regard could have been cured by a timely instruction. A curative instruction is generally sufficient to dispel the prejudicial effect of inappropriate prosecutorial statements, *People v Humphreys*, 24 Mich App 411, 414-415; 180 NW2d 328 (1970), and jurors are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

We find no plain error in the prosecutor's closing remarks. *Carines, supra* at 763-764. Therefore, defendant's related ineffective assistance of counsel claim also fails. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

#### IV. Sentencing

Defendant argues that the trial court erred in departing from the sentencing guidelines range of 29 to 57 months for defendant's assault conviction. We disagree.

A trial court may sentence a defendant to a term outside the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A substantial and compelling reason is "an 'objective and verifiable' reason that '“keenly” or “irresistibly” grabs our attention’; is 'of "considerable worth" in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995).

In reviewing a departure from the sentencing guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that

the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Babcock, supra* at 264-265. A court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *Id.* at 269.

Defendant argues that the trial court's characterization of the shooting as a hate crime was not an objective and verifiable factor. We agree. To be objective and verifiable, the factor must involve an action or occurrence external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In order to classify the offense as a hate crime, defendant's motive had to be analyzed. Defendant's motive is not a factor external to the mind. While the fact that the victim was a homosexual could be verified, whether defendant shot the victim because of his sexual orientation could not, particularly where defendant maintained that he was not the shooter.

Defendant asserts that the other two factors identified by the trial court in support of its departure decision—the victim's medical condition and defendant's history of escalating violence—were improper reasons for departure because they were already considered in the scoring of the sentencing guidelines variables. A trial court may not base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the trial court finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). To ascertain whether a factor was given inadequate or disproportionate weight in the guidelines calculations, a court must first determine the effect of the factor on the recommended minimum sentence range. *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007).

Defendant asserts that the victim's medical condition was considered in offense variable 3 (OV 3), which addresses physical injury to the victim. MCL 777.33. Defendant received 25 points for this variable for causing a "[l]ife threatening or permanent incapacitating injury" to the victim. MCL 777.33(1)(c). The trial court found that the scoring of OV 3 did not adequately reflect the victim's condition. We agree. The record discloses that the victim is brain dead and is being kept alive by artificial life support. As the trial court observed, the victim was not merely permanently incapacitated, "in essence, he is dead, and only being kept alive by artificial means." Under these circumstances, the trial court did not abuse its discretion in finding that the scoring of OV 3 did not adequately account for the victim's physical condition.

Defendant also asserts that his criminal history was considered in the prior record variables. The prior record variables address a defendant's prior criminal convictions. *Harper, supra* at 616. Although the prior record variables account for the number and severity of defendant's prior convictions, they do not reflect that defendant's level of violence has escalated over time. Thus, the trial court did not abuse its discretion in finding that the prior record variables did not give sufficient weight to this factor.

Although the trial court erred by partly relying on its characterization of the offense as a hate crime as a basis for departure, remand for resentencing is unnecessary. If the trial court would have imposed the same sentence regardless of a misunderstanding of the law or an irregularity in the proceedings, we may affirm the sentence. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). The trial court stated that a sentencing departure was warranted based on any of the three departure reasons and that if it could impose a minimum

sentence greater than two-thirds the statutory maximum, it would. It is apparent from the trial court's comments that it would have imposed the same sentence even if it had not considered the offense to be a hate crime. Therefore, resentencing is not required. *Id.*

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane M. Beckering