

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY LAMAR JONES,

Defendant-Appellant.

UNPUBLISHED
December 9, 2008

No. 279067
Kent Circuit Court
LC No. 06-006630-FC

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 5 to 25 years' imprisonment for his assault with intent to murder conviction, and two years' imprisonment for his felony-firearm conviction. Because there was sufficient evidence to convict defendant beyond a reasonable doubt of assault with intent to murder; the trial court properly denied defendant's motion for a new trial; the trial court did not err when it scored defendant's guidelines and sentenced defendant; and, defendant failed to establish prosecutorial misconduct, we affirm.

On May 22, 2006 at approximately 2:30 in the afternoon, defendant approached Tommy Junior Thomas with a gun in his hand and fired several shots at Thomas. Thomas survived the assault, and testified regarding defendant's identity at trial.

First, defendant argues there was insufficient evidence to prove he had intent to kill Thomas. This Court reviews a challenge to the sufficiency of the evidence de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The Court must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

To convict a defendant of an assault with intent to murder, the prosecutor must prove the following three elements: "1) an assault, 2) with an actual intent to kill, 3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). This offense is a specific intent crime. *People v Lipps*, 167 Mich App 99, 105; 421

NW2d 586 (1988). “The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Based on the evidence at trial, which established defendant approached Thomas with a gun in his hand and then fired several times while in close range, a reasonable juror could conclude defendant intended to kill Thomas. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (There was sufficient evidence to convict the defendant of assault with intent to murder because “the defendant pointed a pistol at [] [the victim], warned him not to come any closer or he would kill him, and pulled the trigger several times (but no bullets fired).”); *People v Hollis*, 140 Mich App 589, 592-593; 366 NW2d 29 (1985) (There was sufficient evidence to convict the defendant of the offense of assault with intent to murder because the defendant knew that aiming a handgun at someone and firing that gun had the “great possibility that that person may be killed.”).

Defendant also contends that a reasonable juror could not believe Thomas’ testimony because of Thomas’ history of providing false information to the police. In addition, defendant argues a reasonable juror could not believe one police officer’s conclusion that a bullet created the holes in Thomas’ shirt because she had no evidence to support her claim. However, “this Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses.” *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). “It is for the trier of fact, and not the appellate court, to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Second, defendant argues that the trial court erred when it denied defendant’s motion for a new trial based on newly discovered evidence. A trial court’s decision on a motion for a new trial or an evidentiary hearing based on newly discovered evidence will not be disturbed absent a clear abuse of discretion. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989). In the present case, defendant moved for a new trial based on newly discovered evidence in the form of two affidavits sworn by two declarants, who claimed that after the trial they heard Thomas state: 1) defendant was wrongly convicted, 2) defendant did not shoot at Thomas, and 3) the hole in Thomas’s shirt was not created by a bullet; rather, it was caused by Thomas dropping hot ash from a marijuana blunt onto the shirt. The trial court concluded the affidavits were highly suspect and were merely cumulative.

For a trial court to grant a new trial based on newly discovered evidence, a defendant must show: “1) the evidence itself, not merely its materiality, was newly discovered, 2) the newly discovered evidence was not cumulative, 3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, and; 4) the new evidence makes a different result probable on retrial.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), citing *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). “Generally, [] where the new evidence is useful only to impeach a witness, it is deemed merely cumulative.” *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). “[W]here newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy.” *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). Therefore, “Michigan courts have expressed reluctance to grant new trials on the basis of recanting testimony.” *Id.*

The affidavits presented by defendant as proof that Thomas recanted his testimony after the trial were highly suspect. Two men claim they overheard defendant recant his testimony, but there was no indication in the affidavits where the purported conversations took place, when they occurred, or what the relationship was between defendant and the men. The affidavits were so lacking in detail that they were inherently suspect and, thus, cannot be the basis for a new trial. Even if the affidavits were not untrustworthy, the evidence revealed in the affidavits only contradicts and casts suspicion on Thomas' testimony. Because this Court considers impeachment evidence to be cumulative, the trial court correctly denied defendant's motion for a new trial. *Barbara, supra* at 363.

In addition, defendant argues the trial court abused its discretion when it denied defendant's motion for a new trial without having the new witnesses testify at the hearing. Defendant waived this issue. If a defendant "expressly approves" an action by the trial court, then this approval "constitutes a waiver that *extinguishes* any error." See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Because defense counsel explicitly stated that the trial court should review the motion on its own, defendant cannot now claim he was entitled to examine the new witnesses at a hearing. *Id.* at 215-216.

