STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2010
v	No. 286887 Ingham Circuit Court
KOVAN SADIQ MIZORI, Defendant-Appellant.	LC No. 07-001093-FC

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to commit murder, MCL 750.83, for which he was sentenced to serve concurrent sentences of 168 to 360 months and 135 to 360 months in prison, respectively.[1] Defendant appeals as of right. We affirm.

Defendant's convictions arise from a brawl during which the victims, two men who were trying to break up the various fights, were each struck in the head from behind with a baseball bat. Witnesses identified defendant as the perpetrator of these assaults.

Defendant first argues that he was denied a fair trial by the admission of hearsay testimony, and that he was denied effective assistance of counsel due to trial counsel's failure to object to that hearsay testimony. We disagree.

Because defendant failed to object at trial to the testimony he complains of now on appeal, this evidentiary issue is unpreserved. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Unpreserved evidentiary issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant's claim of ineffective assistance of counsel is also unpreserved because he did not request a new trial or an evidentiary hearing after the trial. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Review is therefore limited to

[1] The sentencing judge also recommended that U.S. Immigration and Naturalization Service consider whether deportation of defendant at the end of his sentence was appropriate.

mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant first argues that impermissible hearsay was admitted when a detective testified that he had received information identifying defendant as a possible suspect from a fellow officer. The detective specifically testified as follows:

> I received information from my sergeant, . . . who had received information from, I believe, Rudolfo Garcia, that his nephew, Darian Bachman, may know who the accused was. He gave a first name of Kavon with an unknown last name, but had some association with the Video 1 video store on Saginaw Street.

The detective went on to testify that he had previous knowledge that the last name Mizori was associated with the video store referenced above. Based on that knowledge, the detective searched a database and located defendant's name and photograph. The detective included defendant's photo in a "six pack" photo lineup for witnesses to review.

Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Fisher*, 220 Mich App 133, 152, 559 NW2d 318 (1996); *People v Bartlet*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Thus, the detective's testimony, quoted above, did not constitute hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c). Instead, the testimony explained the course and chronology of the police investigation, specifically the creation of a photo lineup including defendant's photo. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (testimony was properly offered to explain why the detective arranged for surveillance of the defendant's home).

We also reject defendant's argument that hearsay was improperly admitted when this same officer provided testimony related to the response of witnesses who viewed the photo lineup. The officer did not testify as to the witnesses' statements, but to the speed of their respective responses. In fact, the prosecutor specifically requested that the detective not say who each witness identified in the photo lineup; he asked only whether either witness hesitated in making their identification. Because the detective did not testify about another declarant's *statement*, his testimony cannot be considered hearsay. MRE 801(c). And, consequently, because neither instance of the officer's testimony that defendant now complains of constituted hearsay, counsel cannot be faulted for failing to object. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000) (defense counsel has no obligation to make a meritless objection).

Additionally, defendant argues that hearsay testimony was admitted when one witness testified "that she heard her mother state that an individual named 'Govan' hit an older man with a bat" and then later identified defendant as "Govan." While this presents a closer question than the aforementioned testimony, we find that this testimony, too, was not hearsay. The testimony was offered, not to establish that "Govan" struck the man, but rather to explain that the witness had introduced defendant to her mother by that name. Thus, there was no error in the admission of this testimony, and again, counsel cannot be faulted for failing to object to it. Further, even were we to find that this testimony constituted hearsay, we conclude that any error in its admission was harmless. See *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). The witness's mother provided first-hand testimony at trial that she knew defendant by the name

"Govan" and that she had observed him hit one of the victims in the head with a bat. In addition, several witnesses presented first-hand testimony that they had observed defendant hit a least one of the victims in the head with the bat. Accordingly, even if admission of this testimony was erroneous, defendant cannot establish prejudice resulting from that error.

Likewise, defendant is not entitled to relief pursuant to his argument that he was denied effective assistant of counsel when his counsel failed to object to this testimony. Even were we to conclude that the testimony was hearsay, given the overwhelming evidence of defendant's guilt presented at trial by other witnesses, defendant has not established that there is a reasonable probability that, but for counsel's alleged error in failing to object to the testimony, the result of his trial proceedings would have been different, or that the trial proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant next argues that he was denied a fair trial due to prosecutorial misconduct and that he was denied effective assistance of counsel by his counsel's failure to object to the alleged instances of misconduct. We disagree. Because defendant did not object to the alleged misconduct at trial, the issue whether the prosecutor committed misconduct is not preserved, and we again review under the plain error rule, *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980) (alteration by *Bahoda* Court).

Defendant first takes issue with the prosecutor's questioning of two defense witnesses related to their failure to talk to police, despite multiple police efforts to contact them, before trial.[2] Defendant claims that the prosecutor's questions implied that the witnesses had fabricated their testimony and resulted in denying defendant a fair trial. Defendant acknowledges that our Supreme Court has held that it is permissible to cross-examine an alibi witness on his or her failure to come forward prior to trial. *People v Gray*, 466 Mich 44, 46-47; 642 NW2d 660 (2002). However, defendant maintains that the witnesses were non-alibi witnesses who would not have had a "natural tendency" to come forward with their evidence.

Defendant directs this Court's attention to its holding in *People v Grisham*, 125 Mich App 280, 287-288; 335 NW2d 680 (1986), that non-alibi witness testimony is subject to a different standard than that of alibi witness testimony. However, defendant fails to acknowledge that *Grisham* specifically noted that

> [a] person who was with a defendant at the time the crime occurred would necessarily have the knowledge that the defendant could not possibly have committed the charged offense. In such a case it is perhaps arguably

[2] We note that defendant takes issue with the prosecutor questioning defense witnesses Gustavo Galindez and Gloria Meza as to why neither came forward before trial, but does not take issue with this same type of questioning as to defense witnesses Milton Moreno or Paubla Quinones.

> unreasonable for the witness to fail to bring such information to the attention of the state.
>
> On the other hand, a non-alibi witness, although possessed of potentially relevant and material information, is not necessarily aware that the information available to him or her will provide a defense to the charged offense or be relevant to the issues raised at trial. [*Id.*]

The *Grisham* Court found that the information possessed by the witness at issue in that case "was not of such a nature that she would have had a 'natural tendency' to take it to the government prior to trial if it were true," and thus, that "[t]he prosecutor should not have been permitted to insinuate her testimony was fabricated because she failed to do so." *Id.* By contrast, in the instant case, both witnesses testified that they were with defendant in the parking lot during the commotion outside and that defendant never had a bat and never assaulted anyone. This testimony fits squarely within the circumstances outlined by *Grisham*, and the prosecutor was entitled to question the witnesses related to their failure to come forward earlier.

Defendant also claims that, during closing arguments, the prosecutor impermissibly urged the jury to convict defendant based on its civic duty. Specifically, defendant challenges the prosecutor's rebuttal argument, where the prosecutor stated the following:

> [The victims], they'll never forget that night. Their lives have been affected for the rest of their lives. They were merely innocent bystanders trying to keep the peace and order in that parking lot and the Defendant took advantage of their vulnerability by cracking them over the head with a baseball bat. Send a message to him. Tell him our society doesn't tolerate conduct like that. Find him guilty. Thank you.

A prosecutor may not urge jurors to convict the defendant as party of their civic duty because such an argument "unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor is permitted to ask the jury to convict defendant based on the evidence. *Bahoda*, 448 Mich at 282. When the prosecutor's remarks are evaluated in context, it is apparent that they were not an appeal to the jurors to convict defendant on the basis of their fear and prejudices, or an attempt to invoke sympathy for hypothetical victims by injecting issues broader than defendant's guilt or innocence. *Id.*; *Abraham*, 256 Mich App at 273. Instead, the prosecutor properly urged the jury to hold defendant accountable for his actions, because the evidence established his guilt of the charged offenses, and this was not misconduct. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Accordingly, defendant's claim of ineffective assistance of trial counsel predicated on the failure to object to the prosecutor's conduct is without merit. *Kulpinski*, 243 Mich App at 27.

Defendant next argues that there was insufficient evidence presented at trial to support his convictions. We disagree.

This Court reviews claims of insufficient evidence de novo, viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). All conflicts in the evidence are resolved in favor of the prosecution. *Kanaan*, 278 Mich App at 619; *Terry*, 224 Mich App at 452. And, the reviewing court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003). "The essential elements of assault with intent to commit murder are: '(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005), quoting *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Defendant argues that his convictions cannot be sustained because there was no evidence presented at trial that he actually intended to commit murder. "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent to kill is sufficient." *McRunels*, 237 Mich App at 181.

There was evidence presented at trial that defendant wielded a baseball bat and deliberately struck two victims in the head from behind with that bat and that neither victim was engaged in fighting at the time of the attack. One party guest who witnessed the attack on one of the victims testified that defendant used a "full baseball swing" when he struck the man. The location of the blows, the use of a weapon that could easily inflict a mortal wound, and the fact that both unarmed victims were blindsided when they were trying to stop the fighting was sufficient to infer that defendant intended to kill. *McRunels*, 237 Mich App at 181.

Defendant's reliance on *People v Taylor*, 422 Mich 554; 375 NW2d 1 (1985) is misplaced. In that case, the victim was shot in the cheek during a confrontation that appeared to be the result of earlier gang-related animosity, and our Supreme Court remanded the matter to the trial court for additional findings because the trial court failed to indicate in any way that it found that the defendant possessed a specific intent to kill. *Id.* at 569. In contrast, in the instant case, the jury was properly instructed regarding the intent element and the verdict plainly demonstrated that the jury found that defendant had a specific intent to kill when he assaulted the victims. This difference underscores the fallacy of another of defendant's arguments, i.e., that defendant did not have the specific intent to kill because he could only be convicted of manslaughter if the victims died, given that he did not have the specific intent to kill. This is a classic example of circular reasoning. Moreover, the instant case is distinguishable from *Taylor* because the victims here were not involved in the "out-of-control melee" defendant describes, except in attempting to stop the ongoing fights. Thus, defendant was not acting with a lawful excuse or justification at the time he struck the men in the head with a baseball bat. Taken as a whole, and viewed in a light most favorable to the prosecution, the evidence presented below together with the reasonable inferences stemming from that evidence was sufficient to support defendant's convictions. *Hawkins*, 245 Mich App at 457; *Terry*, 224 Mich App 452.

We also reject defendant's argument that his sentences are invalid. Defendant first challenges the validity of his sentences by arguing that the scoring of offense variables (OV) 3 and 6 at 25 points each was error. Because defendant objected to the scoring of these offense variables at the sentencing hearing, this issue is preserved for appellate review. *People v Kimble*,

470 Mich 305, 309; 684 NW2d 669 (2004). "This Court reviews 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 Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 3 calls for the assessment of 25 points when a life threatening or permanently incapacitating injury occurred to a victim. MCL 777.33(1)(c). Defendant argues that there was insufficient evidence that either victim suffered an injury that was life threatening at the time it was inflicted. He further asserts that testimony from one victim's treating physician was insufficient to meet the standard of proof required for scoring OV 3 at 25 points. We disagree.

As an initial matter, defendant has provided no citation to authority for his argument that an injury must be "life threatening" at the time it was inflicted in order for 25 points to be assessed under the guidelines. Therefore, this argument is abandoned on appeal. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, the trial court heard testimony from the neurosurgeon asked to provide a consult for one of the victims that the victim's subdural hematoma, which resulted from the blow defendant inflicted to the victim's head, put pressure on the brain and that, if not treated properly, such an injury can impair brain function or cause death. This testimony was sufficient to support the trial court's scoring of OV 3 at 25 points. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 6 is scored for the defendant's intent to kill or injure another individual, and calls for the assessment of 25 points when the defendant had unpremeditated intent to kill. MCL 777.36(1)(b). Defendant argues that 10 points should have been assessed under the language of MCL 777.36(2)(b). That section instructs a sentencing judge to score OV 6 at 10 points "if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent." *Id.* Thus, MCL 777.36(2)(b) applies only when death occurs; plainly, it does not apply here, where neither victim died. Moreover, defendant's argument disregards the statutory requirement that the sentencing judge score OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). The jury found defendant guilty of assault with intent to commit murder. This is a specific intent crime. *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). Thus, the jury's verdict necessarily indicates that it determined defendant had the intent to kill. As a result, the trial court was required to assess defendant 25 points for OV 6.

Defendant also argues that his sentence is constitutionally barred by the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and its progeny. But, our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007).

Finally, defendant argues that the trial court committed reversible error in its response to the jury's request for clarification during deliberation. We disagree. There is no indication on the record that trial counsel objected to the trial court's response to the jury's question. Thus, this issue is unpreserved and reviewed only for plain error. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

The trial court must instruct the jury on the law of the case in a clear and understandable manner. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Jury instructions are reviewed as a whole to determine whether the trial court erred. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.*

Defendant does not argue that the jury instructions provided were incorrect. Instead, he maintains that the jury's request for clarification demonstrates that it did not understand the requisite intent necessary to find defendant guilty of the charged offense and that merely providing the same instruction that had clearly created confusion in the first place constituted error. The jury note does indicate that the jury needed clarification on the issue of intent. The trial court attempted to alleviate this confusion by providing a written copy of the jury instructions. This is a common practice employed by trial courts when juries express confusion over an element of a charged offense. The written instructions provided as follows:

> (1) The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
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> (2) First, that the defendant tried to physically injure another person.
>
> (3) Second, that when the defendant committed the assault, [he] had the ability to case an injury, or at least believed that [he] had the ability.
>
> (4) Third, that the defendant intended to kill the person.

Moreover, a review of the record reveals that the jury was instructed on the charge of assault with intent to commit murder, as well as the lesser charge of assault with intent to commit great bodily harm. Hearing the instructions for both assault with intent to commit murder and assault with intent to do great bodily harm in close proximity may account for the jury's confusion related to the level of intent. When the trial court provided a written copy of the instruction on assault with intent to commit murder, a written copy of the instruction on assault with intent to inflict great bodily harm was also provided, as follows:

> (1) You may also consider the lesser charge of assault with intent to do great bodily harm less than murder. To prove this charge, the prosecutor must prove each of the following beyond a reasonable doubt:
>
> (2) First, that the defendant tried to physically injure another person.
>
> (3) Second, that at the time of the assault, the defendant had the ability to cause an injury, or at least believed that [he] had that ability.
>
> (4) Third, that the defendant intended to cause great bodily harm. Actual injury is not necessary, but if there was an injury, you may consider it as evidence in deciding whether the defendant intended to cause great bodily harm. Great

> bodily harm means a physical injury that could seriously and permanently harm the health or function of the body.

These two instructions should have been sufficient to clear up any previous misunderstanding on the part of the jury. The fact that the jury did not request further clarification indicates that such was the case. Accordingly, we also reject defendant's assertion that trial counsel was ineffective for failing to object to the court's response to the jury question. *Kulpinski*, 243 Mich App at 27.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens