STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286852 Genesee Circuit Court
GILBERT LOPEZ, Defendant-Appellant.	LC No. 07-021216-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant Gilbert Lopez stood trial on charges of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a(2), possession of a firearm during the commission of a felony, MCL 750.227b, and conspiracy to commit armed robbery, MCL 750.157a, 750.529. A jury acquitted defendant of the felony murder charge, but convicted him of the remaining four charges. The trial court sentenced defendant to concurrent terms of 225 months' to 40 years' imprisonment for the assault and conspiracy to commit armed robbery convictions, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction, and a 95-month to 20-year term of imprisonment for the first-degree home invasion conviction, which the court ordered defendant to serve consecutively to his other sentences. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the March 4, 2007 attempted robbery and killing of the victim, Jerry Quackenbush, inside his home at 2110 Eberly Road in Flint Township. Defendant's trial occurred jointly with the trials of two codefendants, Cordaro Leville Hardy and Randy Percy James; defendant, Hardy and James all had separate juries. Several other charged accomplices testified at the joint trials pursuant to plea agreements with the prosecutor: Matthew Clement, Ricky Clements, and Cecil Thornton. The accomplices, Tiffany Hensley, defendant's girlfriend at the time of the March 4, 2007 shooting death of the victim, and a police officer who interviewed defendant on March 5, 2007 all testified that defendant made statements incriminating himself in the robbery planning and the shooting of the victim.

I. Other Acts and Character Evidence

Defendant first complains that the trial court deprived him of a fair trial by allowing the introduction of "direct and indirect evidence that he had planned and/or committed other

robberies, including a planned robbery of victim Quackenbush a few months earlier, and that he was a bad person who had trouble with his girlfriend's family." Defendant additionally avers that to the extent that his counsel introduced some of the improper character evidence, he was ineffective. The alleged other acts evidence and improper character evidence was revealed in the course of testimony by Hensley, defendant's former girlfriend. Hensley testified at length over the course of two days concerning her familiarity with the victim, defendant, and the numerous accomplices in this case, her knowledge of the charged events, and the details of the multiple statements she supplied to police officers investigating the events of March 4, 2007.

A. Defense Counsel's References to Other Acts

The first specific discussion that defendant argues injected improper other acts evidence occurred slightly more than halfway through defense counsel's initial cross examination of Hensley, which spanned 60 transcript pages. Defendant maintains that his counsel's references amount to ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers*, 248 Mich App at 714-715; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The first portion of the record cited by defendant reflects the following discussion:

> *Defense counsel*: Well did [defendant] tell you about anything else that went on that night?
>
> *Hensley*: I don't remember. All I know is what he told me.
>
> *Defense counsel*: Okay. Well did he tell you that he went with some guys and that they held up some place on the north end?
>
> *Hensley*: Excuse me?
>
> *Defense counsel*: Well I'm asking you. Did he say that he was with some friends and they went up on the north end and robbed someplace, hit a lick somewhere?
>
> *Hensley*: I mean they could have. I . . . really don't remember.
>
> *Defense counsel*: You wouldn't remember as we're sitting here today, you wouldn't remember if he told you he robbed someplace else before he robbed [the victim]?

Hensley: I don't remember if he did or not. I mean—

Defense counsel: I'm at second interview, page 15 at the bottom, page 16. Why don't you start right here at the bottom with your statement and go right through here, to here.

* * *

Does that refresh your memory whether or not you told the police about this other set of robberies that supposedly took place?

Hensley: Yes.

Defense counsel: And . . . so you told the police, now we're into the second interview. You didn't tell them this in the first interview, but now we're part way into the second interview and you tell them that [defendant] told you that he and, do you remember the people's names he told you he was with?

Hensley: I think it was Matt, Tyler, Devonte and some guy named Ray-Ray.

Defense counsel: Okay. So [defendant], Matt, Devonte, Tyler and Ray-Ray, they went up on the north end and they hit a lick or robbed someplace and then [defendant] said, I got an idea, let's go rob my girlfriend's grandfather?

Hensley: I don't know if that's how it went exactly 'cause I wasn't there—

* * *

Defense counsel: Is that essentially what you told the police?

Hensley: No, . . . what I told the police was, that [defendant] told me that him and his friends had went to the north side, they had handled their lick or whatever. And his friend had asked him if they knew about anything else and [defendant] said my girlfriend's grandpa or whatever. And somebody took him over there.

Defense counsel: So now, here we are into our second statement, a certain number of minutes into it 'cause we got 15 typed pages. And for the first time you disclose this to the police, right?

Hensley: I believe so.

Defense counsel: All right. So let me go back, and this is what [defendant] told you in the van, right?

Hensley: I . . . don't remember if it was in the van or not.

Defense counsel: Oh okay. So you don't remember where he told you this?

Hensley: No, I don't.

Defense counsel: Okay. So—but if it was in the van—well let me ask you this. He would have told you this at some point prior to you finding [the victim], right?

Hensley: Before I found [the victim] you mean?

* * *

Yeah.

Defense counsel: He would of [sic] told you that. So I'm certain at this point you must have believed [defendant] when he told you what he did to [the victim]?

Hensley: I didn't believe [defendant] when he told me what he did to [the victim].

Defense counsel: So even though, either in the van or sometime later in the day and one of these many phone calls that you're telling us about. [Defendant] tells you, not only do we rob [the victim], but we went up to the north end and we robbed somebody else and then went over and robbed [the victim], you're still not believing him? Is that what you're telling us?

Hensley: I didn't believe that he went to [the victim's] house, no.

Defense counsel: Okay. Did you just not think that was an important detail to give to the police?

Hensley: . . . I don't understand what you mean.

Defense counsel: Well the police are talking to you in your first interview, the time that's in here, it starts as 11:51 p.m., and it ends at 12:48 p.m., so a little over an hour. So that first interview for an hour, in that entire interview, you never thought it was important to tell the police that [defendant] told you that he and these other guys went and robbed some other house before they went over to [the victim's]?

Hensley: I guess not.

Defense counsel: Just make that stuff up? Is that what you just did? You made that up when you gave it to the police?

Hensley: No.

Defense counsel: And Gilbert didn't tell you that, did he?

Hensley: Yes.

After reviewing the challenged portion of the record, we find that defense counsel's mention of an uncharged robbery on the night of the victim's shooting did not constitute ineffective assistance of counsel. Defense counsel's inquiries of Hensley did not fall below an objective level of reasonable performance or trial strategy. The passage quoted above comprises a part of counsel's broader and successful effort to cast at least some doubt on Hensley's overall veracity by eliciting that the information or disclosures she made to the police morphed or varied through her multiple statements to investigators, and by prompting her to repeatedly express equivocation concerning the extent of her recollections. Given Hensley's direct examination testimony to the effect that defendant had admitted to her that he shot the victim, defense counsel reasonably pursued the defense strategy of seeking to undermine Hensley's credibility, including within the above portion of the record. *Rockey*, 237 Mich App at 76-77 (observing that decisions concerning "what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," and that "[t]his 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").

Even assuming that defense counsel's references to defendant's commission of an uncharged robbery fell below an objective standard of reasonableness, ineffective assistance would not exist because defendant cannot demonstrate a reasonable probability that but for counsel's errors the result of the proceedings would have differed and that the attendant proceedings were fundamentally unfair and unreliable. *Pickens*, 446 Mich at 312, 326-327; *Rodgers*, 248 Mich App at 714. Defense counsel extensively and thoroughly cross-examined Hensley and defendant's accomplices, who all incriminated defendant as the instigator of the planned robbery and the shooter of the victim. Defense counsel also argued in closing that Hensley and defendant's accomplices had substantial incentive to minimize the extent of their culpability in the planned robbery and shooting, and that much of their testimony in general and with respect to defendant's role in the robbery lacked credibility. The jury presumably had reasonable doubt about defendant's primary role in shooting the victim given that it acquitted him of the most serious charge against him, felony murder.

Moreover, viewing the challenged portion of the record in the context of the extended trial, which included the testimony of multiple witnesses incriminating defendant in the planned robbery and shooting, we detect no reasonable likelihood that the isolated four-page transcript excerpt quoted above can be said to have altered the outcome of the trial or rendered the trial fundamentally unfair and unreliable. The same analysis and conclusion applies when we take into account the brief, related portion of the prosecutor's redirect examination of Hensley, during which the following reference to an uncharged robbery took place:

Prosecutor: [Defendant]'s told you before that he's robbed other people?

Hensley: He's told me that—

Prosecutor: Keep your voice up.

Defense counsel: Judge . . . I'm going to object.

* * *

Prosecutor: Judge, this is follow-up. It's my first note after [defense counsel's] questioning of her. Himself he asked her about what [defendant] had told her about having previously robbed someone.

* * *

This is fair game.

Defense counsel: [There was] a specific reference to her statement about a robbery that occurred earlier that evening. If that's what re-direct is to, than obviously that's fair. But I do not—

The Court: That's—now let's be very specific.

Prosecutor: I can be more specific.

* * *

Do you remember [defense counsel] asking you that question?

Hensley: Yes.

Prosecutor: And you told him in reference to the portion of the statement that you had previously told the police that [defendant] had told you that he had robbed people?

Hensley: When they went to the north side, yes.

Prosecutor: Okay. Has [defendant] ever told you things that you didn't believe?

Hensley: Yes.

Even assuming for the sake of argument that defense counsel did not lodge the appropriate objection to the prosecutor's redirect inquiries of Hensley, such a failure would not have affected the outcome of the trial or deprived defendant of a fair proceeding because (1) the prosecutor limited the redirect questioning of Hensley concerning an uncharged robbery to the one specific inquiry quoted above and did not thereafter reference any uncharged conduct by defendant either during closing or rebuttal arguments, and (2) the record contained abundant, properly admitted evidence of defendant's guilt.

B. Codefendant's Counsel's Reference to Prior Incident at the Victim's House

The next allegedly improper injection of other acts evidence during Hensley's testimony occurred shortly after counsel for codefendant Hardy began cross-examining Hensley. The pertinent portion of the trial record reflects as follows:

> *Hardy's counsel*: And you . . . were repeatedly asked about statements that you made to the police officers on March 4th, March 5th, . . . do you recall that? One statement at the Flint police Post and the other one at the Flint Township?
>
> *Hensley*: Right.
>
> *Hardy's counsel*: Do you recall telling the police and also for that matter to testifying at District Court, that based on information you had received you thought, couldn't prove but thought, that [defendant] and a person named Scotty and a person named Quez had been involved in an incident at Mr. Quackenbush's sometime in December?
>
> *Defense counsel*: Judge, can we approach?
>
> *The Court*: Of course.

After a one-minute bench conference, the trial court announced, "At this time we have to have the Lopez jury leave the courtroom. So, thank you. Not the others just the Lopez." After defendant's jury had departed the courtroom, the trial court explained briefly, "All right, side bar conference now has resulted in the Lopez jury leaving the room based on the objection of [defense counsel]." Defendant's jury returned at the conclusion of Hardy's counsel's cross examination of Hensley.

The record thus plainly reveals that the jury had left the courtroom before Hardy's counsel elicited any testimony from Hensley with regard to a December 2006 "incident" at the victim's residence. Hardy's counsel did not even specifically mention a prior "robbery" of the victim or any other crime in which defendant may have had involvement in December 2006. Contrary to defendant's contention on appeal that "it would have been clear to the jury that . . . he had attempted . . . to rob [the victim] in December of the previous year," the record simply does not substantiate that his jury learned of a December 2006 attempted robbery of the victim.

C. Other Character Evidence

In the midst of Hensley's direct examination, the prosecutor asked her as follows about the nature of defendant's relationship with Hensley and her family:

> *Prosecutor*: . . . Do you remember telling the police about the history of your relationship with [defendant]?
>
> *Hensley*: Somewhat, yeah.

Prosecutor: How would you describe your relationship with [defendant]? What was it like back at that time?

Hensley: It was all right. I mean we did fun things.

Prosecutor: Okay. How was the relationship with your family as a result of you being romantically involved with [defendant]?

Defense counsel: Judge, I'm gonna object to relevance.

* * *

Prosecutor: Judge, I think that it's very important through the statement that she gives to the police, how certain things come out. The questions that we've [sic] already have in regards to why she would or wouldn't say things at a particular phase. She's indicated that she was still in love with [defendant]. And I think a bit of her background of the relationship and how that affected her familiar [sic] relationship—I'm just real briefly going into that.

