STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 288988 Kalamazoo Circuit Court
BRUCE LEE PARKER, Defendant-Appellant.	LC No. 2007-001823-FC

Before: SERVITTO, P.J., AND FITZGERALD AND BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, possession of a firearm during the commission of a felony, MCL 750.227b, and conspiracy to commit first-degree home invasion, MCL 750.157a. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 263 months to 50 years' imprisonment for armed robbery, 129 months to 30 years' imprisonment for first-degree home invasion, 87 months to 22-1/2 years' imprisonment for unlawful imprisonment, two years' imprisonment for felony-firearm with credit for 353 days in jail, and 129 months to 30 years' imprisonment for conspiracy to commit first-degree home invasion, with the sentences to run concurrent, except the sentence for felony-firearm, which is to precede and run consecutive to the other sentences. We affirm.

This case arises out of a November 16, 2007, early morning home invasion and armed robbery perpetrated by several men at a Kalamazoo, Michigan duplex where five young college women lived and a friend was staying the night. Defendant contends that he happened upon the home invasion, believing it to be the site of a party, and tried to stop the robbery as it was occurring, but hid in fear when a SWAT team arrived and surrounded the house.[1] At trial, several of the victims identified defendant as being the first intruder and actively participating in the robbery.

[1] Despite countless requests over a police loudspeaker to leave the house, defendant remained inside, alone, for several hours after all others had evacuated. Police deployed tear gas into the house, called in a K9 unit, and used a thermal heat detector to pinpoint defendant's whereabouts in the attic, which he accessed through a bathroom ceiling.

Defendant argues that the prosecutor denied him his constitutional right to silence and due process by eliciting extensive testimony regarding his post-arrest silence. Because defense counsel did not object to the prosecutor's questions, we review defendant's claims for plain error that affected his substantial rights. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). We find that the prosecutor's questions referred to defendant's silence before he received *Miranda*[2] warnings, thus the due process clauses of the United States and Michigan Constitution, US Const, Am V, XIV; Const 1963, art 1, § 17, have not been violated. See *People v Borgne*, 483 Mich 178, 187-188; 768 NW2d 290 (2009). Also, the prosecutor's questions related to testimony that was previously elicited by defense counsel at some length,[3] and "remarks by a prosecutor, even if improper, do not constitute reversible error where made primarily in response to matters previously discussed by defense counsel." *People v Green*, 34 Mich App 149, 151; 190 NW2d 686 (1971). Based on the foregoing, the prosecutor's questions did not violate defendant's constitutional rights to silence and due process.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's questioning of defendant about his silence. To establish ineffective assistance of counsel during trial, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Review is limited to errors apparent on the record because no evidentiary hearing was held. *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007). We find that because the prosecutor's questions were not improper, defense counsel was not ineffective for failing to object. Defense counsel is not ineffective for failing to make an objection that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Thus, defense counsel's performance did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302.

Defendant also argues that the trial court engaged in improper ex parte communication with the jury on substantive issues of law because the judge answered three written questions from the jury outside the presence of the parties and their attorneys; therefore, prejudice to defendant is presumed. Contrary to defendant's assertion, and aside from defendant's waiver as addressed below, there was no ex parte communication because, as stated by the trial court on the record, the court consulted with the attorneys before submitting written answers to the jury.[4]

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[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] The defense strategy appears to have been to explain why defendant failed to leave the house over the course of several hours despite police orders and efforts to evacuate him and to further his contention that he was caught off guard and disoriented by being at the wrong place at the wrong time.

[4] The record contains the following exchange prior to the jury being brought back into the courtroom with its verdict:

> *The Court*. . . . The record will reflect that there have been several questions—legal questions from the jury. Each of those had been in writing. Pursuant to

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While the court did not reconvene the parties and issue the written instructions in their presence before the jury, nothing in the record implies defendant was not permitted that opportunity.

In addition, defendant argues the trial court misstated the law as to the prosecutor's burden of proof when answering the jury's question regarding aiding and abetting. We find that because defense counsel approved of the trial court's handling of the jury questions and the trial court's answers to the questions by not objecting on the record, defendant has waived any argument of error on appeal. See *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Regardless, defendant's argument has no merit. "Instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). The instruction given by the judge in response to the jury's question relating to aiding and abetting was legally accurate and did not diminish the prosecutor's burden of proof. See *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006); CJI2d 8.1.

Defendant also argues that because defense counsel failed to object to the trial court's handling of the jury questions and the trial court's answer to the aiding and abetting question, his counsel was ineffective. This issue is not properly presented for our review because it was not raised in the statement of questions presented. See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008), citing MCR 7.212(C)(5). Nevertheless, the issue has no merit because there was no improper ex parte communication and the trial court correctly instructed the jury regarding aiding and abetting. Consequently, such objections by defense counsel would have been futile. See *Milstead*, 250 Mich App at 401.

Defendant next argues error with respect to the scoring of several offense variables (OVs). Specifically, he argues that OV 1, MCL 777.31, which considers aggravated use of a weapon, was improperly scored at 45 points because the maximum possible score for this variable is 25 points. With respect to OV 7, MCL 777.37, which considers aggravated physical abuse, defendant contends that there was insufficient evidence to support the scoring of 50 points because there was nothing in the record to indicate that anyone had been treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety of the victim. Finally, defendant argues that the scoring of OV 8, MCL 777.38, which considers

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> the court rule I have consulted with the attorneys and answered those questions in writing. All of the questions have been made part of the record, and were stamped and entered into the file.
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> Is there anything that needs to be placed on the record before we receive the jury and accept their verdict?
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> *The Prosecutor*. Nothing for the People, your Honor.
>
> *Defense Counsel*. No, your Honor.

victim asportation or captivity, was unsupported because the entire duplex was subject to the intruders' control so one room was not more or less dangerous than another. Further, any movement was purely for the purpose of committing the offense.

A trial court's calculation of the recommended minimum sentence range under the legislative guidelines is reviewed to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "'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), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Issues of statutory interpretation are also reviewed de novo. *McLaughlin*, 258 Mich App at 671. The Michigan Supreme Court stated in *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001):

> In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished. [Citations omitted.]

It was further explained by this Court in *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003):

> Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used . . . . Further, the language must be applied as written, and nothing should be read into a statute that is not within the manifest intent of the Legislature as indicated by the act itself. [Citations omitted.]

Starting with OV 7, the trial court scored OV 7 at 50 points. Defendant asserts he should have received zero points. MCL 777.37(1)(a) provides that 50 points should be scored for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." "'[S]adism' means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Emotional, psychological, or physical abuse can result in humiliation. *People v Mattoon*, 271 Mich App 275, 277-278; 721 NW2d 269 (2006). We find that the record supports the scoring of OV 7 at 50 points. The intruders' conduct, as described by the victims at trial, included awakening one or more victims in the middle of the night; kicking in a door and throwing one or more victims to the ground, kicking them, and pushing their heads down; tying up one of the victims and placing a pillow on her face; dragging one or more victims around the house by the neck and hair; pointing a gun at the head, ribs, and chin of one or more victims; striking a victim in the face with a gun; placing a gun in a victim's mouth and telling her that if she didn't shut up she was going to die; repeatedly threatening the victims with death; telling the victims that the intruders could not wait to kill them, (defendant in particular declared that "he had just gotten out of prison and he was not afraid to go back, and that he couldn't wait to f**king kill us bitches"); dragging

one victim down the hallway over another victim's body while proclaiming she "is going to be first"; and telling one victim that if she did not produce money, her breasts would be cut off. In the aggregate, these acts support a conclusion that the conduct was beyond that necessary to complete the charged offenses, and instead was "designed to substantially increase the fear and anxiety" of the victims suffered during the offense. Further, it subjected one or more victims to extreme humiliation as the result of emotional, psychological, or physical abuse, and was inflicted to produce suffering or for the offender's gratification. As such, the trial court did not abuse its discretion in scoring OV 7 at 50 points.

With respect to OV 8, defendant received a score of 15 points. OV 8 may be scored at 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). We find that the record supports the scoring of OV 8 at 15 points. In particular, one victim was moved from the entryway of the duplex into a bedroom upstairs, which was further into the house and more limited in terms of potential escape routes.[5] Also, several victims were seized from their various locations in the house and brought into the same bedroom, which made it easier for the intruders to prevent individual escapes and would have made the threatened executions of the women easier had defendant and his cohorts followed through on their threats.[6] In addition, one victim was later removed from the bedroom where the women were being held and brought to the isolated location of a closet where her death or a physical or sexual assault could have been forthcoming. Based on these facts, the record supports a conclusion that one or more of the victims were asported to another place of greater danger or to a situation of greater danger. See, e.g., *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996); *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995). Thus, there is evidence to support the trial court's scoring decision with regard to OV 8.

With respect to OV 1, defendant received a score of 45 points, which defendant contends exceeds the maximum possible score. The trial court indicated that it interpreted MCL 777.31 to permit the scoring of points for each person in danger of injury, and furthermore, that it had previously scored OV 1 at 45 points for co-defendant Sirvon Palmore. The court concluded that under the multiple offender provision, MCL 777.31(2)(b), defendant's score should also be 45 points. The court commented, however, on the need for clarification by this Court with respect to whether OV 1 is to be scored by adding together points applicable to each person in danger of injury or loss of life, or instead, is limited to a maximum score of 25 points.

MCL 777.31 provides, in pertinent part:

[5] When the victim was brought upstairs, she was also arguably placed in a situation of greater danger given that she had to jump from a second story window in order to escape after the police arrived.

[6] It is impossible to determine whether defendants and his cohorts would have followed through because the police arrived while the robbery was in progress.

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by *assigning the number of points attributable to the one that has the highest number of points:*

(a) 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 25 points

(b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device 20 points

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon 15 points

(d) The victim was touched by any other type of weapon 10 points

(e) A weapon was displayed or implied 5 points

(f) No aggravated use of a weapon occurred 0 points

(2) All of the following apply to scoring offense variable 1:

(a) *Count each person who was placed in danger of injury or loss of life as a victim.*

(b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points. [Emphasis added.]

In multiple offender situations, the trial court is typically bound by the score previously given to a co-defendant in accordance with the plain language of subsection 2(b); however, "the sentencing court should not be bound to apply an erroneous score . . . . " *People v Morson*, 471 Mich 248, 259; 685 NW2d 203 (2004). Thus, if co-defendant Palmore was erroneously scored under OV 1, defendant need not be subject to the same erroneous scoring. That said, and while we harbor significant doubt as to whether OV 1 can be scored any higher than 25 points,[7] we

[7] We have found no case in which this Court or the Michigan Supreme Court expressly upheld or rejected the scoring of OV 1 at greater than 25 points. Furthermore, as stated in *Morson*, 471 Mich at 256 and 261, OV 1 assesses points for aggravated use of a weapon and OV 9 assesses points for the number of victims. Reading *Morson* in particular, one may deduce that 25 points is the maximum score for OV 1. In *Morson*, one victim was robbed of her purse at gunpoint and another person, who witnessed the robbery, ran after the defendant and was shot in the chest. *Id.* at 253. Although there were two persons in danger of injury or loss of life as described in MCL 777.31(2)(a), the "highest number of points" discussed in that case was only 25 points. It is reasonable to conclude that the phrase, "[c]ount each person who was placed in danger of injury

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need not address the issue because even if OV 1 were rescored at 15 points instead of 45 points as defendant seeks, his total OV score would be reduced from 180 to 150 points, and he would remain at the highest OV level for all of the applicable sentencing grids. Because the correction of the alleged scoring error would not alter the applicable guidelines ranges, and defendant's sentences were within the appropriate guidelines ranges, resentencing is not required. See *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

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or loss of life as a victim," as set forth in MCL 777.31(2)(a), is an instruction to the trial court that it need not limit its focus to the actual victim of the offense when determining the maximum possible score, but rather, may consider other persons who were placed in danger when determining the highest possible score under OV 1. Thus, if a firearm was not discharged at the actual victim of the charged offense, but was discharged at another person in danger of injury, a score of 25 points is appropriate, see, e.g., *Morson*, 471 Mich at 258 (assessing 25 points for the shooting of the "good Samaritan"), unless the court is bound by a previous, proper lesser OV 1 score in a multiple offender situation.