STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2010
v	No. 288399 Kalkaska Circuit Court
THEODORE THOMAS KOZUBAL, Defendant-Appellant.	LC No. 08-002966-FH

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of one count of assault with intent to do great bodily harm less than murder, MCL 750.84.[1] The trial court sentenced defendant to 36 months to 10 years in prison. We affirm.

Defendant first argues that the prosecutor failed to divulge exculpatory evidence, specifically an email from a witness asking the prosecutor not to reveal that the witness was the source of certain information. However, because defendant through counsel acquiesced to the trial court's handling of the matter, this argument has been waived. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). In any event, especially considering that the witness was called by the defense, defendant has not shown that that he could not have obtained the information himself with reasonable diligence. Further, defendant has not established that a reasonable probability exists that the outcome of the proceedings would have been different had the email been disclosed earlier. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). The email did not exonerate defendant; it did not contain any admission of culpability by anyone. Rather, it simply noted an assertion that if no one talked to the police, everyone could escape responsibility. And, there was other evidence before the jury to establish that the actors in question were very uncooperative with police and were not forthright with information.

Next, defendant argues that he was denied a fair trial by prosecutorial misconduct and unfair evidentiary rulings by the trial court. Defendant's unpreserved assertions of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich

[1] Defendant was found not guilty of a second charge of assault with intent to do great bodily harm less than murder.

App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *Id.* at 448-449. Defendant's preserved evidentiary challenges are reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Defendant first asserts that the prosecutor committed misconduct by injecting remarks after defense counsel's objections were sustained in an attempt to denigrate defendant's case. We disagree. While the prosecutor's characterization of one objection as "made-up" and his assertion that another question posed was not "much of a stretch" were arguably improper, the trial court instructed the jury that the attorneys' questions and remarks were not evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).[2]

Defendant also asserts that the prosecutor engaged in misconduct by not presenting evidence to support factual assertions made during his opening statement. More specifically, he notes that the prosecutor stated in his opening statement that defendant slashed one victim's arm but presented no evidence to support that assertion. The prosecutor also stated that the medical records would show that a second victim was not intoxicated at the time of the incident, but defendant asserts the evidence showed the opposite. "The general rule is that when a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith." *People v Pennington*, 113 Mich App 688, 694-695; 318 NW2d 542 (1982).

We conclude that the record establishes that the prosecutor did not make unsubstantiated comments on the evidence; evidence was presented that could be characterized in the manner represented by the prosecutor. An eyewitness testified that that he saw the victim tackle defendant while defendant was still holding the broken bottle, and that immediately after that, the witness observed that the victim's arm had been cut. Additionally, while there was testimony that a hospital admission form indicated that the other victim was intoxicated, his treating physician testified that he was not "grossly intoxicated" at the time.

Finally, defendant argues that the prosecutor's comments during rebuttal argument regarding two witnesses was improper and warranted a mistrial. During closing argument, defense counsel noted that he called the two as witnesses, not the prosecutor. On rebuttal, the prosecutor indicated that he was responsible for their presence at trial. Certainly, a prosecutor may not question defense counsel's veracity or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008);

[2] Further, after the prosecutor characterized the objection as "made-up", the court sustained the objection and instructed the prosecutor on why his question was not a proper one. This actually placed defense counsel (and defendant by extension) in a good light. As for the "much of a stretch" comment, it could be seen as a comment on the court's ruling, not counsel's objection. Moreover, the court reiterated that the objection was sustained, thus validating the objection.

People v Dalessandro, 165 Mich App 569, 580; 419 NW2d 609 (1988). But that is not what happened here. Rather, the prosecutor's comments were directed to an implied assertion made by defense counsel that the prosecutor had not brought forth other possible perpetrators of the assault on one of the victims in an attempt to eliminate the possibility of finding reasonable doubt. This argument was not improper. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997).

Defendant also argues that the trial court improperly overruled several of his hearsay objections, and as a result, that evidence was improperly admitted denying him a fair trial. However, defendant fails to cite any authority to support this argument and he fails to analyze any of the alleged errors or how they affected his trial. Therefore, we conclude that defendant's argument is abandoned on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Defendant further asserts that the trial court erred when it gave the jury an instruction on flight because there was no evidence to support that defendant fled the scene. We disagree. Consistent with CJI2d 4.4, the trial court instructed the jury as follows:

> There has been some evidence—there may have been some evidence in this case that the defendant may have tried to run away or tried to hide after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear; however, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows that the defendant had a guilty state of mind.

"'A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.'" *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006), quoting *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). The trial court may provide an instruction when the evidence presented at trial supports giving that instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). "'[A] trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.'" *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), quoting *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Blackston*, 481 Mich at 460.

The trial court's decision to give the challenged instruction here was within the range of principled outcomes considering the evidence of record. "It is well established in Michigan law that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Additionally, the instruction did not state that defendant fled but that "there may have been some evidence in this case that the defendant may have tried to run away or tried to hide after the alleged crime." This leaves the issue whether there was a flight where it should be, in the hands of the jury, which was also properly charged with determining the significance of that evidence, if any.

Finally, we reject defendant's argument that offense variables (OVs) 1, 2, and 9 were improperly scored. Defendant was given 25 points for OV 1. MCL 777.31(1)(a) provides that 25 points is scored 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." The victim of the sentencing offense was severely cut with glass from a bottle when he was struck in the head with the bottle and it broke. Additionally, the second victim suffered severe cuts to his arm when defendant continued to wield the bottle after it was broken. This supports the score. The same is true of OV 2, which provides that 5 points are properly assessed if "[t]he offender possessed or used a pistol, rifle, shotgun or knife, or other cutting or stabbing weapon." MCL 777.32(10)(d).

MCL 777.39 governs the scoring of OV 9 and provides that the trial court assess 10 points when, "2 to 9 victims were placed in danger of physical injury or death, or 4 to 19 victims . . . were placed in danger of property loss." MCL 777.39(10)(c). Victim is defined as "each person who was placed in danger of physical injury or loss of life or property . . . . " MCL 777.39(2)(a). Defendant argues that the trial court erred in scoring 10 points because it should not have considered the victim of the charge for which he stands acquitted. However, when "fashioning an appropriate sentence," the court may consider "the evidence offered at trial, . . . including other criminal activities established even though the defendant was acquitted." *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Here, the second victim clearly was "placed in danger of injury or loss of life," as plainly evidenced by the fact that this second victim was actually injured as a result of defendant's conduct, so the scoring of OV 9 was also proper. See *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

We affirm.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis