STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 2010
V JAMES ANTHONY-WILLIE CROSS, Defendant-Appellant.	No. 292669 Kent Circuit Court LC No. 08-011642-FC

Before: STEPHENS, P.J., AND MARKEY AND WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; possession of a firearm during the commission of a felony, MCL 750.227b; assaulting/resisting/obstructing an officer during the performance of his duties, MCL 750.81d(1); felon-in possession of a firearm, MCL 750.224f; and carrying a concealed weapon, MCL 750.227. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 40 to 90 years' imprisonment for his assault with intent to commit murder conviction, five years' imprisonment for his felony-firearm conviction, 5 to 15 years for his assaulting/resisting/obstructing an officer during the performance of his duties conviction, 10 to 25 years for his felon-in possession of a firearm conviction, and 7-½ to 20 years for his carrying a concealed weapon conviction. The sentences for his felony-firearm conviction and carrying a concealed weapon conviction are to run concurrently to each other. The remaining sentences are concurrent with each other but consecutive to the felony-firearm sentence. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that there was insufficient evidence of his specific intent to kill to convict him of assault with intent to commit murder. We disagree. "The 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 McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) (citation omitted). To prove the second element, a prosecutor must show that a defendant had the specific intent to kill, not a general intent. *People v Brown*, 267 Mich App 141, 148-149; 703 NW2d 230 (2005). "[T]he distinction between specific intent and general intent crimes is that the former involves a particular criminal intent beyond the act done, while the latter involves merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 574; 339 NW2d 461 (1983) (citation omitted). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be

inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *Hawkins*, 245 Mich App at 458. A "jury may infer an intent to kill from the manner of use of a dangerous weapon[.]" *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

Here, the evidence demonstrates that in the early morning hours of October 21, 2008, Officer Thomas Warwick of the Grand Rapids Police Department was on patrol when he saw a Dodge Intrepid parked in a gas station parking lot. He soon learned that the license plate was expired and followed the Intrepid out of the parking lot. Meanwhile, another police cruiser driven by Officer Bradley Cutright of the Grand Rapids Police Department and also containing Officer James Butler of the Grand Rapids Police Department began following Warwick's cruiser. Eventually, the Intrepid pulled over, at which point defendant immediately exited the passenger side and ran from the scene. Warwick and Butler chased defendant on foot. Butler caught up with defendant after defendant scaled over a chain link fence. Butler reached through the fence, grabbed the back of defendant's shirt, and pulled him back against the fence to prevent him from running any farther. Warwick then scaled the fence, at which point defendant pulled out a handgun. Butler saw the gun and warned Warwick. When Warwick landed on defendant's side of the fence, defendant deliberately aimed the gun directly at Warwick's head. After a struggle, Warwick recovered the gun. After defendant was detained, Butler picked up the gun and gave it to another officer who observed that the gun was loaded with the safety in the "off" position, and that there was one live round in the chamber and seven in the magazine. Based on these facts resolving all conflicts in favor of, and viewing all the evidence in the light most favorable to the prosecution, we conclude that a reasonable trier of fact could have viewed all the evidence in the record and inferred that defendant possessed the specific intent to kill Warwick with the handgun. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Kanaan*, 278 Mich App at 619.

Next, we address defendant's numerous claims of prosecutorial misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights to determine if defendant was denied a fair trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and a prosecutor's comments must be viewed in context of the pertinent portions of the record, *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003).

First, defendant argues that the prosecutor elicited irrelevant and prejudicial testimony from several witness. In particular, he challenges as improper: (1) testimony by Warwick that he identified the Intrepid in a high crime area with a history of robberies and gang activity, (2) testimony by Warwick and Butler that they could have used deadly force during the altercation, (3) testimony by Warwick that he and Butler were runners and in good shape, and (4) testimony that the gun was unregistered. Regarding the first three statements, we conclude the testimony was relevant and admissible as part of the res gestae, *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979); *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), and in order to provide the jury with the "complete story" of the events surrounding the crime, *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Moreover, the officers' testimony regarding the use of deadly force and Warwick's statement regarding their level of fitness were relevant to

the demonstrate the severity and intensity of the struggle with defendant and were logically relevant as circumstantial evidence of his state of mind at the time of the crime, which, as previously indicated, was a material fact at issue to prove assault with intent to commit murder. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998) (citation omitted) ("Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence[.]"). The testimony concerning the registration of the gun was relevant to the charges of felon-in-possession of a firearm and carrying a concealed weapon. Although all of the above testimony was prejudicial to some extent, as is all evidence for that matter, *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994); *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995), the evidence was not so prejudicial as to inject extraneous considerations into the lawsuit, such as jury bias, sympathy, anger, or shock. *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). Since the evidence was relevant and admissible, prosecutorial misconduct did not occur. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); see also *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002) ("Case law is clear that a prosecutor has the discretion to prove his case by whatever admissible evidence he chooses.").

Defendant also argues that the prosecutor made several improper remarks during her opening statement. In particular, he challenges (1) her statement that Warwick was in a high drug traffic area and (2) her comment that it was a routine day for Warwick, but that he quickly became scared and engaged in a fight for his life. Warwick testified that he first identified the Intrepid in a high crime neighborhood where there were many robberies and drug and gang activity. As previously indicated, his testimony was relevant and admissible. Thus, the prosecutor's comment during opening statement merely forecasted the anticipated testimony, and was not improper. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991) ("Opening argument is the appropriate time to state the facts to be proven at trial."). Similarly, Warwick testified that he had been assigned to patrol the area near the parking lot since March of 2008, and that he "was in definite" fear that defendant would regain control of the gun after he, Warwick, took possession of it. Additionally, Butler testified that he believed defendant would have shot Warwick if he had more time. Thus, again, the prosecutor's remark during the opening statement merely stated facts that would later be proven at trial. *Id.*

Defendant also argues that the prosecutor made several improper remarks during her closing argument. First, he challenges her argument that defendant knew the gun was loaded. There was testimony that moments after defendant was detained an officer observed that the gun was loaded. Subsequent testimony showed the gun was fully operational. As there was additional testimony that defendant knowingly possessed the gun, the prosecutor could logically infer, and argue to the jury, that defendant also knew that it was loaded. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003) ("A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.")

Defendant also challenges two additional remarks during closing argument as irrelevant and prejudicial because they improperly encouraged the jury to sympathize with the victim and convict defendant based on civic duty. In particular, the prosecutor first commented: "In going over this case and trying to decide what to say to you all today, the main thing that goes through

my mind in a case like this is do they understand how close you were to that officer [Warwick] not being able to sit here today?" She then stated:

> So, an older detective here—And [sic] I have to tell him I said he was an older detective. [sic]— in the hallway—he stopped by. [sic] – and he said, "Oh, that's the case with Warwick?" He said, "You know, when I read that report," – this is him talking. [sic] – "the hair on the back of my neck raised up." He said, "I don't [sic] if it had been me, like an older guy, a slower guy, you know, not as in shape, if I would have made it. I probably would have shot him, if I saw the gun, or I would have been shot."

Contrary to defendant's argument, we conclude that these remarks did not amount to an improper "civic duty" argument that appealed to the fears and prejudices of the jurors. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). However, we find that the logical inference from these statements was that defendant very nearly killed Warwick and that even the possibility of his death was emotional. Such an appeal to sympathy was improper. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). We also find that the latter remark concerning the older detective's statement was improper because he did not testify at trial, so his statement was not in evidence. *Ackerman*, 257 Mich App at 450. However, these statements were brief and relatively short in light of the rest of the prosecutor's long closing and rebuttal closing arguments. Thus, the improper comments did not so deflect the jury from the evidence presented as to deny defendant a fair trial. *Id.* Moreover, the trial court instructed the jury multiple times that the lawyers' statements and arguments were not in evidence and should not weigh in its decision. Thus, although the prosecutor's remarks were improper, we conclude that the brevity of the comments combined with the jury instructions cured any prejudice that might have occurred.[1] *Unger*, 278 Mich App at 237.

Defendant also argues that the prosecutor improperly misstated the standard of "beyond a reasonable doubt" during her closing argument; however, our reading of the challenged remark does not indicate that the prosecutor ever attempted to recite the standard or mislead the jury. Plain error did not occur.

Defendant also alleges that the cumulative effect of the combined errors denied him a fair trial. However, the few errors discussed *supra* were harmless individually, and we find that their combined effect was not any more prejudicial to defendant than they were in isolation. Thus, defendant was not denied a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) ("Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial.").

Next, defendant argues that he is entitled to resentencing because offense variables (OVs) 1, 2, 9 and 19 were miscored and the court engaged in impermissible judicial fact-finding.

[1] Contrary to defendant's argument, we conclude that the other previously identified instances of alleged prosecutorial misconduct did not encourage the jury to sympathize with Warwick or appeal to civic duty.

However, defendant's claim has been squarely rejected by our Supreme Court, *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), and we are bound by that decision, *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). Thus, defendant's argument is clearly without merit.

Nevertheless, regardless of any alleged judicial fact-finding, defendant also argues that the facts did not support the scoring of OV 19. "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." *McLaughlin*, 258 Mich App at 671. "Sentencing guidelines scoring decisions for which there is any supporting evidence will be upheld on appeal." *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). MCL 777.49(b) provides that 15 points must be scored if "[t]he offender used force. . . to interfere with. . . the administration of justice[.]" Here, Warwick and Butler were investigating the expired license plate when defendant fled on foot and subsequently fought and resisted the officers. Thus, there is no question that the officers were in the process of administering justice, and that defendant used force to interfere.[2] The facts support the score. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009).

Next, defendant argues that his trial counsel was constitutionally ineffective. Defendant recites the applicable law setting forth the standard for ineffective assistance of counsel, but he includes no discussion or application of the law to his case. Absent any reference to his counsel's specific conduct, the issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

[2] We reject defendant's argument that MCL 777.49(b) is unconstitutionally void for vagueness. "Statutes are presumed to be constitutional, and a statute is to be construed in a constitutional manner unless the unconstitutionality of the statute is facially obvious." *People v Osantowski*, 274 Mich App 593, 601; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008). In light of the plain and unambiguous language of the statute, see *Barbee*, 470 Mich at 286, we conclude that a person of ordinary intelligence could read this statute and "give the words. . . their ordinary meanings." *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). As such, the statute is not unconstitutionally vague. *Id.*