Third, defendant argues the trial court incorrectly scored 25 points for offense variable ("OV") 6, MCL 777.36. Defendant has also waived this issue. At sentencing, defense counsel argued OV-6 was incorrectly scored at 50 points, and he suggested that the appropriate score was either 10 or 25 points. The trial court ultimately scored 25 points for OV 6, and defense counsel then agreed that 10 points was not supported because there was no evidence of an extreme emotional state. Because defendant expressly recommended the score that was ultimately accepted by the trial court, he now cannot claim the trial court erred. *Carter, supra* at 215-216. Regardless of the waiver, at trial, the jury convicted defendant of assault with intent to murder. This offense is a specific intent crime. *Lipps, supra* at 105. As previously discussed, the evidence at trial was sufficient to sustain a conviction of assault with intent to murder. Evidence demonstrated that defendant fired a gun at Thomas at close range and then proceeded to chase Thomas as he attempted to escape while still firing the gun. This evidence as well as other record evidence led the jury to conclude defendant intended to kill Thomas. This was clearly demonstrated by the jury's decision to convict defendant of assault with intent to murder. Therefore, the trial court did not abuse its discretion when it determined defendant had an intent to kill and scored 25 points for OV 6. MCL 777.36(1)(b).

Fourth, defendant contends the trial court erred when it sentenced him to a minimum sentence of five years for the conviction of assault with intent to murder. This Court reviews a trial court's sentencing determinations for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). However, because defendant failed to preserve this issue, defendant "must show a plain error that affected substantial rights." *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). To avoid forfeiture under the plain error rule, three requirements must be met: "1) an error must have occurred, 2) the error must be plain, and 3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A plain error will warrant reversal only if it "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 independent of the defendant's innocence." *Id.* (internal citations omitted.)

MCL 769.34(10) states that if a defendant's minimum sentence "is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." See also *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). At sentencing, the trial court determined the sentencing guidelines suggested a minimum sentence between 51 to 85 months. The trial court sentenced defendant to not less than five years (60 months) and not more than 25 years. Because the minimum sentence was within the recommended minimum sentence range under the legislative guidelines, this Court must affirm defendant's sentence unless the trial court erred in scoring the sentencing guidelines or the sentence was based on inaccurate information. MCL 769.34(10).

Defendant contends the sentence was based on inaccurate information because the trial court erred when it failed to conduct an assessment of defendant's rehabilitative potential pursuant to MCR 6.425(A)(5). Defendant's claim is without merit. MCR 6.425(A)(5) requires a probation officer to conduct an investigation and complete a presentence report before a sentencing hearing and "depending on the circumstances," include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." MCR 6.425(A)(5). In the present case, the presentence report stated defendant was in good mental and physical health and that he did not have any substance abuse problems. This information satisfied the requirement of MCR 6.425(A)(5). Because there was no evidence of scoring errors or inaccurate information and because the minimum sentence was within the sentencing guidelines range, we affirm defendant's sentence. *Pratt, supra* at 429-430; MCL 769.34(10).

Defendant also maintains the trial court erred when it failed to state the reason for the sentence and how the sentence is proportionate to the offense. No such declarations are required. As this Court has held, a trial court must either select a minimum sentence within the guidelines range unless "substantial and compelling" reasons exist to justify a sentence that departs from the guidelines range. *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003); MCL 769.34(3). "[I]f the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines," then the trial court is not required to articulate any additional reasons for the sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Further, a minimum sentence within the sentencing guidelines is presumed proportional. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Because the minimum sentence was within the sentencing guidelines and the trial court relied on the sentencing guidelines to determine the sentence, the trial court was under no obligation to further state its reasons for the sentence. *Conley, supra* at 313.

In addition, defendant argues that Michigan's indeterminate sentencing scheme is unconstitutional and that the sentence must be vacated pursuant to the United States Supreme Court decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Under the doctrine of stare decisis, a decision of the Supreme Court is binding until the Supreme Court overrules itself. *People v Tims*, 202 Mich App 335, 340; 508 NW2d 175 (1993), rev'd on other grounds 449 Mich 83 (1995). The Michigan Supreme Court in *People v Drohan*, 475 Mich

140, 143; 715 NW2d 778 (2006), held that the Michigan sentencing scheme was constitutional and did not violate the Sixth amendment. In compliance with this ruling, defendant's sentence is not violative of *Blakely, supra*, and it is affirmed. *Id.*

Finally, defendant alleges that four instances of prosecutorial misconduct require a reversal of the conviction. Because defendant failed to object at trial, our review is limited to plain error affecting a defendant's substantial rights. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). A defendant's claim of prosecutorial misconduct is reviewed on a case-by-case basis. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). This Court has recognized that a defendant "is not entitled to a perfect trial, only to a fair one." *People v Harris*, 64 Mich App 503, 509; 236 NW2d 118 (1975). In general, prosecutors are given great latitude to "argue the evidence and all reasonable inferences from the evidence as it relates to (their) theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant alleges the prosecution impermissibly 1) denigrated the defense counsel during closing arguments, 2) vouched for the credibility of a witness, 3) bolstered the credibility of a witness, and 4) used false testimony. After a review of the record, we conclude there was no evidence to support defendant's claims. For that reason, we hold that a new trial is unwarranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio