

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LAWERENCE WAGNER,

Defendant-Appellant.

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UNPUBLISHED

October 5, 2010

No. 293280

Wayne Circuit Court

LC No. 07-011047-FC

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of felonious assault, MCL 750.82. Defendant was sentenced to 23 to 48 months' imprisonment. We affirm.<sup>1</sup>

**I. BASIC FACTS**

On the evening of May 27, 2007, Demario Watts, a limousine driver, picked up defendant and some of his friends for a night out. Over the course of the evening, defendant's behavior, according to Watts, became exceedingly strange and Watts suspected defendant was using drugs. Watts was also concerned that defendant would not pay him for his services. At around 4 a.m. the next morning, after defendant had made several attempts to jump out of the vehicle while it was moving, Watts proceeded to drive toward a police station. Defendant told Watts not to go to the police station and the two struggled for control of the steering wheel. Subsequently, Watts drove the limousine to his mother's house, all the while struggling for control of the steering wheel with defendant. Once the two arrived at Watts' mother's house, defendant proceeded to drag Watts from the vehicle. An altercation ensued during which defendant stabbed Watts twice, once six inches from his left lung and once in his back below his left shoulder blade. Watts' mother came to the front door of her home and heard her son say, "Oh, you done stabbed me. Oh, you going to jail now." She saw Watts on top of defendant and observed blood coming down Watts' back. Defendant was arrested and charged with armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than

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<sup>1</sup> This appeal has been considered without oral argument pursuant to MCR 7.214(E).

murder, MCL 750.84, and felonious assault, MCL 750.82. After a jury trial, defendant was convicted of felonious assault and acquitted on the other counts. This appeal followed.

## II. MOTION FOR MISTRIAL

Defendant first argues that the trial court erred by denying his motion for mistrial. Specifically, defendant contends that he was denied a fair trial because the prosecutor referenced his *capias* during cross-examination. We disagree. We review a trial court's decision on a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 587, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

Here, the prosecutor asked defendant during cross-examination, "Sir, in fact, the reason we're here in 2009 is because you didn't show up for court." Defense counsel immediately objected before defendant could answer, the trial court sustained the objection, and cross-examination promptly continued on a different subject. Subsequently, the jury was provided with a standard instruction that the attorneys' questions are not to be considered evidence.

Given our review of the record, we simply fail to see how defendant's entire trial was tainted, or how he was unfairly prejudiced, by the prosecutor's isolated reference to his failure to appear. Defendant has not shown that the result of the trial would have been different had the prosecutor not posed this question, or otherwise shown that the jury's verdict was improperly influenced by the statement. In fact, the jurors were specifically instructed that the attorneys' questions were not to be considered evidence. Jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and defendant has presented no reason or pointed to any record evidence to suggest that we should ignore this presumption.

Further, defendant's reliance on *People v McKenzie*, 121 Mich App 133; 328 NW2d 398 (1982) in support of his contention that reversal is required is misplaced. In *McKenzie*, this Court disapproved of the prosecutor's cross-examination of the defendant regarding the defendant's failure to appear for impeachment purposes. *Id.* at 136. The *McKenzie* Court did not reverse the defendant's conviction on this basis and, thus, its statement is dicta. *People v Green*, 205 Mich App 342, 345-346; 517 NW2d 782 (1994). Moreover, the prosecutor in the present case did not seek to impeach defendant, but rather to show defendant's consciousness of guilt. Nonetheless, even assuming for sake of argument that the prosecutor's question was inappropriate, defendant never answered it and the trial court instructed the jury that the attorneys' questions were not evidence; thus, no unfair prejudice resulted. The trial court did not abuse its discretion by denying defendant's motion for mistrial.

## III. SENTENCING

Defendant next argues that the trial court erred by scoring offense variable (OV) 3 at 25 points. Defendant contends that the evidence did not support this score, that the jury's verdict did not support this score, and that OV 3 should only have been scored at ten points for bodily injury requiring medical treatment. We disagree. "We review scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence

adequately supported a particular score.” *People v Wiggins*, \_\_\_ Mich App \_\_\_ ; \_\_\_ NW2d \_\_\_ (2010).

Under the sentencing guidelines, OV 3 is applicable when “physical injury” occurs to a victim. MCL 777.33. The statute directs the trial court to “[s]core offense variable 3 by determining which of [several listed factual circumstances] apply and by assigning the number of points attributable to *the one that has the highest number of points . . . .*” *Id.* Twenty-five points must be assessed if the physical injury to a victim is “life threatening or permanent[ly] incapacitat[ing] . . . .” MCL 777.33(1)(c), whereas 10 points must be scored if “[b]odily injury requiring medical treatment occurred to a victim . . . .” MCL 777.33(1)(d). Significantly, a trial court must score the highest number of points possible under this offense variable. MCL 777.33; *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005).

Here, Watts sustained two stab wounds, one six inches from his lung and another below his left shoulder blade. Watts did not die, but he had to receive medical treatment, including a blood transfusion of two or three units of blood. The natural and reasonable inference is that had Watts’ wounds gone untreated, he could have bled to death. “Scoring decisions for which there is any evidence in support will be upheld.” *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Because the evidence supported the score and because the trial court was required by the statute to score OV 3 at the highest number of points possible, it did err by scoring OV 3 at 25 points. See *Houston*, 473 Mich at 407. Further, the fact that the jury found defendant guilty of only felonious assault, and not assault with intent to do great bodily harm, is irrelevant. A sentencing factor, or an offense variable, need only be proved by a preponderance of the evidence and not beyond a reasonable doubt. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 140 (2006). The trial court did not err by scoring OV 3 at 25 points.

We affirm.

/s/ Elizabeth L. Gleicher  
/s/ Brian K. Zahra  
/s/ Kirsten Frank Kelly