STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2010
v	No. 289886 Wayne Circuit Court
FELTON DWAYNE KNUCKLES, Defendant-Appellant.	LC No. 08-008237-FC

Before: OWENS, P.J., and K.F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted of unlawful imprisonment, MCL 750.349b, felon in possession of a firearm, MCL 750.224f, three counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 15 to 30 years' imprisonment for his unlawful imprisonment conviction, two to five years' imprisonment for his felon in possession of a firearm conviction, two to four years' imprisonment for his felonious assault convictions, and two years' imprisonment for his felony-firearm conviction. He appeals as of right. We affirm, but remand for resentencing.

I. DEFENDANT'S RIGHT TO COUNSEL

Defendant's first issue on appeal is that he was denied his right to counsel because he did not knowingly, intelligently, and voluntarily waive his right to counsel. We disagree.

This issue was not preserved at the trial court; therefore, this Court reviews the issue for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Carines*, 460 Mich at 734. Reversal is warranted only when the plain, forfeited error resulted in

[1] Defendant was acquitted of kidnapping, MCL 750.349, extortion, MCL 750.213, placing explosives near property, MCL 750.207(2)(a), arson, preparation to burn property, MCL 750.77(1)(d)(i), placing explosives with intent to alarm, MCL 750.209(2), and two counts of felonious assault, MCL 750.82.

the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 736-737.

Under the Sixth Amendment of the United States Constitution, a criminal defendant has the right to "the assistance of counsel for his defense." US Const, Am VI; *Gideon v Wainwright*, 372 US 335, 343; 83 S Ct 792; 9 L Ed 2d 799 (1963). The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 343-344. The Sixth Amendment right to counsel attaches at "the initiation of adversary judicial criminal proceedings" such as a preliminary examination. *Moore v Illinois*, 434 US 220, 231; 98 S Ct 458; 54 L Ed 2d 424 (1977). Once the Sixth Amendment right to counsel attaches, a defendant has a right to counsel at all "critical" proceedings. *People v Frazier*, 478 Mich 231, 244 n 11; 733 NW2d 713 (2007). However, a defendant has the right to waive the assistance of counsel at trial and instead invoke his right to self-representation. *Iowa v Tovar*, 541 US 77, 87; 124 S Ct 1379; 158 L Ed 2d 209 (2004). A defendant's waiver must be knowing, intelligent and voluntary. *Id.* at 88.

Michigan law also protects a defendant's right to self-representation. Const 1963, art 1, § 13; MCL 763.1. For a defendant's request to waive the assistance of counsel and represent himself or herself to be valid under Michigan law, the request must meet a three-part test set out in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). First, the request must be unequivocal. *Id.* at 367. Second, the trial court must determine whether the defendant is knowingly asserting his right to self-representation. *Id.* at 368. Third, before accepting the request, the trial court must determine whether "the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id.* MCR 6.005(D)(1) sets out the procedures a trial court should follow, consistent with *Anderson*, when a defendant requests to represent himself. The trial court must advise the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence, and the risk involved in self-representation. MCR 6.005(D); *People v Williams*, 470 Mich 634, 642-643; 683 NW2d 597 (2004). Although a defendant has waived the assistance of counsel, at each subsequent proceeding the record must affirmatively show that the court advised the defendant of the right to a lawyer's assistance, and to assistance at public expense if he is indigent, and that the defendant waived those rights. MCR 6.005(E); *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996). The presence of standby counsel does not satisfy the notice and waiver requirements. MCR 6.005(E); *Lane*, 453 Mich at 139.

Trial courts must substantially comply with the waiver of counsel procedures set forth in case law and the court rule before granting a defendant's request to represent himself. *People v Russell*, 471 Mich 182, 191; 684 NW2d 745 (2004). Substantial compliance requires the court to discuss with the defendant the waiver of counsel requirements, and to find that the defendant "fully understands, recognizes and agrees to abide by the procedures." *Id.* The failure to comply with the court rule requiring readvice of the right to counsel and rewaiver at each proceeding subsequent to the initial waiver may not be considered for the first time on appeal unless it could have been decisive to the outcome of the case. *Lane*, 453 Mich at 139.

Defendant argues that he did not validly waive his right to counsel because the trial court failed to inform defendant of the sentence enhancements he might face if he was convicted of

unlawful imprisonment as a fourth habitual offender, the mandatory minimum sentence for felony-firearm (until the first day of trial), and his right to counsel at the pretrial hearings on October 9, 2008, October 16, 2008, and October 20, 2008. We conclude that the trial court did not substantially comply with the requirements of MCR 6.005(D)(1) by informing defendant of the maximum penalty he faced if convicted of unlawful imprisonment and, as a result, defendant did not knowingly, intelligently and voluntarily waive his right to counsel.

In the hearing on July 31, 2008, and, on the first day of trial on October 22, 2008, the trial court informed defendant of all of the charges brought against him. It indicated to defendant that he faced a potential life sentence if he were to be convicted of all of the charges brought against him. However, on the first day of trial, with regard to unlawful imprisonment, the trial court informed defendant that if convicted he faced "a maximum period of incarceration of fifteen years imprisonment." The trial court failed to inform defendant that he faced sentence enhancements as a result of being a fourth habitual offender. In reality, defendant faced a maximum term of life imprisonment as a fourth habitual offender, MCL 750.349b(2); MCL 769.12(a), and was sentenced to 15 to 30 years' imprisonment for his unlawful imprisonment conviction. The trial court did inform defendant that he faced a maximum term of life imprisonment for the charge of kidnapping, but defendant was acquitted of kidnapping. As a result, the trial court failed to substantially comply with MCR 6.005(D)(1) with regard to the unlawful imprisonment conviction.

Concerning the mandatory minimum, the trial court did inform defendant that he faced a mandatory two-year period of imprisonment if convicted of felony-firearm. Although the trial court failed to inform defendant of his right to counsel at all of the pretrial hearings, defendant forfeited any challenge to those by failing to raise the issue because he has failed to show how that affected the outcome of the case. *Lane*, 453 Mich at 139.

Even though the trial court erred in failing to inform defendant of the maximum penalty he faced if convicted of unlawful imprisonment, we conclude that defendant is not entitled to a new trial. Defendant has not shown whether knowing he faced sentence enhancements would have caused him not to represent himself and would have altered the outcome of the proceedings. In fact, based on the statements by the prosecutor on October 9, 2008, regarding the plea deal, it appears that defendant was aware that he faced sentence enhancements, even if the trial court failed to inform him. In addition, defendant knew that he faced a potential sentence of life imprisonment if convicted of all of the charges brought against him: he indicated on more than one occasion that he was aware that he was charged with serious crimes, but he was waiving his right to counsel. Moreover, defendant ably represented himself at trial. His self-representation resulted in acquittal of seven of the charges brought against him. Although the trial court erred, the error did not affect the outcome of the proceedings or deny defendant a fair trial.

II. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct during her closing argument. We disagree.

As this issue was not preserved at the trial court, this Court reviews the issue for plain error. *Carines*, 460 Mich at 764. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in

context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). A prosecutor may, however, argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

The prosecutor stated the following in her closing argument:

> The Defendant is giving you some stories. You can't have it both ways. You can't say that Dellonie Davenport is a weakling when he needs me to come with him around town to be the enforcer and then claims [sic] he's the big bad man. You can't claim that he's the big bad man and I'm afraid to come outside in front of the house cause he's got all these henchmen that are going to come shoot me when he relies on you to be the enforcer.
>
> You can't have it both ways. It's just inconsistent. It makes no sense. You cannot, cannot have it both ways. How long were you going to lock yourself in that location? There's no food in that house. How were you going to get out? You had a phone. You could have called the police and said, look, I'm being locked in this location, come get me; I'm telling you the situation.
>
> How long would you stay there? Would you stay until dark when it's even more dangerous? Ladies and gentlemen, his story makes no sense. Give it the credit it deserves; zero. It's nothing but a smoke screen. It's like an octopus. An octopus, when it's in the water it has only one means of protecting itself. It sends out a jet of ink to muddy up the area so it can slither away.
>
> He has done that in this case trying to inject – talking about marksmen. Aren't you all marksmen? Shouldn't you have killed me? What's that mean? What the heck does that mean? You should have killed me if I was there?

Defendant argues that these comments by the prosecutor were improper because they implied that defendant was intentionally misleading the jury. We disagree.

The prosecutor was not improperly implying that defendant intentionally misled the jury. Instead, the prosecutor argued, based on the facts in evidence, that defendant's opening statement, his testimony and his questions to the police officers were not worthy of belief. In particular, the prosecutor questioned defendant's testimony that he acted as his cousin Dellonie Davenport's "enforcer" while at the same time was afraid that Dellonie was going to hurt him if he left Dellonie and Kimberly Davenport's rental home. Similarly, the prosecutor questioned defendant's opening statement in which defendant stated that if he had actually pointed a gun at the police officers, he would have been killed. Defendant reiterated the arguments in his questioning of Detroit Police Officer Lanaris Hawkins in which he asked whether Hawkins had training in shooting and whether he was a "marksman." Given that defendant raised these issues

in his opening statement, his testimony, and his questions, it was not improper for the prosecutor to call them into question in her closing argument.

In any event, any harm resulting from the prosecutor's statements was remedied by instructions from the trial court. Jurors are presumed to have followed the jury instructions, and instructions are presumed to cure most errors. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009). In this case, the trial court instructed the jury, "The lawyer's [sic] statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theory." Therefore, any potential error was remedied by the trial court's instructions to the jury.

III. SENTENCING

Defendant's next issue on appeal is that the trial court erred in scoring 15 points for offense variable (OV) 8 and, as a result, defendant was entitled to resentencing. We agree.

The imposition of a sentence under the scoring guidelines is reviewed for an abuse of discretion. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). The interpretation of the statutory sentencing guidelines and the legal questions presented by application of the guidelines are subject to de novo review. *Id.*

Under OV 8 of the sentencing guidelines, 15 points may be assessed for transporting the victim to another place or a situation of greater danger or holding the victim captive beyond the time necessary to commit the offense. MCL 777.38(1)(a); *People v Apgar*, 264 Mich App 321, 329-330; 690 NW2d 312 (2004). However, MCL 777.38 further states that defendant should be scored zero points "if the sentencing offense is kidnapping." MCL 777.38(2)(b). The statute does not give a specific citation for the sentencing offense of "kidnapping." MCL 777.38(2)(b).

Defendant argues that the trial court should have scored zero points for OV 8 because the sentencing offense, unlawful imprisonment, is a form of "kidnapping." Whether unlawful imprisonment amounts to "kidnapping" for purposes of OV 8 is an issue of statutory interpretation and construction. The purpose of statutory construction is to discern and give effect to the intent of the Legislature. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). In construing a statute, this Court "must give effect to every word, phrase and clause …, and must avoid an interpretation which would render any part of the statute surplusage or nugatory." *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005), citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

As noted above, MCL 777.38(2)(b) does not provide a specific citation for the sentencing offense of "kidnapping." In other parts of the sentencing guidelines, specific statutes are delineated when specific offenses are referred to. For example, OV 13 states that ten points should be scored against a defendant if the sentencing offense is part of a pattern of felonious criminal activity involving three or more "crimes against a person or property or a violation of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii)." MCL 777.42(1)(c). Moreover, "kidnapping" is not defined within the statute itself. MCL 777.1. Given that MCL 777.38(2)(b) does not refer to a specific statute in this case while other sections in the sentencing guidelines do, and there is no definition of "kidnapping" within the statute, the meaning of "kidnapping" within MCL 777.38(2) is ambiguous.

As a result, we will engage in statutory interpretation and construction to delineate whether the legislature intended to cover unlawful imprisonment under kidnapping. When the statutory sentencing scheme was enacted in 1998, the criminal offense of kidnapping was defined as:

> CONFINING PERSON AGAINST WILL, ETC.--Any person who willfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.
>
> Every offense mentioned in this section may be tried either in the county in which the same may have been committed or in any county in or through which the person so seized, taken, inveigled, kidnapped or whose services shall be sold or transferred, shall have been taken, confined, held, carried or brought; and upon the trial of any such offense, the consent thereto of the person, so taken, inveigled, kidnapped or confined, shall not be a defense, unless it shall be made satisfactorily to appear to the jury that such consent was not obtained by fraud nor extorted by duress or by threats. [MCL 750.349.]

This Court indicated that the kidnapping offense was comprised of "six forms of conduct, each of which constitute[d] the crime of kidnapping." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). One of the forms of conduct covered under "kidnapping" was if a defendant "willfully, maliciously, and without lawful authority, (a) forcibly or secretly confined or imprisoned any other person within this state against his will[.]" *Jaffray*, 445 Mich at 297, citing *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984). At the time the sentencing guidelines were enacted, there was no separate crime of unlawful imprisonment. MCL 750.349b. On August 24, 2006, the legislature amended the definition of kidnapping in MCL 750.349, and added MCL 750.349b, which defines unlawful imprisonment. MCL 750.349b. MCL 750.349 now defines kidnapping as:

> (1) A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:
>
> (a) Hold that person for ransom or reward.
>
> (b) Use that person as a shield or hostage.
>
> (c) Engage in criminal sexual penetration or criminal sexual contact with that person.
>
> (d) Take that person outside of this state.
>
> (e) Hold that person in involuntary servitude. [MCL 750.349.]

In contrast, MCL 750.349b, which defines unlawful imprisonment, reads:

> Sec. 349b. (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> > (a) The person is restrained by means of a weapon or dangerous instrument.
> >
> > (b) The restrained person was secretly confined.
> >
> > (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

Given the statutory history of MCL 750.349 and the similarity of its prior language with the current definition of unlawful imprisonment under MCL 750.349b, we conclude that the legislature intended to exempt the sentencing offense of unlawful imprisonment from being scored under OV 8. The sentencing guidelines are a comprehensive and integrated statutory scheme designed to promote uniformity and fairness in sentencing. *People v Bemer*, 286 Mich App 26, 34; 777 NW2d 464 (2009). If the intent of the legislature was to exempt the crime of kidnapping from OV 8, then the crime of unlawful imprisonment, which was previously a part of the crime of kidnapping, should also be exempted.[2] As a result, the trial court erred in scoring 15 points for OV 8.

Because the trial court erred in scoring 15 points under OV 8, defendant's total offense variable score should be reduced from 80 points to 65 points. As a fourth habitual offender with a prior record variable score of 67, whose sentencing offense was unlawful imprisonment, a class C crime, defendant's guidelines range would change from 58 to 228 months' imprisonment to 50 to 200 months' imprisonment. MCL 777.21(3)(a)-(c). As a result, defendant is entitled to a remand for resentencing.

Defendant argues that the trial court erred in scoring 25 points for OV 12. We again agree. The failure to preserve a sentencing guidelines scoring issue for review precludes review unless the defendant can show plain error, which affected his substantial rights and resulted in prejudice, in that the defendant was innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

Under OV 12, contemporaneous felonious criminal acts, a defendant should be scored 25 points for "three or more contemporaneous felonious criminal acts involving crimes against a person." MCL 777.42(1)(a). For the purpose of OV 12, a contemporaneous criminal act is one, which occurred within 24 hours of the sentencing offense and "has not and will not result in a separate conviction." *People v Waclawski*, 286 Mich App 634, 687; 780 NW2d 321 (2009). In

[2] We also note that although the Legislature added MCL 750.349b to separately define unlawful imprisonment, it still remains a subsection of Chapter L of the Michigan Penal Code which is entitled "Kidnapping."

this case, the trial court erroneously considered the three felonious assaults of Howell, Hawkins, and Bryant as the three felonious acts for purposes of OV 12. However, each of those felonious assaults resulted in a conviction. Therefore, the trial court erred.

However, we conclude that the trial court's error with regard to OV 12 was harmless. Although the trial court erred in considering the felonious assaults, for which defendant was convicted, under OV 12, it should have considered those assaults for purposes of OV 13. Under OV 13, continuing pattern of criminal behavior, a court must assess 25 points under offense variable 13 if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). Conduct scored under OV 12 cannot be scored again under OV 13, unless it was related to an organized criminal group. MCL 777.43(2)(c).

In this case, the trial court refused to score OV 13 in part because it had already scored points for defendant under OV 12. The trial court reasoned:

> *THE COURT*: So what you're saying, do not consider the score of OV-11 and 12 unless the offense was related to membership in an organized crime group and there was no proof of an organized crime group. Okay.
>
> *DEFENDANT KNUCKLES*: Exactly, your Honor.
>
> *THE COURT*: All right. Okay. But OV-13, the score that the presentence investigation has down as twenty-five points which would mean the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. Can we take into consideration crimes that occurred at the same time? No, contemporaneous felonious criminal activity, right?
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> *DEFENDANT KNUCKLES*: That's correct.

Given that the trial court erred in considering the felonious assaults that resulted in convictions under OV 12, it can now consider those same felonious assaults for purposes of OV 13. As a result, the three felonious assault convictions demonstrate a pattern of criminal behavior, and defendant should have been scored 25 points for OV 13.

IV. PUBLIC TRIAL

Finally, defendant argues that the trial court committed error requiring reversal when the trial judge acknowledged, in another case, his general policy of excluding the public from jury selection in capital cases. We disagree.

While there is nothing on the record to indicate one way or the other whether the public was actually excluded from the courtroom in this case, the people acknowledge that it was the trial court judge's policy, prior to the January 2010, to close the courtroom to the public during jury selection in capital cases such as defendant's. Therefore, we will assume, without deciding, that defendant's allegations regarding the closure of the courtroom are accurate.

Defendant did not object to the closure of the courtroom during jury selection; therefore, this issue is unpreserved. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings, such as when a criminal defendant claims he was deprived of a fundamental constitutional right at trial that was decisive to the outcome of the case. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009), *People v McRunels*, 237 Mich App 168, 172; 603 NW2d 95 (1999).

Defendant relies on *Presley v Georgia*, ___ US ___; 130 S Ct 721; __ L Ed 2d ___ (2010), to argue that the trial court could not close the courtroom without making explicit findings and considering all alternatives. However, the trial court is only required to make such findings upon a timely objection by defendant. Had defendant objected to this procedure, the trial court could have devised an alternative way to handle the situation. However, given defendant's failure to object, the temporary nature of the exclusion, and defendant's failure to explain how the procedure caused him prejudice, we conclude that defendant's Sixth Amendment right to a public trial was not violated. *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987). Even if the closure of the courtroom constituted plain error, defendant has not established that his substantial rights or the fairness of the judicial proceedings were affected. See *Carines*, 460 Mich 763.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood