

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 31, 2012

v

JUAN RAMOS RIVERA,

Defendant-Appellant.

No. 302608
Oakland Circuit Court
LC No. 2010-234248-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Defendant Juan Rivera appeals as of right his jury conviction of armed robbery¹ and first-degree home invasion.² The trial court sentenced Rivera to serve concurrent sentences of 20 to 40 years in prison. We affirm in part, reverse in part, and remand only for resentencing.

I. FACTS

On October 7, 2010, Rivera and his friend, Hector Ortiz-Vargas, robbed the home of Marian Murphy in the hopes of finding items to sell to fund their heroin addictions. At the time of the robbery, Murphy resided in a single-family home with her boyfriend and her six-year-old son. About 8:10 a.m. on October 7, 2010, Murphy left her home to drive her son to school. Murphy returned home at about 9:15 or 9:20 a.m. When she arrived home, she saw a white Cavalier parked in her driveway. The car had backed into the driveway so that the trunk was closer to the house.

Murphy parked her car and headed toward the side door of the house, which opened up into the kitchen of the home. As Murphy approached the house, she noticed that the side door was open about one foot wide. As she passed by the white Cavalier, she also noticed that her father's leaf blower was in the back seat.

¹ MCL 750.529.

² MCL 750.110a(2).

Murphy stepped into her kitchen and heard noises in the home. Two men then appeared in the kitchen from the family room around the corner. One of the intruders said, "I have a gun." Murphy immediately turned around and walked to her car as fast as she could, hoping that she would not be shot. Murphy did not actually see a gun. Murphy saw both intruders. She described one as tall and the other as shorter. One man wore a white hoodie sweatshirt, and the other man had a distinctive "Caesar" haircut. Although she could not say with any certainty, Murphy suggested at trial it was the shorter man who said that he had a gun. Rivera is 5-feet-11-inches tall, and Ortiz is 5-feet-8-inches tall. Both men weigh about 180 pounds. Although Rivera is taller Murphy said at trial that Rivera looked like the shorter man. But she also said that it was hard to tell who was taller if the two men were not standing next to each other.

As Murphy stood next to her car, she saw the two men exit her home through the kitchen door and get in the white Cavalier. Both men climbed in through the driver's seat, and the taller one climbed over the other man to get into the passenger's seat. As the taller man climbed over the other man, Murphy could see that he had "stuff" from her home in his hands. Rivera confirmed in his testimony that he climbed in through the driver's door to get to the passenger's seat. While Rivera and Ortiz were getting in the car, Murphy wrote the license plate number of the white Cavalier on her hand. After the car left the driveway, Murphy called 9-1-1.

The following items were stolen from Murphy: a leaf blower, copper pipes for a plumbing project, a hairdryer, a flat iron, some children's toys, and a pocket watch. The side door through which the intruders entered was dented, and the doorjamb was damaged. Some pipes connected to the home's water heater were also damaged.

Murphy gave the police the license plate number she had written on her hand. The car, a 1996 Chevy Cavalier, was registered to Kimberly Whittingill, Ortiz's fiancée. On the morning of October 7, 2010, Whittingill knew Ortiz used the car to take his son to school. Police went to the address at which the car was registered. The car was not there and did not return home after a short time, so a BOLO ("be on the lookout") was issued for the license plate number.

Detective Jeffrey Cardinal, a member of the Fugitive Apprehension team of the Oakland County Sheriff's Office, heard the BOLO about the home invasion and the license plate number. Detective Cardinal responded to 144 Summit Street in Pontiac, Michigan, after receiving information that the car was in the area. When he arrived, the car was unoccupied. Detective Cardinal watched the car, and at about 11:40 a.m., two individuals from 144 Summit approached the vehicle. One individual got in the driver's seat, and the other went to the passenger's side and retrieved a green bag. The individual who retrieved the green bag walked away, and the driver drove away in the car. Police stopped the car down the road and took the driver, Ortiz, into custody. Some of the items from the robbery, such as the pocket watch and children's toys, were recovered in the vehicle; apparently, the items taken during the robbery not recovered in the car were already sold. After learning that items from the robbery had been recovered in the car, Detective Cardinal searched for the individual who had taken the green bag.

Detective Cardinal identified Rivera as the individual who retrieved the green bag from the car. Detective Cardinal approached Rivera in the yard of 144 Summit Street. When Detective Cardinal approached, Rivera busied himself by taking a measuring tape out of the green bag and measuring the yard. Other police officers arrived at the scene, and another officer

asked Rivera for identification. Rivera produced two forms of photo identification. The first, a Michigan Department of Corrections card, had the name Juan Rivera. The second was a New York State identification card with the name Pablo Colon. (Rivera's given name is Pablo Colon; he was paroled in the State of Michigan as Juan Rivera.) Rivera gave the police permission to look in the green bag. The bag contained tools, including a measuring tape, hammer, two pairs of work gloves, and a pry bar. The police then took Rivera into custody.

Later that day, the police asked Murphy to have a look at some individuals. They showed her three men. Murphy identified the first, Rivera, as one of the intruders. She was "100 percent sure" that he was one of the men at her house. With respect to the second man, Ortiz, she was slightly less sure: about "85 percent sure." She was absolutely sure that the third man was not involved. At trial, Murphy identified Rivera as one of the intruders in her home. Police also asked Murphy about several pieces of personal property that they recovered. Murphy confirmed that the items were hers.

As stated above, a jury convicted Rivera of first-degree home invasion and armed robbery. Rivera appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Rivera raises several challenges to the sufficiency of the evidence presented in his case. This Court reviews *de novo* a defendant's sufficiency claim.³ This Court views the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt.⁴

B. STATEMENT REGARDING POSSESSION OF A GUN

Rivera claims that the evidence was insufficient to establish his conviction for armed robbery because he did not have a gun; did not say, "I have a gun"; and did not aide in such an assertion.

MCL 750.519 governs armed robbery and provides that an armed robbery may occur when a perpetrator "represents orally or otherwise that he or she is in possession of a dangerous weapon."⁵ Armed robbery also requires an assault and a felonious taking of property from the victim's presence.⁶

³ *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

⁴ *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

⁵ MCL 750.529.

⁶ *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001).

Here, Murphy was unwavering in her testimony that one of the perpetrators made an oral representation of a dangerous weapon when he said the words, “I have a gun.”⁷ And a reasonable jury could have concluded beyond a reasonable doubt that it was Rivera who spoke those words. The jury listened to Murphy’s 9-1-1 call in which she stated that the larger man made the statement, and evidence showed that Rivera was taller than the other robber. Murphy testified that her memory was best when she made the call. Accordingly, a jury could have reasonably concluded that Rivera, the taller man, made the statement. Furthermore, even though Murphy was hesitant in her trial testimony, she stated that she believed the shorter man made the statement. Though seemingly at odds with the 9-1-1 call, the jury could have reasonably reconciled the two statements because at trial Murphy identified Rivera as the shorter man based upon her memory of his face. The jury might have reasonably accepted Murphy’s identification of Rivera’s face and concluded that Murphy was merely confused about his height. Though there were inconsistencies in Murphy’s recollection, “[a] jury has the right to disregard all or part of the testimony of a witness”⁸ and “to believe or disbelieve, in whole or in part, any of the evidence presented.”⁹

Even assuming that Rivera’s accomplice, Hector Ortiz, spoke the words, “I have a gun,” we conclude that the evidence supported Rivera’s conviction for armed robbery under a theory of aiding and abetting. “‘Aiding and abetting’ describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.”¹⁰ To convict upon a theory of aiding and abetting, the prosecution must prove the following:

“(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.”¹¹

An aider and abettor’s state of mind may be inferred from the facts and circumstances, including “a close association between the defendant and the principal, the defendant’s participation in the planning or execution of the crime, and evidence of flight.”¹²

⁷ MCL 750.529.

⁸ *People v Goodchild*, 68 Mich App 226, 235; 242 NW2d 465 (1976).

⁹ *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

¹⁰ *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

¹¹ *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

¹² *Carines*, 460 Mich at 758.

Here, the evidence shows that, rather than dropping Murphy's possessions and fleeing, Rivera accompanied Ortiz to the kitchen to confront Murphy. One of the men stated, "I have a gun." When Murphy fled, the men left the home, and Rivera took more of Murphy's belongings with him as he climbed into Ortiz's car. The two men fled together and went on to sell some of Murphy's property. These circumstances do not suggest a man who was "merely present" but, rather, one who actively participated in robbing Murphy. "Where more than one person is engaged in a robbery, and all are acting in concert, one of them being armed with a dangerous weapon, all are guilty of robbery armed whether any of the others were armed or not."¹³ Because the use of a weapon during a robbery is foreseeable, this is true even if one of the perpetrators did not have knowledge of the existence of a weapon.¹⁴ As possession of a gun during a robbery is foreseeable, the verbal assertion in this case was foreseeable in the context of the robbery.

Rivera may also be held liable as an aider and abettor for crimes that are the natural and probable consequences of the offense he intends to aid or abet, meaning those actions that further the "common enterprise, and which might be expected to happen if the occasion should arise."¹⁵ Rivera admitted to lending active support to planning the robbery of Murphy's home; it was even his idea to enter the house. He then removed property from her garage and her house. Rivera participated in this criminal enterprise fully aware that the home was occupied by a family who might return at any moment. Having undertaken the robbery of a home occupied by a family, Rivera can reasonably be held responsible for the natural and probable consequences of those actions—here, armed robbery when one of the home's occupants returned. These two approaches to aiding and abetting are not in conflict, and we conclude that, under either analysis, the evidence was sufficient to support Rivera's conviction for armed robbery.¹⁶

In sum, considering the evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient to establish Rivera's armed-robbery conviction under either a principal or an aiding-and-abetting theory of liability.

C. VICTIM'S PRESENCE

Rivera claims that the evidence was insufficient to establish either his conviction for armed robbery or home invasion because he disputes whether Murphy was present in the home. Rivera contends that Murphy did not cross the threshold into the home. However, we conclude that Murphy's testimony—that she took one or two steps into the kitchen and stood near the microwave—offered a sufficient basis for the jury to conclude that she was present in her home.

¹³ *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972).

¹⁴ *Id.*

¹⁵ *Robinson*, 475 Mich at 9.

¹⁶ *Id.* at 14-15.

Moreover, while a victim's presence is an element of armed robbery,¹⁷ we know of no requirement that the victim cross the threshold of the home to satisfy the elements of that crime.

In sum, considering the evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient to establish Rivera's armed-robbery and home-invasion convictions.

III. JURY INSTRUCTIONS

Rivera argues that the trial court erred by failing to sua sponte offer further clarification about his "mere presence" at the robbery. We find that Rivera waived review of the jury instructions when his trial counsel expressly approved the instructions.¹⁸ We nevertheless note that the instructions, taken verbatim from CJI2d 8.1 and CJI2d 8.5, accurately stated the law of aiding and abetting, including instruction that mere presence does not establish guilt. Because the instructions accurately stated the law and "fairly presented the issues to be tried," we conclude there was no error in the instructions as given.¹⁹

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Rivera makes two claims of prosecutorial misconduct; we find both to be without merit. Because Rivera failed to timely and specifically object, his claims are unpreserved, and we review them for plain error.²⁰ Review of prosecutorial misconduct involves an evaluation of the prosecutor's remarks as a whole, and in context, to determine whether the defendant received a fair and impartial trial.²¹ "Generally, prosecutors are accorded great latitude regarding their arguments and conduct" and are "free to argue the evidence and any reasonable inferences that may arise."²²

B. SUGGESTION OF GUILT BY ASSOCIATION

Rivera first claims that the prosecutor inappropriately presented a case based upon guilt by association by suggesting that Rivera could have been convicted because of his "mere presence." While we agree that some of the prosecutor's language supports Rivera's argument,

¹⁷ *Rodgers*, 248 Mich App at 707.

¹⁸ *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000); *Lueth*, 253 Mich App at 688.

¹⁹ *People v Alderete*, 132 Mich App 351, 356; 347 NW2d 229 (1984); *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

²⁰ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

²¹ *Id.* at 330.

²² *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks and citations omitted).

taken as a whole, and in context, the prosecutor's references to "mere presence" did not deny Rivera a fair and impartial trial.

The prosecutor's argument regarding "mere presence" was not that Rivera's presence alone was enough to convict, but rather that Rivera did not have to voice the words, "I have a gun," to be found guilty. The prosecutor made clear in his arguments that Rivera must have done "something to assist in the commission of the crime" and that he must have "intentionally assist[ed]." The prosecutor was free to argue that Rivera's role as an aider and abettor could be inferred from his willing confrontation and intimidation of Murphy in support of Ortiz.²³ Even if the prosecutor's references to "mere presence" were improper, the trial court cured any error by instructing the jury that the lawyers' statements and arguments were not evidence, and, as noted above, instructing the jury that Rivera's "mere presence" was not a basis for his guilt.²⁴

C. PORTRAYING THE DEFENDANT AS A CRIMINAL

Rivera next argues that the prosecution's questioning of a police officer relating to "burglar tools" was prosecutorial misconduct because it was designed to portray Rivera as a criminal. However, a prosecutor may offer all relevant evidence, not otherwise excluded, to prove his case.²⁵

Relevant evidence is that which has any tendency to make a fact of consequence more or less likely.²⁶ Here, relevant to issues at trial, the prosecutor's questions sought to establish that the tools in Rivera's possession could be used to break into a home—the act Rivera was on trial for committing. While the evidence may have been prejudicial, merely being prejudicial does not render relevant evidence inadmissible; only evidence which is *unfairly* prejudicial should be excluded.²⁷ Unfair prejudice occurs when extraneous considerations are injected into the lawsuit and create a "tendency that evidence with little probative value will be given too much weight by the jury."²⁸ Here, the possibility that a jury might regard Rivera's possession of "burglar tools" as an indication of his criminal propensity does not outweigh the probative value of determining the use of tools that Rivera possessed the day of the robbery.²⁹ Accordingly, the prosecution's good-faith attempt to elicit relevant evidence does not constitute prosecutorial misconduct.³⁰

²³ *Callon*, 256 Mich App at 330.

²⁴ *People v Unger*, 278 Mich App 210, 235, 237; 749 NW2d 272 (2008).

²⁵ *People v Mills*, 450 Mich 61, 70-71; 537 NW2d 909 (1995).

²⁶ *Id.* at 66.

²⁷ *Id.* at 75.

²⁸ *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

²⁹ MRE 403.

³⁰ *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Additionally, the trial court’s instruction that the lawyers’ questions were not evidence cured any harm.³¹

V. SENTENCING ISSUES

A. STANDARD OF REVIEW

Rivera challenges the scoring of offense variables (OV) 1, 4, and 19. He preserved his claim by objecting during sentencing. Accordingly, we review his claims for an abuse of discretion to determine if the record offers adequate evidence in support of the scores.³² This Court will uphold scoring decisions supported by “any evidence.”³³

B. OFFENSE VARIABLE 1

A score of five points for OV 1 is appropriate if “[a] weapon was displayed or implied.”³⁴ During the sentencing hearing, the trial court adopted the prosecution’s reasoning and scored OV 1 at five points because a gun was implied during the robbery. However, MCL 777.31(2)(e) prohibits a score of five points for OV 1 if the conviction offense is for armed robbery under MCL 750.529. When there are two concurrent convictions, the trial court properly scores only the higher of the two offenses.³⁵ Here, Rivera was charged with armed robbery (a Class A felony³⁶) and first-degree home invasion (a Class B felony³⁷). And Rivera’s sentencing information report was prepared using his armed robbery conviction. Accordingly, the trial court abused its discretion in scoring OV 1 at five points.

C. OFFENSE VARIABLE 4

A score of ten points for OV 4 is appropriate if “[s]erious psychological injury requiring professional treatment occurred to a victim.”³⁸ The sentencing guidelines emphasize that ten points may be scored “if the serious psychological injury may require professional treatment.”³⁹ Furthermore, “the fact that treatment has not been sought is not conclusive.”⁴⁰ Notably,

³¹ *Unger*, 278 Mich at 235, 237.

³² *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

³³ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

³⁴ MCL 777.31(1)(e).

³⁵ *People v Mack*, 265 Mich App 122, 125-128; 695 NW2d 342 (2005).

³⁶ MCL 777.16y.

³⁷ MCL 777.16f.

³⁸ MCL 777.34(1)(a).

³⁹ MCL 777.34(2).

⁴⁰ *Id.*; see also *People v Waclawski*, 286 Mich App 634; 681; 780 NW2d 321 (2009).

however, the question is not whether the victim *may* have suffered serious psychological injury, it is whether the victim *did* suffer serious psychological injury that *may* require professional treatment.⁴¹ “The trial court may not simply assume that someone in the victim’s position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury *occurred* to a victim,” and there must be record evidence to support such finding.⁴²

In *People v Apgar*⁴³, this Court held that a victim’s testimony of having suffered fear during the crime can be sufficient to support the trial court’s finding of serious psychological injury. It does not always, however, warrant such a finding. The victim’s fear in *Apgar* arose out of truly horrific criminal conduct. The victim was 13 years old.⁴⁴ The defendant and his friends invited the victim to go to “the store” with them, to which she agreed, and they drove her around for several hours while they forced her to smoke marijuana and pointed a sharp knife-like object against her neck.⁴⁵ They arrived at a house, and defendant took the victim into an empty bedroom and forced her to have sexual intercourse with him by placing the knife-like object to her throat and threatening to kill her if she did not comply.⁴⁶ Both of the defendant’s friends forced the victim to perform oral sex on them by threatening her with the same knife-like object.⁴⁷ One of the friends burned a homemade tattoo on her chest before forcing her to have oral sex. One could reasonably conclude that the homemade tattoo would serve as a future reminder to the victim of the horrific event. The victim’s testimony that she was fearful during the encounter, taken together with the nature of the criminal conduct, presented sufficient direct and circumstantial evidence to establish that *serious* psychological injury occurred as a result of the incident.

Here, while the crimes of armed robbery and first degree home invasion can certainly cause a person to suffer psychological injury, merely assuming or speculating that the victim has actually suffered psychological injury is not enough to score OV 4.⁴⁸ The record evidence must actually support such a finding.⁴⁹ And, pursuant to MCL 777.34(1)(a), the psychological injury must be *serious*. Other than her description of the event in this case, wherein Marian Murphy testified that she was shocked and frightened to find defendant and his cohort in her home, she did not testify to any facts that would establish beyond mere speculation that she sustained *serious* psychological injury from the incident. The presentence investigation report (PSIR)

⁴¹ See MCL 777.34.

⁴² *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295, 305 (2012) (emphasis in original).

⁴³ *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

⁴⁴ *Id.* at 323.

⁴⁵ *Id.* at 323-324.

⁴⁶ *Id.* at 324.

⁴⁷ *Id.*

⁴⁸ See *Lockett*, 286 Mich App at 183.

⁴⁹ *Id.*

indicates that attempts to obtain a victim impact statement from Murphy were unsuccessful. The PSIR contains no evidence of any psychological injury (e.g., such evidence might include an interview with Murphy or someone who knows her indicating that she was not sleeping well, she experienced fear or anxiety whenever returning home alone, etc.). Murphy did not write a letter to the judge, she did not appear at the sentencing, and no other evidence was presented at the sentencing regarding Murphy's psychological state as a result of the crime. Any of these methods could be used to produce sufficient information to determine whether serious psychological injury actually occurred. And, unlike *Apgar*, the circumstances of the crime itself, taken together with Murphy's testimony of fear during the encounter, were not enough to establish that she suffered *serious* psychological injury. If a victim's fear alone were always enough to score OV 4 at ten points, every crime against a person would have to be scored at ten points as it is hard to imagine a victim not being frightened during a crime against them. Because proof of serious psychological injury is required to score OV 4 at ten points, based on the evidence of record the trial court's scoring of OV 4 was erroneous.

D. OFFENSE VARIABLE 19

A score of ten points for OV 19 is appropriate if "the offender otherwise interfered with or attempted to interfere with the administration of justice."⁵⁰ OV 19 has a broad reach that can include acts that constitute "obstruction of justice" but is not limited only to acts that constitute an "obstruction of justice."⁵¹ The phrase refers to more than just the judicial process and includes the activities of law enforcement officers.⁵² Because "[t]he investigation of crime is critical to the administration of justice[,] [p]roviding a false name to the police constitutes interference with the administration of justice, and OV 19 may be scored, when applicable, for this conduct."⁵³ Here, considering Rivera's admitted efforts to look busy and mislead police about his use of the tools, along with the alias he provided to police, the record offers adequate support for the trial court's decision to score OV 19 at ten points.

E. ENTITLEMENT TO RESENTENCING

An erroneous score requires resentencing if its correction would result in a different minimum guidelines range.⁵⁴ Defendant's minimum guidelines range under MCL 777.62 was 126 to 420 months (prior record variable level F and OV level II). To be entitled to resentencing on the basis of an erroneous OV score, an error in OV scoring would have to reduce defendant's total OV score of 25 points to 19 points or less.⁵⁵ Scores of zero points for both OV 1 and OV 4

⁵⁰ MCL 777.49(c).

⁵¹ *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004).

⁵² *Id.* at 287-288.

⁵³ *Id.* at 288.

⁵⁴ *People v Francisco*, 474 Mich 82, 89 n 8, 711 NW2d 44 (2006).

⁵⁵ See *id.*; MCL 777.62.

would reduce defendant's total OV score of 25 points to 10 points. Therefore, resentencing is required.⁵⁶

F. *BLAKELY* CHALLENGE

To the extent Rivera relies upon *Blakely v Washington*⁵⁷ to suggest that the jury was required to find the facts used in scoring the offense variables beyond a reasonable doubt, his argument is without merit. It is well established that *Blakely* does not alter Michigan's indeterminate sentencing system.⁵⁸

VI. CUMULATIVE EFFECT OF ALLEGED ERRORS

Because we have found no errors other than in the scoring of Rivera's sentencing guidelines, we conclude there can be no cumulative effect of errors denying Rivera a fair trial.⁵⁹

We affirm in part, reverse in part, and remand only for resentencing. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Jane M. Beckering

⁵⁶ See *Francisco*, 474 Mich at 89 n 8.

⁵⁷ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁵⁸ *People v Drohan*, 475 Mich 140, 156; 715 NW2d 778 (2006).

⁵⁹ *Bahoda*, 448 Mich at 292 n 64 (“[O]nly actual errors are aggregated to determine their cumulative effect.”).