STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2010
v	No. 289934 Kent Circuit Court
ROBERT WILLIAM LANGFORD, Defendant-Appellant.	LC No. 08-000608-FH

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; assault with a dangerous weapon (felonious assault), MCL 750.82; carrying a concealed weapon (CCW), MCL 750.227; and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 50 years' imprisonment for the former assault conviction, to 4 to 15 years' imprisonment for the latter assault conviction, and to 5 to 25 years' imprisonment for each of his CCW and carrying a dangerous weapon convictions. We affirm.

Defendant argues that the trial court erroneously failed to instruct the jury on the use of non-deadly force in self-defense. This issue is waived, because defense counsel expressed satisfaction with the trial court's jury instructions. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Even if this issue was properly before this Court, defendant would not be entitled to relief because he has failed to establish plain error affecting his substantial rights regarding this instructional error. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

In this case, defendant was charged with the offense of assault with intent to do great bodily harm of Michael Ross, among other charges. It is unclear how the dispute started given the conflicting testimony of the two victims, one eyewitness, and defendant. It is nonetheless undisputed that defendant possessed a box cutter, and that he displayed it during the incident. Defendant testified at trial that he did not swipe or stab either victim. This testimony, if believed, would be similar to the circumstance in *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). In *Pace*, the knife at issue was merely held at the defendant's side during the affray. *Id*. at 533. The *Pace* Court noted that merely displaying a knife does not constitute deadly force. *Id*. at 533-534. Therefore, the Court found that the trial court erred in offering the deadly force instruction along with the correct non-deadly force instruction. The implication of

the opinion is that it is error to give the deadly force instruction when the record evidence did not support it. In this case, however, the record contains evidence demonstrating that defendant did much more than hold the box cutter at his side. Notably, he admitted to the police that he cut Ross's shoulder. Ross claimed that defendant slashed him on the shoulder, and as a result, he required 16 stitches, could not work for two months, and has a permanent scar. However, as the *Pace* Court's opinion directed:

> In a case where the evidence is conflicting on whether deadly force has been employed under this definition, the trial court should preface MCJI 7:9:01 with a statement to the effect that "If you find that defendant utilized deadly force, the following is the standard for assessing his self-defense claim". Additionally, the court should also preface CJI 7:9:09 with a comparable statement indicating that what follows is the standard to be applied if the jury finds defendant only used nondeadly force. However, in cases where the evidence clearly establishes that deadly force has not been used, the court should not give CJI 7:9:01. [Id. at 535 n 7.]

It is neither for this Court nor the trial court to make a credibility ruling regarding the defendant's testimony under oath. It was, therefore, error to not provide the non-deadly force instruction and allow the jury to reach its own conclusion on the issue.

Although error plainly occurred in this instance, defendant is not entitled to relief because he has not demonstrated that the error substantially affected his rights. The testimony at trial was overwhelming that defendant did brandish the weapon. John Bailey, the eyewitness, testified that Ross started to flee from defendant after he brandished the box cutter, and that defendant slashed at Ross twice. According to Bailey, defendant missed with the first attempt, but slashed Ross's neck or shoulder with the second attempt. The testimony of Ross, the nature of his wounds and the admission of the defendant to the officers all supported the proposition that defendant appears to have used more force than necessary for self-defense in this case. See *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). We conclude that defendant's conduct fits the definition of deadly force, where "defendant's acts are such that the natural, probable, and foreseeable consequence of said acts is death." *Pace*, 102 Mich App at 534. Consequently, defendant has not established that the proper instruction would have resulted in a different outcome. As a result, the trial court's incomplete instruction to the jury on self-defense, though erroneous, did not affect defendant's substantial rights, *Aldrich*, 246 Mich App at 124-125.

Next, defendant claims that the prosecutor engaged in misconduct by improperly shifting the burden of proof onto him during the prosecutor's rebuttal argument. We review unpreserved claims of prosecutorial misconduct under the plain-error rule. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A prosecutor may not attempt to shift the burden of proof, *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); however, "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

Although the challenged portion of prosecutor's rebuttal includes language that questions whether defendant proved his defense to the jury ("did he prove any of his defense to you"), viewing the prosecutor's remarks in context, we find that the prosecutor was not attempting to shift the burden of proof onto defendant. Rather, the prosecutor was arguing that defendant's story was not corroborated by any supporting evidence, and, therefore, was not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Further, the prosecutor

properly responded to defendant's claims that he did not cause the injuries to the two victims. When a defense makes an issue legally relevant, the prosecutor may comment on the improbability of the defendant's theory or evidence. *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). Additionally, the prosecutor did not misstate the record by arguing that only defendant claimed that Ross was aggressor. It is true that there was testimony that defendant and Ross engaged in pushing; however, there was no testimony, other than by defendant, that Ross was the aggressor. We conclude that the prosecutor did not shift the burden of proof, where the remarks, taken in context, merely challenged the credibility of defendant as well as his defense theories. *McGhee*, 268 Mich App at 635; *Howard*, 226 Mich App at 548.

The trial court also instructed the jury at the conclusion of trial, in part, that the arguments of the attorneys did not comprise evidence, that the jurors must presume defendant's innocence, that they were only to consider the evidence admitted at trial, and that they were to decide which witnesses were credible, and that the prosecutor had the burden to prove the elements of each offense and to disprove defendant's claim of self-defense beyond a reasonable doubt. The trial court's instructions prevented any potential prejudicial effect. *Ackerman*, 257 Mich App at 448-449. Defendant, therefore, failed to establish plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

Defendant next asserts that defense counsel rendered ineffective assistance of counsel by failing to object to the foregoing alleged instructional error and claim of prosecutorial misconduct. To sustain a claim of ineffective assistance of counsel, a defendant must prove that defense counsel's "performance was deficient" and that deficiency "prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). As discussed previously, defendant failed to establish plain error affecting his substantial rights regarding the foregoing alleged errors. We conclude that the unpreserved allegations of instructional error and prosecutorial misconduct were not prejudicial to defendant; thus, defense counsel does not render ineffective assistance for failing to raise futile objections. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *Ackerman*, 257 Mich App at 455.

Defendant raised an additional six issues for appeal in a supplemental appellate brief. First, defendant claims that defense counsel rendered ineffective assistance of counsel by failing to raise an insanity defense. This claim entirely lacks merit. The record suggests that defendant's first appointed defense counsel sought to advance an insanity defense. The trial court subsequently ordered defendant to undergo a psychiatric examination regarding his claim of insanity. Defendant filed two *in propria persona* motions, which essentially opposed the prospective insanity defense. Notably, defendant moved to set aside the psychiatric examination. The trial court denied both motions. A psychologist conducted an evaluation of defendant, and the trial court conducted a subsequent hearing. The insanity defense was not addressed at the hearing, nor did the psychologist reference it in his report. We find that the insanity defense was abandoned as a possible defense based on defendant's *in propria persona* motions and his representations in the psychologist's report. We reject defendant's claim of ineffective assistance of counsel, where the record demonstrates that an insanity defense was considered, and ultimately rejected by defendant. A defendant is not allowed to assign error to something he deemed proper below, "[t]o do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Second, defendant contends that the trial court improperly denied a challenge for cause on a prospective juror. Such a decision is reviewed for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004). Even if the trial court erred by not excusing the challenged juror, reversal is not warranted. In such cases where reversal is required, "[t]here must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995). The record demonstrates that the final three prongs are not satisfied in this case. The defense did not exhaust all peremptory challenges, where defense counsel exercised peremptory challenges on three jurors, including the challenged juror. See MCR 6.412(E)(1) (criminal defendants are generally entitled to five peremptory challenges). Further, there is no indication that the defense sought to excuse any further jurors, where defense counsel ultimately expressed satisfaction with the jury. Thus, reversal is not warranted. *Id.*

Third, defendant challenges the sufficiency of the evidence for his carrying a dangerous weapon with unlawful intent conviction. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *McGhee*, 268 Mich App at 622. Defendant only challenges the element of intent. A defendant's intent can be proved by circumstantial evidence, "from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

Here, the testimony of Bailey and Ross, as well as defendant's admission to the police, establishes the element of intent, where if believed by the jury, the testimony and admission demonstrates that defendant possessed a box cutter and intended to injure Ross with it by slashing at him with it. *Id.* This Court should not interfere with the jury's credibility assessment of the witnesses. *Williams*, 268 Mich App at 419. Defendant essentially contends that there must be evidence that defendant intended to use the dangerous weapon unlawfully when he first possessed it. The plain meaning of the statute precludes the use of a dangerous weapon against the person of another. See MCL 750.226. The fact that defendant may have had a legitimate use for the box cutter when he initially obtained it does not matter. There is no statutory requirement that he have unlawful intent when he initially obtained the dangerous weapon. Defendant's box cutter would fall under the statute as a "razor" or "any other dangerous weapon or instrument," and the evidence demonstrated that he intended to use the box cutter unlawfully, i.e., in an assaultive manner, against a retreating Ross. MCL 750.226. Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence for a rational jury to find defendant guilty beyond a reasonable doubt of the offense of carrying a dangerous weapon with unlawful intent. *McGhee*, 268 Mich App at 622.

Fourth, defendant argues that the trial court erroneously failed to provide a correct jury instruction on the offense of carrying a dangerous weapon with unlawful intent, as well as failing to provide a missing evidence instruction. This issue is waived, where defense counsel expressed satisfaction with the trial court's jury instructions. *Carter*, 462 Mich at 216; *Tate*, 244 Mich App at 559. Nevertheless, the record demonstrates that the trial court's jury instruction on the offense of carrying a dangerous weapon with unlawful intent was proper, where it included

all of the elements of the charged offense. *Canales*, 243 Mich App at 574. Further, defendant was not entitled to a missing evidence instruction, where there is no evidence that the prosecution acted in bad faith in allegedly failing to produce evidence. See *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). Defendant failed to establish plain error affecting his substantial rights. *Aldrich*, 246 Mich App at 124-125. Defendant's related claims of ineffective assistance of counsel are abandoned for failure to address the merits of such claims. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Fifth, defendant asserts that offense variable (OV) 4 was improperly scored. We review unpreserved allegations of error under the plain error rule. *Carines*, 460 Mich at 763-764. Defendant received 10 points for OV 4 reflecting that a "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). We agree with defendant, where there was no evidence that any victim suffered a serious psychological injury in this case. Although erroneously scored, reversal is not required, because an erroneous score that would not, when corrected, result in a different recommended range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Here, defendant had a prior record variable score of 70 points for a PRV level E, and an OV score of 60 points for an OV level V. Deducting 10 points for the erroneous OV 4 scoring results in a new total OV score of 50 points. Defendant's OV Level V remains unchanged. See MCL 777.65; MCL 777.21. Thus, this scoring error does not warrant reversal. *Id.*

In reaching our conclusion, we reject defendant's related claims of ineffective assistance of counsel, because defense counsel does not have to make meritless objections. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Additionally, we reject defendant's contention that the guidelines scoring improperly increased his sentences based on factual findings not made by a jury contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). *Blakely* does not affect our sentencing scheme, because Michigan uses an indeterminate sentencing scheme, wherein the trial court sets the minimum sentence but cannot exceed the statutory maximum. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). In this case, all of his minimum sentences were within the recommended minimum sentence range under the legislative guidelines and the applicable statutes set the maximum sentence. *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

Finally, defendant complains that the trial court committed numerous sentencing errors with respect to the imposition of his sentences. As noted above, we conclude that defendant's sentences were proper. See *Babcock*, 469 Mich at 256. After an exhaustive review of the record, we conclude that none of the alleged sentencing errors require vacation of defendant's sentences or a remand for resentencing. Defendant's related claims of ineffective assistance of counsel are abandoned for failure to address the merits of such claims. *McPherson*, 263 Mich App at 136.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens