

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL JAMAL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

September 15, 2009

No. 284981

Wayne Circuit Court

LC No. 08-000003-FC

Before: O’Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of armed robbery, MCL 750.529, two counts of assault with intent to commit murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 25 to 50 years’ imprisonment for each of the armed robbery convictions, 25 to 50 years’ imprisonment for three¹ assault with intent to commit murder convictions, four to seven years’ imprisonment for the felon in possession of a firearm conviction, and two years’ imprisonment for the felony-firearm conviction. We affirm defendant’s convictions and remand for entry of an amended judgment of sentence.

Defendant raises three issues on appeal. First, defendant claims that he was denied a fair trial because of prosecutorial misconduct. Second, defendant argues that he should be resentenced because of an error in calculating his sentencing guidelines range. Third, defendant argues that he was wrongly convicted and sentenced for one count of assault with intent to commit murder where the jury acquitted him of that count. We disagree with the first two arguments and agree with the last one.

A. Prosecutorial Misconduct

¹ That defendant was convicted of only two counts of assault with intent to commit murder yet sentenced for three counts is the subject of one of defendant’s issues on appeal.

Defendant argues that he was denied a fair trial when the prosecutor made improper comments during closing argument. A prosecutor's remarks are evaluated in the context of the evidence presented and in light of defense arguments. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *Id.* at 29.

The prosecutor, during closing argument, said, "You have to look at it from the shoes of the victims. Put yourself in their shoes and what would be your consideration if you were in their shoes." Later, during rebuttal, the prosecutor added, "So put yourself in their shoes and for those reasons I reiterate that I'm asking you to find the defendant guilty and you should be confident in doing so."

Generally, prosecutors are prohibited from asking jurors to place themselves in the position of the victim. *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999); *People v Leverette*, 112 Mich App 142, 151; 315 NW2d 876 (1982), overruled on other grounds *People v Wakeford*, 418 Mich 95, 110-113 (1983). The prosecutor's words, on their face, violated the mandate of *Leverette*, where this Court found the prosecutor's argument to be improper because it put the jurors in the position of the victim.. In *Leverette*, the prosecutor asked each juror to not decline to convict simply because the victim was the only witness. *Leverette*, *supra* at 150-151. Essentially, the prosecutor wanted the jurors to think of how they would feel if they were the victim and sole witness to a crime: a juror would certainly want such a defendant to be convicted. *Id.* at 151. In the present case, defendant argued that he was merely present at the crime scene and played, if anything, a minimal role in the crimes. It is noteworthy that the defense challenged the victim's testimony regarding defendant's role in the crime by implying that the home was a drug house and that all of the individuals present at the house were engaged in the drug trade.

Prosecutors are allowed to respond to defense counsel's arguments and theory of the case. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). An argument can be made that the prosecutor was attempting to get the jurors to dismiss any bias they may have had based upon their dislike for the victims and focus on the evidence to determine whether a crime had been committed. While improper, this is a far cry from the conduct in *Leverette*. In fact, while the prosecutor's phrasing of "put yourself in their shoes," was not technically proper, the underlying argument was a proper argument: you cannot acquit just because you do not like the victims. Therefore, regardless of the language used by the prosecutor, the crux of his argument was valid.

The two referenced remarks may have injected some prejudice into the jurors' minds, but the jury instructions were sufficient to cure any prejudicial effect since jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Here, there was an objection by defense counsel to which the trial court responded, "I'm going to give you the law so continue." This statement implicitly tells the jurors that they should essentially ignore the prosecutor's comment because the judge will inform them later on this issue. After closing argument and rebuttal, the judge explicitly instructed the jurors, "You must not let sympathy or prejudice influence your decision. As jurors you must decide what the facts of this case are. . . . You must take the law as I give it to you. If a lawyer says something different about the law follow what I say." Therefore, even if the prosecutor's statements were

impermissible, the judge's instructions cured any prejudicial effect, and defendant was not denied a fair trial. See *Cooper, supra* at 653-654.

B. Incorrect Sentencing Guidelines

Defendant argues that he should be resentenced because alleged scoring errors caused an incorrect, higher guidelines range to be used at sentencing. Generally, the application of statutory sentencing guidelines is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Preserved scoring issues are reviewed "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant argues that the ten points scored for Offense Variable 4 (OV 4) was incorrect. OV 4 deals with the degree of psychological injury suffered by a crime victim. MCL 777.34. Ten points is properly scored when serious psychological injury requiring professional treatment occurred to a victim. *People v Hicks*, 259 Mich App 518, 535; 675 NW2d 599 (2003); MCL 777.34. The fact that professional treatment was not sought is not conclusive when scoring the variable. *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005); MCL 777.34(2).

A victim's testimony regarding being put in fear during the crime's commission is sufficient to support the scoring of ten points for OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Here, Jalelle Abdullah testified that after he was shot three times, he tried "to get away" from the gunmen by stumbling into the kitchen. A logical inference is that he was trying to get away because he was scared of getting shot by the gunmen again. It turns out that Abdullah's fears were well justified since he, indeed, did get shot again – making it four times total – before collapsing down a staircase. Shanton Paredes also testified that he was in "shock" while he was witnessing defendant shoot Abdullah in the back in the kitchen. Paredes testified that he still was in shock long after the incident when he was reporting what happened to the police. Lastly, Gregory Willis testified that defendant pointed the gun at him and tried to cock the weapon, but Willis pushed defendant's arm and ran out the front door. Willis continued to run away from the house while being shot at by defendant, who was standing on the front porch. In fact, Willis was in such a hurry to leave the house that he left without his jacket or shoes and ran as fast as he could without even bothering to look back. Willis also testified that he ran out of the house because defendant was "trying to shoot me." Again, a logical inference from the testimony is that Paredes and, especially, Willis were fearful during the encounter with defendant.

Defendant also argues that OV 14 was improperly scored at ten points. Ten points is appropriately scored for OV 14 when a defendant acts as a leader in a multiple-offender situation. *Apgar, supra* at 330; MCL 777.44(1)(a). To determine whether a defendant was a leader in a multiple-offender situation, the entire criminal episode is evaluated. *Apgar, supra* at 330; MCL 777.44(2)(a). In *Apgar*, the defendant was convicted of criminal sexual conduct. *Apgar, supra* at 323. He was the first to have sexual contact with the victim and had the most sexual contact with her. *Id.* at 331. He also was the oldest, and only his DNA was found on the victim's body. *Id.* The *Apgar* Court noted that even though the defendant was not the one driving the vehicle, these facts were sufficient to support a finding that the defendant acted as the leader for OV 14 scoring purposes. *Id.*

Here, defendant had knowledge of the gambling and the amount of money present in the house. Defendant left the house and returned later with the second gunman. A natural inference is that defendant was the impetus in this criminal episode since he was the one who informed the other participant of the situation. Furthermore, since defendant was the one who knew the people inside the house, it was up to him to get the two gunmen admitted. Without defendant's effort, this criminal episode does not happen. The circumstantial evidence in this case is just as compelling as the evidence in *Apgar*. Therefore, there is sufficient evidence to show that defendant was a leader in a multiple-offender situation and scoring of OV 14 at ten points was proper.

Therefore, pursuant to MCL 777.62, defendant's appropriate guidelines range is 225 to 468 months, which is the range the trial court used. Since there was no error in the guidelines calculation and defendant's minimum sentence of 300 months is within the guidelines range, we must affirm defendant's sentence. MCL 769.34(10).

C. Clerical Error on Judgment of Sentence

Defendant argues that he was wrongly convicted and sentenced to a count of assault with intent to murder Jasmine Robinson after a jury acquitted him of that specific charge. We agree.

An unpreserved issue is subject to review only for plain error affecting the defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Here, defendant was charged with three counts of assault with intent to commit murder. The jury acquitted defendant of the count against Jasmine Robinson. The trial judge, during sentencing, also remarked that he was sentencing defendant on only two counts of assault with intent to murder. However, the judgment of sentence entered by the trial judge showed three convictions and three sentences for assault with intent to murder.

Given the discrepancy between what was stated in open court and what appeared on the written order, it is evident that a clerical error occurred. The error is obvious, and, in fact, the prosecution concedes the error. Just as clear, this error deprived defendant of a substantial right. Therefore, we agree with defendant that the judgment of sentence should be amended to remove this extra assault with intent to commit murder conviction and sentence.

We affirm defendant's convictions and sentences, but remand for the entry of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Cynthia Diane Stephens