

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 22, 2012

V  
  
KENNETH VINCENT RIVET, JR.,  
  
Defendant-Appellant.

No. 303531  
Bay Circuit Court  
LC No. 09-010981-FC

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Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of one count of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was acquitted of one count each of armed robbery, MCL 750.529, and possession of a firearm by a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to serve 96 to 420 months in prison and ordered to pay \$2,000.10 in restitution costs. We affirm.

The victim testified that he was assaulted by defendant and another man at the other man's home. According to the victim, the other man had requested that the victim bring heroin to the home, which the victim did. When the victim arrived, he was confronted and attacked in the breezeway of the home by the two men. In addition to other injuries, the victim sustained a seven-centimeter head laceration that required eight staples to close. The victim testified that he had been struck by the butt of 12-gauge, double-barrel shotgun.

**I. PROSECUTORIAL MISCONDUCT**

Defendant argues that the prosecution violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when it failed to provide his trial counsel with medical reports documenting the size and treatment of the victim's head laceration. During trial, the victim testified that he had sustained a nine-inch head laceration that required 12 staples to close. At defendant's sentencing hearing, however, the court found that the victim's head laceration was actually seven centimeters in length, according to the written medical report by the treating hospital. The report also stated that the wound was closed with eight staples, not 12. Defendant claims that the prosecutor obtained the medical report following the assault but failed to provide it to defense counsel. Defendant also asserts that he was denied a fair trial when the prosecutor

not only failed to correct the victim according to the information in the medical report, but reiterated the incorrect testimony during her closing argument.

Defendant claims further that the prosecutor improperly elicited testimony about defendant's illegal drug use and that drug distribution paraphernalia was found at defendant's residence. Although the testimony relating to the paraphernalia was stricken from the record, defendant argues that it "created a substantial probability that the jury would give the prosecution the benefit of the doubt" with respect to its case.

"Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003). The test is whether a "defendant was denied a fair and impartial trial" due to the actions of the prosecutor. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). "Generally, 'prosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261; 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980).

In *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), this Court held that

[a] criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing [*Brady*, 373 US at 87]. In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

In the instant case, the prosecution claims that no *Brady* violation occurred, in part, because it disclosed the victim's medical report to defense counsel. Defendant supports his assertion that he did not receive the reports with an affidavit by trial counsel.

Even assuming the prosecution failed to disclose the medical report as defendant contends, nevertheless, defendant fails to establish that a *Brady* violation occurred. Although the medical reports did contradict the victim's trial testimony about the size and treatment of his head laceration, defendant cannot establish the existence of "a reasonable probability . . . that the outcome of the proceedings would have been different" if defendant had access to the report before trial. *Id.* That the victim suffered a seven-centimeter head laceration, which took eight staples to close, is sufficient evidence to support a finding that the person who caused it intended to inflict great bodily harm. In addition, as the prosecution notes, other evidence established the severity with which defendant and his accomplice attacked the victim, especially police testimony regarding the victim's blood found on the wall of the breezeway.

Defendant also argues that the prosecutor engaged in misconduct by allowing the victim to testify falsely or inaccurately about the head wound. Defendant's assertion that the victim's testimony was perjured is based entirely on the discrepancy with the medical records. However, it does not follow that because this discrepancy exists, the prosecutor's reliance on the victim's testimony was something other than a good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Finally, defendant claims that the prosecutor engaged in misconduct by injecting prejudicial evidence of defendant's drug use into the trial. Defendant acknowledges that the trial court correctly struck testimony that police found scales for "weighing" and "packaging drugs" in defendant's residence. Not only was it stricken, but the trial court also instructed the jury "not to consider" testimony that was stricken when deciding the facts of the case. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

As for evidence of defendant's own use of illegal drugs, we agree with the prosecution that by asserting a motive for the assault—i.e., attempting to protect his daughter from access to drugs—defendant placed his motive at issue. Evidence of defendant's own use of illegal drugs "makes it less probable that he would beat up the victim for being a drug dealer and more probable that he would beat . . . [him] in order to steal his drugs." And even if the evidence that defendant had used illegal drugs had been excluded, it is not likely, in view of the substantial other evidence adduced, that the outcome of the trial would have been different. See *People v Blackmon*, 280 Mich App 253, 267; 761 NW2d 172 (2008) (holding that "in order to constitute or cause a deprivation of liberty without due process under the federal constitution, the prosecutorial misconduct must be so flagrant as to render the entire trial fundamentally unfair" (citations and internal quotation marks omitted)).

## II. SENTENCING

Defendant argues next that the sentencing judge erred by scoring offense variables (OVs) 1 and 2 because the evidence in the record did not establish by a preponderance of the evidence that a gun had been used to commit the offense of which he was convicted. A preponderance of the evidence standard is applicable to findings by the sentencing court for purposes of sentencing, even where a jury has found that a fact was not proven beyond a reasonable doubt. *People v Ratkov*, 201 Mich App 123, 126; 505 NW2d 886 (1993).

The trial court scored 15 points for OV 1 and 5 points for OV 2. OV 1 is aggravated use of a weapon. MCL 777.31. The sentencing court scores 15 points where "[a] firearm was pointed at or toward a victim." MCL 777.31(1)(c). OV 2 is "lethal potential of the weapon possessed or used." MCL 777.32. A score of 5 points is assessed when "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d).

In finding that defendant used a firearm during the assault, the trial court noted that the fact that the jury acquitted defendant of the firearms charges "means that they decided that there was reasonable doubt. It doesn't mean that they necessarily concluded that there wasn't a firearm." Further, the trial court was empowered to consider the victim's credibility, see *People*

*v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988) (“[A] sentencing judge is afforded ‘wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.’”), and that determination is to be given deference, see *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The fact that the trial court found the victim not to be “the most credible of witnesses” does not mean that the trial court could not have concluded that his testimony about the shotgun was credible, particularly in light of the supporting evidence. Specifically, the trial court found that the nature of defendant’s injury—the seven-centimeter head laceration that required eight staples to close—and the blood spatters on the wall of the breezeway indicated that “something more than the punch that . . . [defendant] claims he inflicted.” Accordingly, the scoring of OVs 1 and 2 is substantiated.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that trial counsel’s performance was deficient because he did not obtain or utilize the medical reports, either at trial or at sentencing, to support his contention that OV 1 and OV 2 should not have been scored. To establish a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel’s representation fell below an objective standard of reasonableness and (2) that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The relevant inquiry “is not whether a defendant’s case might conceivably have been advanced by alternate means,” but whether defense counsel’s errors were so serious that they deprived the defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002). Defendant bears the heavy burden of showing that counsel was not effective, as effectiveness of counsel is presumed. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

First, as the prosecution points out, the fact that trial counsel did not dispute the size of the injury permitted him to pursue a strategy that avoided any potential testimony that the victim’s head laceration could have been caused by the butt of a shotgun. The absence of such testimony appeared to have contributed to defendant’s acquittal of the offenses charged that necessarily required defendant’s use of a weapon. We will not second guess the trial strategy pursued by trial counsel, which appears on its face to be sound. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Therefore, defendant cannot establish that counsel’s performance fell below an objective standard of reasonableness.

Second, defendant has not shown that a reasonable probability exists that his counsel’s utilizing of the medical records would have changed the outcome of his trial or his sentence. The medical records showed that the victim’s head laceration was seven centimeters in length and required eight staples to close. This was a sizable head wound, and defendant admitted to police officers and an attorney from the prosecutor’s office before trial that he kicked and hit the victim. Thus, there is not a reasonable probability that defendant’s conviction would have been altered. And concerning the scoring of OVs 1 and 2, the trial court *did* rely on the medical records. Thus, defendant cannot show how he was prejudiced when he got what he wanted—mainly, the trial judge’s consideration of the medical reports in scoring the OV variables.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Peter D. O'Connell  
/s/ William C. Whitbeck