

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORA JUNIOR HUDDLESTON,

Defendant-Appellant.

UNPUBLISHED

November 12, 2009

No. 285961

Berrien Circuit Court

LC No. 2007-405687-FH

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assaulting a jail employee, MCL 750.197c. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 4 to 15 years' imprisonment. We affirm.

Defendant first contends that there was insufficient evidence to sustain his conviction. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

MCL 750.197c, provides in relevant part, “[a] person lawfully imprisoned in a jail, . . . who . . . through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement . . . knowing the person to be an employee . . . is guilty of a felony”

To support a conviction of assault of an employee of a place of confinement, the prosecution must prove that the defendant: (1) was lawfully imprisoned in a place of confinement; (2) used violence, threats of violence, or dangerous weapons to assault an employee of the place of confinement or other custodian; and (3) knew that the victim was an employee or custodian. [*People v Neal*, 232 Mich App 801, 802; 592 NW2d 92 (1998), adopted by special panel 233 Mich App 649; 592 NW2d 95 (1999).]

The first element is not at issue in this case. The second element involves two separate inquiries: first, whether defendant acted with “violence” within the meaning of the statute, and second, whether defendant committed an assault against an employee. A simple assault may be committed either by an attempt to commit a battery or by an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). “A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.” *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

We conclude the evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant acted with violence under the statute when he threw feces and urine at Sergeant John McCoy. See *People v Boyd*, 102 Mich App 112; 300 NW2d 760 (1980) (throwing a container of liquid presumed to be urine amounted to violence under the statute); *Terry*, *supra* at 662-663 (spitting in the face of an officer amounted to violence under the statute). We also find that there was sufficient evidence to allow a rational jury to conclude beyond a reasonable doubt that defendant committed an assault against McCoy, an employee of the jail. Three deputies and McCoy testified that McCoy was hit with fecal matter and urine, which is an offensive touching. See *Terry*, *supra* at 663, and *Boyd*, *supra* at 117. Additionally, evidence showed defendant acted with intent because he was aware the deputies were prepared to enter his cell. McCoy instructed defendant to turn and face the back wall of the cell and defendant refused. Other testimony established that the officers warned defendant they were going to enter his cell, and officers instructed defendant to stop throwing feces. After deputies entered the cell, however, defendant took time to scoop fecal matter and urine out of the sink and throw it in the exact location where McCoy was standing, evincing that he acted with intent. Although defendant testified otherwise, this Court will not interfere with the factfinder’s role of determining the weight of evidence or credibility of witnesses. *Wolfe*, *supra* at 514-515.

Finally, the evidence was more than ample for the jury to reasonably infer that defendant knew that the assault victims were jail employees. McCoy and three other deputies testified that all the officers involved in the incident were in full uniform. “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, we find the prosecutor presented sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant assaulted McCoy within the meaning of MCL 750.197c.

Next, defendant contends that the trial court denied him his right to due process and a fair trial by admitting other-acts evidence, improperly instructing the jury, and failing to “control the prosecutor.” We review each of the alleged instances of error separately.

The trial court admitted evidence of an incident that occurred in 2006 at the Berrien County Jail, during which defendant used a Styrofoam cup to throw feces into the face of a deputy as the deputy attempted to serve him lunch. The trial court admitted the evidence to show common scheme, plan or system and to show motive and intent. MRE 404(b). We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

In order for evidence of a defendant’s other crimes, wrongs, or bad acts to be admissible pursuant to MRE 404(b), the evidence must meet the following requirements: 1) it must be

offered for a proper purpose; 2) it must be relevant; 3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice; and 4) the trial court may provide a limiting instruction. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In this case, evidence of the 2006 assault shares significant common features with the charged offense and shows defendant effectuated both assaults in a unique and distinctive manner. In both instances defendant was incarcerated at the Berrien County Jail and both times he saved feces and urine in containers inside his jail cell and waited for the opportunity to throw it at a deputy. Additionally, in both instances, defendant was angry. The similarities of the other-acts evidence and the charged offense in this case share a “concurrency of common features” such that they are “naturally to be explained as caused by a general plan of which they are individual manifestations.” *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000), quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249. The evidence was logically relevant to show common scheme, plan or system. In addition, the other acts evidence was logically relevant to show defendant intended to throw the feces at the deputies. Finally, the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Crawford, supra* at 398. In this case, the evidence was more than marginally probative; the trial court also provided a limiting instruction to the jury. In sum, the trial court did not abuse its discretion in admitting the challenged evidence pursuant to MRE 404(b).

With regard to defendant’s contention that the trial court improperly instructed the jury, we conclude that defendant waived appellate review of this argument because his defense counsel affirmatively indicated that he had no objection to the instructions. *Lueth, supra* at 688. Where there is waiver, there is no error to review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even were we to review defendant’s argument, it lacks merit. Specifically, defendant argues that the trial court failed to instruct the jury according to the language of MCL 750.197c that it find he assaulted the deputy “through the use of violence, threats of violence or dangerous weapons.” Jury instructions must be reviewed in their entirety and, even if imperfect, do not require reversal if they sufficiently protect the defendant’s rights by fairly presenting the issues being tried. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). In this case, the trial court instructed the jury that a “battery” is a “forceful, or violent, or offensive touching.” The trial court also informed the jury that defendant had to intend to commit a battery or place McCoy in fear of an imminent battery. Therefore, we conclude that the trial court effectively informed the jury that defendant must have intended a forceful, violent, or offensive touching, or intended to place McCoy in fear of an imminent battery. The court’s instructions fairly presented the issues being tried and protected defendant’s rights. *Id.*

Defendant did not preserve his argument that the trial court erred in failing to “control the prosecutor,” which we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). As discussed, *infra*, the prosecutor did not commit misconduct that denied defendant his right to a fair trial; therefore, defendant cannot show that the trial court committed any error in this regard that affected his substantial rights. *Id.*

Next, defendant contends the prosecutor made four statements that denied him his right to a fair trial and his constitutional right to due process. Defendant did not preserve this issue for appellate review because he did not make timely and contemporaneous objections to the

challenged statements. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). This Court reviews unpreserved claims of prosecutorial misconduct for outcome-determinative plain error. *Id.* Pursuant to the plain-error standard, a defendant must show: 1) that an error occurred, 2) the error was plain, 3) and the plain error affected substantial rights in that it affected the outcome of the lower court proceedings. *Carines, supra*. After reviewing the alleged improper statements, we find that defendant has failed to show plain error affecting his substantial rights.

Specifically, defendant first contends that the prosecutor improperly referenced facts not in the record when the prosecutor stated during closing argument that defendant did not like being in jail and that he was going to “punish” the deputies by throwing feces at them. “Prosecutors cannot make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case.” *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). “The prosecutor’s comments must be considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Id.* In this case, the prosecutor merely stated his theory of the case and a reasonable inferences arising from the evidence. *Id.* Also, the prosecutor’s statement was a proper response to defense counsel’s closing argument that defendant did not intentionally throw feces at the deputies, but rather he acted to keep “the walls from closing in.” *Id.*; *Callon, supra* at 330.

Second, defendant alleges that the prosecutor improperly appealed to the jury’s “civic duty” to obtain a verdict and injected sympathy into the proceedings when he argued that the deputies have a difficult job and did not deserve to have feces thrown at them and by arguing that being hit with feces is disgusting. It is improper for a prosecutor to appeal to the jury to sympathize with a victim or to urge the jury to convict as part of its civic duty. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). In this case, it was improper for the prosecutor to reference the difficulty of the deputies’ responsibility at the jail because it interjected issues broader than guilt or innocence. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). But this remark was brief and isolated, and the trial court instructed the jury that, “[t]he lawyers’ statements and arguments are not evidence” and that, “[y]ou must not let sympathy or prejudice influence your decision.” Because the prejudicial effect of most improper prosecutorial statements can be eliminated by a curative instruction, and because jurors are presumed to follow their instructions, defendant cannot show that plain error affected his substantial rights. *Unger, supra* at 235. The prosecutor’s statement describing defendant’s act of throwing feces and urine into McCoy’s face and mouth as “violent, disgusting, revolting or humiliating” was “permissible commentary on the evidence and the inferences drawn from the evidence.” *McGhee, supra*.

Third, defendant contends that the prosecutor impermissibly shifted the burden of proof when he argued that defendant was “using that stuff about the walls moving in as an excuse. He could’ve brought a doctor in here to say that he has those problems and he didn’t.” A prosecutor may not attempt to shift the burden of proof to defendant by commenting on defendant’s failure in general to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, “[w]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant.” *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). In this case,

defendant advanced an alternative theory of the case at trial that he needed to spread feces on the wall of his cell because of a mental condition. If the jury were to believe this theory, it would have accepted that defendant did not act with the intent to assault McCoy. *Id.* The prosecutor's remark was a proper comment on the validity of defendant's theory and did not shift the burden of proof in this case. *Callon, supra* at 331. "[I]t is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *Fields, supra* at 111 n 21, quoting *United States v Bright*, 630 F2d 804, 825 (CA 5, 1980).

Fourth, defendant contends that the prosecutor improperly asked him to comment on the credibility of witnesses when he asked defendant if he believed the officers lied during their testimony. It is improper for a prosecutor to ask a defendant to comment on the credibility of other witnesses because the defendant's opinion is not relevant to the fact finder's determination of witness credibility. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). Although the prosecutor improperly questioned defendant as to whether he believed the deputies were dishonest in their testimony, defendant has failed to show that the improper questioning amounted to plain error affecting his substantial rights. *Carines, supra* at 763. On direct examination, defendant himself accused the deputies of lying; the prosecution's questions were isolated, and there was overwhelming evidence in this case that would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed the charged offense. Any error did not affect defendant's substantial rights because it did not affect the outcome of the lower court proceedings. *Id.*

Defendant next contends that he was denied the effective assistance of counsel when his counsel failed to object to any of the alleged errors that he raises on appeal. Defendant failed to preserve the issue of whether he was denied the effective assistance of counsel for review because he did not move in the lower court for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court's review is therefore limited to mistakes apparent on the record. *Id.* "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, the defendant must demonstrate the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defense counsel objected to admission of the other-acts evidence at trial; however, he did not object to the jury instructions, any of the alleged improper statements made by the prosecutor, and he failed to object to the scoring of two offense variables raised in defendant's sentencing issue *infra*. As discussed already, defendant has failed to show that the prosecutor's conduct amounted to plain error affecting his substantial rights. Therefore, he cannot show that defense counsel's failure to object to the statements, or to the trial court's failure to control the prosecutor, prejudiced his defense by affecting the outcome of the lower court proceedings.

Toma, *supra* at 302-303. With regard to defense counsel's failure to object to the jury instructions, defense counsel's performance did not fall below an objective standard of reasonableness because, as discussed *supra*, the trial court did not err in instructing the jury. *Id.* Similarly, defense counsel's failure to object to the scoring of offense variable (OV) 1 and OV 19 was not below an objective standard of reasonableness because, as discussed *infra*, we find these variables were properly scored. See *Knapp*, *supra* at 386 (a defense counsel is not required to advocate a meritless position or make a frivolous objection).

Finally, defendant contends that the trial court erroneously scored OV 1, OV 9, and OV 19. We review "a sentencing court's scoring decision 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). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Additionally, we review the interpretation of the applicable statutes de novo. *Id.*

MCL 777.31 governs the scoring of OV 1. Twenty points are scored if "[t]he victim was subjected or exposed to a harmful biological substance" Pursuant to the statute "harmful biological substance" is defined according to MCL 750.200h which defines the phrase as a "bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans" The trial court scored OV 1 at 20 points, and defense counsel affirmatively indicated on the record that he did not have any objection to the score. Defendant has therefore waived review of the scoring of OV 1. *Carter*, *supra* at 214-215. Moreover, defendant's argument lacks merits. We take judicial notice of the fact that human fecal matter contains harmful bacteria that could cause disease in another human being, and conclude that it amounts to a "harmful biological substance" for purposes of scoring OV 1. In *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007), this Court affirmed the trial court's 20-point score for OV 1 where the defendant spat HIV-infected blood on a corrections officer. The Court took judicial notice that HIV-infected blood could spread the disease, and that therefore, it was a "harmful biological substance" under MCL 750.200h and MCL 777.31. Similarly, defendant exposed McCoy to harmful biological substance when he threw fecal matter into the face and mouth of the deputy. This evidence supports the trial court's finding that defendant exposed McCoy to a "harmful biological substance" within the meaning of MCL 777.31.

MCL 777.39 governs the application of OV 9, which is scored at ten points where two to nine persons are placed in danger of physical injury or death. MCL 777.39. In this case, McCoy and the three other deputies who entered defendant's cell were placed in danger of injury because the cell was covered in feces and urine and the deputies could have fallen on the floor or suffered injury in subduing defendant. Also, when defendant threw the feces and urine, he could have hit any of the deputies in the eyes or the mouth, causing them injury. In fact, two deputies were actually hit with the feces and urine. The record evidence thus supports the trial court's scoring of this variable at ten points.

Finally, MCL 777.49 governs the scoring of OV 19, which requires scoring 25 points when "[t]he offender by his or her conduct threatened the security of a penal institution" Defendant did not object to the scoring of OV 19 at the sentencing hearing and our review is limited to plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684

NW2d 669 (2004). Here, defendant spread feces and urine all over his cell and the mixture leaked under the cell door into the hallway. McCoy required the assistance of four other deputies to assist in controlling defendant so that the unsanitary and risky situation could be corrected. This diverted staff from other areas of the jail, which left the facility more susceptible to a security breach. This evidence supports the trial court's assessment of 25 points for OV 19.

We affirm.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Jane E. Markey