A brief bench conference ensued, after which the record reveals the following pertinent inquiries:

Prosecutor: I guess what I'm getting at is, were there some of your family members who maybe weren't real happy that you were in a relationship with, specifically [defendant]?

Hensley: Yes.

Prosecutor: Was there some trouble now and then—

Hensley: Yes.

Prosecutor: —with your family? Okay. Back to March 3rd . . . .

The record reflects that defense counsel objected to the prosecutor's question of Hensley about her family members' attitudes toward defendant. Furthermore, we detect nothing in the prosecutor's lone inquiry about some of Hensley's family members' attitudes toward defendant that reasonably permits any specific, negative inference about defendant's general character, criminal or otherwise. Because the prosecutor's inquiry did not implicate MRE 404(a) or (b), defense counsel need not have objected on these grounds. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Moreover, the prosecutor's sole inquiry concerning defendant's relationship with Hensley's family did not affect the outcome of his trial in light of the ample, properly admitted evidence of his guilt. MCL 769.26; MRE 103(a).

II. Introduction of Perjured Testimony

Defendant next suggests that the prosecutor improperly introduced false or perjured testimony during his trial. Defendant elaborates that the "prosecutor's case was based on testimony from admitted liars who had perjured themselves numerous times in numerous venues, making it impossible to know when and where they were telling the truth." This Court considers

de novo questions of constitutional law. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath.
>
> Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, and that a prosecutor has a duty to correct false evidence. As this Court has explained,
>
> "(t)he prosecutor's duty to prevent lies from entering the evidence in the guise of truth stems not from any particular role in the adversary process; rather, it is derived from the prosecution's duty to represent the public interest, and to place the pursuit of truth and justice above the pursuit of conviction." (*People v Cassell*, 63 Mich App 226, 229; 234 NW2d 460 (1975).)
>
> In *Napue* [*v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959),] the United States Supreme Court expanded the prosecutorial duty to correct perjured testimony to include perjured testimony that related to the witness' credibility and not just the facts of the case. [*People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998) (some citations omitted).]

See also *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986) (explaining that "[i]t is inconsistent with due process when the prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, even when the false testimony goes only to the credibility of the witness").

Defendant insists that the prosecutor introduced perjured testimony by the three accomplice witnesses who testified at trial, Thornton, Clements, and Clement. Each of the accomplice witnesses had previously supplied two or three statements to police investigators and had offered admissions under oath to obtain their plea bargains; Clements and Clement additionally had testified at at least one preliminary examination. The multiple statements of Thornton, Clements, and Clement contained many inconsistencies within the accounts of each accomplice, presumably because of (1) the numerous occasions on which Thornton, Clements and Clement supplied their recollections of the evening of March 3, 2007 and the early morning of March 4, 2007; (2) Thornton, Clements, and Clement somewhat naturally at different points in the police investigation sought to minimize their culpability or the culpability of the robbery participants to whom they felt closest; and (3) Clements and Clement acknowledged having drunk substantial quantities of alcohol at the social gathering that occasioned most of the robbery participants' presence in the same location and their fatal trip to the victim's residence.

After reviewing the prosecutor's extensive direct examinations of Thornton, Clements, and Clement, we conclude that at no point during defendant's trial did the prosecutor knowingly or negligently elicit any false testimony by the accomplice witnesses. The first accomplice testimony presented at trial came from Thornton, whom the prosecutor initially questioned concerning his plea agreement and his recollection of the relevant events on March 3, 2007 and

March 4, 2007. The prosecutor then painstakingly led Thornton through the details of his two statements to the police and his plea agreement testimony and inquired about all of the inconsistencies within Thornton's various accounts, specifically whether Thornton had previously told the truth or lied to the police and whether he had told the truth in his account at trial. The prosecutor similarly placed the plea agreements of Clements and Clement on the record, elicited their recollections of the party that began on March 3, 2007 and the intended robbery and shooting in the early morning hours of March 4, 2007, and highlighted at length the inconsistencies between their trial recollections and their numerous prior statements.

The only specific alleged lies identified in defendant's brief on appeal that occurred at his trial involved the following testimony of Thornton:

> *Defense counsel*: Mr. Thornton, I am going to make certain that this morning I heard one of your answers earlier correctly. When the prosecutor was asking you about Randy—and Randy and Percy are the same persons, correct?
>
> *Thornton*: Yes.
>
> *Defense counsel*: About Randy having a gun. I understood you to say that you never saw him with a gun. Is that correct?
>
> *Thornton*: Correct.
>
> *Defense counsel*: All right. So as you're here today under oath, your testimony earlier is that you never saw Randy with a gun, correct?
>
> *Thornton*: Correct.
>
> *Defense counsel*: All right. Now didn't you tell Judge Fullerton, when you were under oath [at a plea proceeding], that in fact you had seen Randy or Percy with a gun?
>
> *Thornton*: Yes.
>
> *Defense counsel*: So my question to you is who are you lying to? Are you lying to these juries today, telling them that you never saw Randy with a gun, or were you lying to Judge Fullerton, when you were under oath, when you told her that you did see him with a gun?
>
> *Thornton*: Well, I was lying to the jury.
>
> *Defense counsel*: You were lying to the jury? Okay. Well, one thing that's been established by the prosecutor, you would agree with me wouldn't you, is that you are a liar?
>
> *Thornton*: Yeah.

> *Defense counsel*: All right. And in fact you lied by telling things that you [sic] not truthful and you lie by omission, correct? In other words you fail to fully disclose?
>
> *Thornton*: Correct.

Thornton additionally acknowledged that although he initially had stated at trial that in the getaway car after the shooting defendant ejected a shell from a gun while sitting in the back seat, he subsequently identified the back seat shell ejector as codefendant Hardy.

With respect to Thornton's alleged lies concerning codefendant James's possession of a gun around the time of the robbery and whether defendant had ejected a shell in the backseat of the getaway car, the above-quoted exchanges reveal that defense counsel brought these inconsistencies to the jury's attention. The prosecutor also retouched on these discrepancies in her redirect examinations. In summary, defendant has not substantiated that the prosecutor engaged in any conduct that deprived him of due process at trial; the record gives rise to absolutely no reasonable inference that the prosecutor knowingly or negligently elicited false or perjured trial testimony by defendant's accomplices. Under the American system of jurisprudence, the jury is the primary arbiter of truth and fiction in the accounts of the witnesses presented at a trial, and here the jury had the opportunity to weigh Thornton's, Clements's and Clement's trial testimony with full knowledge of their many prior inconsistent statements. *People v Lemmon*, 456 Mich 625, 639-642; 576 NW2d 129 (1998). This Court will not revisit the jury's credibility assessments. *Id*. at 642-643 n 22; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

III. Bolstering of Accomplice Witness Testimony

Defendant additionally claims that the prosecutor in her closing argument mischaracterized the potential penalties of the testifying accomplice witnesses as life in prison, and incorrectly insinuated that the accomplices faced the same potential punishment as defendant. Defendant also argues that the trial court reinforced the prosecutor's misleading argument by instructing that all three accomplices faced potential life terms of imprisonment. In defendant's estimation, "[t]he effect of the improper argument and instruction was to bolster . . . the witnesses' credibility, and this was unfair to [defendant], whose defense rested on demonstrating the incredibility of these witnesses' testimony."

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000),

criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, 240 Mich App at 720.

A. Closing Argument and Instruction Concerning Potential Accomplice Punishments

Defense counsel raised no objection at trial on the basis that the prosecutor's argument exaggerated the accomplice witnesses' potential post-plea bargain terms of imprisonment. The relevant portion of the challenged argument reflects the following:

> The cautionary . . . instruction regarding an accomplice [sic] testimony does tell you to examine it very closely. Think about whether it is supported by other evidence. Think about whether it is falsely slanted to make the defendant seem less guilty because of the accomplice's own reasons or bias or for some other reason. Consider their plea bargain. What their reward or promise is. In this case, what was the promise? *Potential life in prison but not life without parole. You can get life in prison or you can get a sentence* (inaudible). What did each accomplice tell you from this chair if (inaudible)?
>
> There is no promise not to prosecute someone. No one got a slap on the wrist or a promise of probation. *The two people [Thornton and Clements] who went to the scene plead to life felonies and a weapons offense requiring mandatory consecutive prison time and will face life in prison for their participation in this homicide*.
>
> When you consider that as a motive to lie, there is some way on a scale of how much of a benefit that is for a person that's why there is [sic] rare instances when a jury learns the crime penalties should be the exact same crimes as the defendant is charged with. You can't consider those penalties. The knowledge of those penalties when you determine whether or not Mr. Lopez is guilty of any of the crimes in which he is charged. You are provided that information to help you determine what motive or benefit that the accomplice witness may have when giving his testimony. . . . [Emphasis added.]

In this excerpt, the prosecutor correctly reiterated that Thornton and Clements, who pleaded guilty of assault with intent to rob while armed, faced a statutorily authorized maximum penalty of life imprisonment. MCL 750.89. Because the prosecutor aptly characterized the statutory maximum penalty under MCL 750.89, the above passage reveals no prosecutorial misconduct in this regard, *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (noting that only a prosecutor's clear and uncorrected misstatements of the law may deprive a

defendant of a fair trial), and no hint that the prosecutor intended to "vouch for the credibility of h[er] witnesses by suggesting that [s]he has some special knowledge of the witnesses' truthfulness." *People v Seals*, 285 Mich App 1, 22; ___ NW2d ___ (2009). Therefore, we find no error, plain or otherwise, arising from the complained of portion of the prosecutor's closing argument. Moreover, regarding defendant's expression of concern that the prosecutor exaggerated the accomplices' likely penalties, the jury plainly had awareness that Thornton and Clements faced minimum terms of imprisonment well short of life because defense counsel (1) questioned Thornton and Clements about their minimum sentence guidelines recommendations, which on the assault with intent to rob while armed count approximated 9 to 13 or 10 to 15 years for Thornton and 9 to 13 years for Clements, and (2) pointed out in his closing argument that Thornton and Clements, "the two most accountable people," received "deals that would get them out of prison in under twenty years."

Defendant also maintains, in another unpreserved appellate contention, that the following trial court instruction exacerbated the improper prosecutorial vouching:

> You have heard testimony that the three witnesses I previously numerated [sic], Cecil Thornton, Ricky Clements, and Matthew Clement have made agreements with the prosecutor about the charges brought against him [sic] in exchange for his [sic] testimony during the trial.
>
> *You have also heard evidence that each of them face the possible penalty of life in the state's prison as a result of those charges*. You are to consider this evidence only as it relates to that witness's credibility and as it may tend to show the witness's bias or self interest. [Emphasis added.]

This instruction tracked CJI2d 5.13, which the trial court properly read to the jury in this case in which the three accomplice witnesses offered testimony as part of plea bargains with the prosecutor. The only error inherent in the above excerpt constitutes the trial court's mention that Clement, who pleaded guilty of conspiracy to commit unarmed robbery, faced potential life imprisonment. MCL 750.157a; MCL 750.530(1) (authorizing a 15-year maximum term). However, the trial court's lone misstatement about the extent of Clement's potential maximum term of imprisonment did not render the instructions prejudicial to defendant because, when reviewed as a whole, "they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Furthermore, defendant faced no danger of prejudice given that the details of, and the minimum sentencing guidelines applicable to, Clement's conspiracy to commit unarmed robbery plea were placed on the record in detail during his trial testimony.[1]

[1] Defendant cannot demonstrate that his counsel's failure to object to the prosecutor's accurate closing argument and the trial court's lone instructional misstatement altered the outcome of the trial and deprived him of a fair proceeding. *Rodgers*, 248 Mich App at 714.

B. Closing Argument Discussion Concerning Consideration of Potential Penalties Faced by Defendant

According to defendant, the prosecutor likely confused the jury by unclearly stating that the jury could not consider a potential penalty in rendering defendant's verdict. Once again, defense counsel made no objection to the now challenged portion of the prosecutor's closing argument, the pertinent portion of which states as follows:

> You cannot consider the punishment that the testifying co-defendants received and your knowledge of what crimes are punishable by when you decide what to find that man guilty of.
>
> You have to look at the facts. And whatever the crime that those facts deem he is guilty of it is the facts in whatever the crime that you are required to convict him of. Irrespective of your knowledge of penalties. Remember, penalties can be used to evaluate the bargain method, witnesses (inaudible).

The prosecutor's discussion, although perhaps not eloquently uttered, correctly summarized the legal principle that a deliberating jury may not let a defendant's possible penalty influence its verdict. CJI 2d 2.23; *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973) (observing that "it is proper for the court to instruct the jury that they are not to speculate upon" matters involving "the disposition of a convicted defendant"). Thus, no prosecutorial misconduct arose from the prosecutor's penalty reference, and defense counsel was not ineffective for failing to object to the prosecutor's proper remark. *Mack*, 265 Mich App at 130.

IV. Prosecutorial Disparagement of Defendant and Appeals to Jury Sympathy

Defendant further contends that the prosecutor engaged in misconduct by appealing to jury sympathy for the victim and disparaging defendant's character in her closing and rebuttal arguments. Defendant alternatively submits that his counsel was ineffective for failing to object to the prosecutor's improper arguments.

Defense counsel offered no objection at trial to the allegedly improper sympathy invocation and character references that occurred in the following portion of the prosecutor's closing and rebuttal arguments:

> There was a plan for this robbery. And it was a plan that went incredibly, very tragically wrong. And Jerry Quackenbush paid the ultimate price for that plan. There's a 76 year old man, faced down on the kitchen floor in his pajamas because his plan was to go and rob him. He died trying to protect his home from Gilbert Lopez and his band of thugs who were out there trying to make a score.
>
> He was kind. He was generous. And he was compassionate. Gilbert Lopez was greedy, cocky, and full of bravado and booze. The true Gilbert Lopez was revealed not just in his heartless action in that kitchen of Jerry Quackenbush's home but his jaunt about town after the murder running into his mother, his friends, hassling his girl, and going back to Matt's to go to sleep. Even after encountering his own mother, outside of Terry's Lounge on that street,

> he doesn't do anything to seek help for the man that he left on that kitchen floor, shot. Left to die. Calls the girlfriend, who he has a bit of a rocky relationship and tells her that he shot and killed the man that she thinks of as a grandfather. Then he goes to hang out with his friends. And he moves on to the house of one of his confederates where he is ultimately arrested.
>
> * * *
>
> This band of thugs, this entity that has been created, is led by Gilbert Lopez to the home of Jerry Quackenbush. A man who has worked his entire adult life (inaudible) from General Motors to make his living. Raised a family, lost a wife. We learned from Tiffany that he was kind and giving, compassionate and loving. By his own choice, Tiffany wasn't his family. Tiffany's grandma wasn't his family nor was her mother. But by his choice, he treated her like family. And that choice, brought the ugliness of Gilbert Lopez and his band of thugs into his world.

The entirety of the prosecutor's discussion, including her characterizations of the victim and defendant, finds support in the evidence presented at trial and the reasonable inferences arising from the evidence. *Schutte*, 240 Mich App at 721. In particular, abundant evidence introduced at trial established that (1) the victim and Hensley's family shared a close relationship, in which the victim maintained frequent contact with Hensley and members of her family and often loaned them money, and (2) the plan to rob the victim arose at defendant's specific suggestion, the suggestion occurred at a party at a point when defendant and other robbery accomplices had imbibed significant quantities of alcohol, at defendant's request the carload of accomplices stopped and secured firearms before defendant directed the group on a 20-minute drive to the victim's residence, and defendant took the lead at the victim's residence by approaching and knocking on his back door, stepping inside, and firing a shotgun blast to the victim's chest. In summary, nothing in the prosecutor's discussion amounted to misconduct of any kind. See *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007) (observing that a prosecutor "has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms"). Even accepting defendant's position that the prosecutor somehow crossed the line in the passages quoted above, we conclude that any error qualifies as harmless in light of the relatively isolated nature of the remarks, the trial court's instruction that counsel's questions and statements did not constitute evidence, and the overwhelming, properly admitted evidence of defendant's guilt. *Watson*, 245 Mich App at 591-592.[2]

V. Sentencing Guideline Offense Variables

Defendant lastly insists that the trial court improperly scored five statutory offense variables (OVs) in formulating his terms of imprisonment. We review a trial court's scoring decisions to determine whether the sentencing court properly exercised its discretion and whether

[2] Defense counsel's failure to object did not amount to ineffective assistance of counsel. *Mack*, 265 Mich App at 130.

evidence of record 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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, the interpretation and application of the statutory guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). Where a defendant has failed to timely object to the trial court's scoring of offense variables, we consider his appellate contentions only to determine whether any plain error occurred that affected the defendant's substantial rights. *People v Brown*, 265 Mich App 60, 62-63; 692 NW2d 717, rev'd in part on other grounds 474 Mich 876 (2005).

A. OVs 1 and 3

Defendant avers in an unpreserved contention concerning OVs 1 and 3 that they "should not have been scored where the jury found him not guilty of shooting" the victim. The Legislature envisioned in MCL 777.31(1)(a) that a court should score OV 1 at 25 points where "[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon." Pursuant to MCL 777.33, a court should assign 100 points under OV 3 if "[a] victim was killed," MCL 777.33(1)(a), and "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b). The clear and unambiguous language of MCL 777.31(1)(a) and MCL 777.33(1)(a) and (2)(b) apply to the undisputed facts of this case—that defendant killed the victim by discharging a shotgun at him and homicide was not the sentencing offense.

Defendant theorizes that the trial court misscored OVs 1 and 3 by taking into account the victim's death when calculating the guidelines applicable to his assault with intent to murder and other convictions, thus ignoring that the jury had acquitted him of killing the victim. "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; ___ NW2d ___ (2009). However, unlike OV 9, which the Supreme Court held "does not so provide" for the scoring of factors beyond the sentencing offense, *id*., the plain language of OVs 1 and 3 obligated the trial court to consider and score points for defendant's discharge of a firearm "at or toward a human being," 777.31(1)(a), and to "[s]core 100 points if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b). We conclude that the trial court did not err, plainly or otherwise, by scoring OVs 1 and 3 at 25 and 100 points, respectively.[3]

B. OV 10

Defendant disputes the trial court's scoring of 15 points under OV 10, which permits this assignment when "[p]redatory conduct was involved" in the crime's commission. MCL 777.40(1)(a). The Legislature defined "predatory conduct" as "preoffense conduct directed at a

[3] Defense counsel was not ineffective for failing to object to the trial court's proper scoring of OVs 1 and 3. *Mack*, 265 Mich App at 130.

victim for the primary purpose of victimization." MCL 777.40(3)(a). To justify the imposition of 15 points under OV 10, evidence must support each of the following inquiries:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Cannon*, 481 Mich at 162.]

The testimony of several witnesses agreed that at some point on the evening of March 3, 2007, defendant and some accomplices had suggested the idea of committing a robbery, that defendant specifically identified the elderly victim as a robbery target, and that defendant arranged for five accomplices to acquire at least two firearms before traveling across town to confront the victim at his residence in the dark, early morning hours of March 4, 2007. Because the trial court in scoring OV 10 at 15 points cited the time of night when the robbery took place and defendant's securing of weapons and his group of accomplices, the court did not abuse its discretion when it found that defendant had engaged in preoffense predatory conduct intended to victimize the elderly victim.

C. OV 13

Defendant further challenges the trial court's scoring of OV 13 on the ground that the court ignored that "the Legislature's intent in enacting OV 13 . . . was not to include the contemporaneous offenses already scored in PRV 7." In MCL 777.43, which focuses on "continuing pattern[s] of criminal behavior," MCL 777.43(1), the Legislature authorized a court to assign 25 points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The Legislature offered the further guidance that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Because the jury convicted defendant of three felonies against a person, assault with intent to rob while armed, first-degree home invasion, and conspiracy to commit armed robbery, that undisputedly occurred "within a 5-year period," we conclude that the trial court properly scored 15 points for OV 13. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

D. OV 14

Defendant finally disputes the trial court's determination that he acted as a leader in committing the charged offenses. The Legislature directed in MCL 777.44(1)(a) that a court should score 10 points for OV 14 if "[t]he offender was a leader in a multiple offender situation." Defendant's position that the trial court erred in viewing him as a leader in this multiple offender situation ignores the wealth of trial testimony substantiating that defendant suggested the victim as the robbery target, that at defendant's urging the accomplices secured firearms en route to the victim's residence, that defendant advised Thornton and Clements of the various steps required

to navigate the 20-minute journey to the victim's residence, and that defendant was the first accomplice to approach the victim's back door, the only accomplice who knocked on the door and exchanged words with the victim, and one of only two accomplices who ever set foot inside the victim's residence, where he shot the victim. The trial court did not abuse its discretion in finding that the record justified scoring 10 points for OV 14.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder