# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 11, 2012 |
| v | No. 303734<br>Schoolcraft Circuit Court |
| PETER CHARLES MARKHAM,<br><br>Defendant-Appellant. | LC No. 2010-006636-FH |

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Peter Charles Markham appeals as of right his jury trial convictions of seven counts of extortion,[1] one count of making a terrorist threat,[2] and one count of use of a computer to commit a crime.[3] Markham was sentenced to eight concurrent sentences of 75 months to 20 years' imprisonment for the convictions of extortion and making a terrorist threat, and 45 months to 20 years for use of a computer to commit a crime, to be served consecutively to the other sentences. We affirm Markham's convictions and sentences and remand for ministerial correction of his presentence investigation report ("PSIR").

This matter arose because of a "ready-to-serve" fee imposed on the water bills of some unoccupied parcels that Markham owned in the city of Manistique. The fee was imposed in order to repay federal loans to upgrade water treatment plants to keep them in compliance with federal law. Markham did not understand how there could be a legal basis for billing for water service on property where no water was actually used, so he refused to pay those bills. Unpaid utility bills in Manistique eventually are turned over to the county to collect as part of property taxes, which exposed Markham to the potential loss of his property. The prospect of losing his property, which Markham considered to be his only asset, led him to express his frustration and anger in menacing language on his website. Markham posted references to "murder, arson, and

[1] MCL 750.213.

[2] MCL 750.543m.

[3] MCL 752.796; MCL 752.797(3)(f).

suicide," "crushing the skulls of or setting afire my tormentors," and the spilling of "innocent blood."

The alleged intended targets of these threats were City Manager Sheila Aldrich, city attorney John Filoramo, Mayor David Peterson, and four city council members: Christine Rantanen, Daniel Evonich, Jan Jeffcott, and Richard Hollister. Markham appeared at a city council meeting on October 26, 2009, but as he began to read the lengthy statement he had prepared, he was stopped by Mayor Pro Tem Rantanen and was told to remain on the subject of the agenda item. He continued, skipping some of his prepared statement. When he read that as a result of city officials aiming to take his property, "I find myself considering a variety of options open to me, including murder, arson, and suicide," he was cut off by Filoramo and was not allowed to read any further. After the meeting, Aldrich suggested to Mayor Peterson and the city council that they change the water-line-disconnect policy then in place.[4] At the December 2009 city council meeting, the policy was amended so that property owners wishing to avoid the ready-to-use fee could pay a disconnect fee and have their water meters removed; service could be reinstated by paying a reconnect fee. Markham, however, did not take advantage of the new policy and refused to pay to stop the billing of the ready-to-serve fee.

The FBI got involved in the case in late December 2009 after Markham sent them a letter complaining about the city's "extortion," and mentioning once again that he was "considering murder, arson, and suicide." Concerned about Markham's potential danger to others, two FBI agents met and interviewed him in a fast-food restaurant in Manistique, where Markham calmly explained how he viewed his options, and he named the city officials whom he believed were attempting to extort his property from him. The agents then informed Director of Public Safety Kenneth Golat about the nature of the interview. After Golat relayed this information by telephoning each city official Markham had named, Aldrich, Peterson, and Golat "conversed daily" about what needed to be done to avert the "possibility of any city employee losing their life." Aldrich talked to City Attorney Filoramo and concluded that what city officials could do was to reduce to zero Markham's outstanding water bill including penalties and interest so that he would not have delinquent taxes due to the water fee issue, as long as he paid the disconnect fee. The offer was relayed to Markham on January 7, 2010, by way of the FBI agent he had spoken with in December.

At the January 11, 2010, city council meeting, Markham appeared and gave Aldrich a letter in an envelope. In it, he rejected the offer to forgive his outstanding fees (and to "buy his silence") and instead proposed a lengthy "counteroffer." Subsequently, Aldrich, Filoramo, Peterson, and Golat agreed that they had the authority to reduce the water fee portion of Markham's tax bill to zero, although they could not do anything about the delinquent property taxes. They also removed the ready-to-serve fees from Markham's other unoccupied parcels, and no ready-to-serve fees were assessed against those properties after that nor was a disconnect fee required.

[4] Since 2004, the city had been operating under a policy that required the water line to a property to be physically disconnected before the ready-to-serve fee would be stopped.

The city's decision to forgive Markham's outstanding water bills, including penalties and interest, and exempting his unoccupied properties from the "ready-to-serve" fee without any payment required was conveyed to Markham by Golat on January 28, 2010. Golat told Markham that the only reason that the city did that was because of Markham's threats to kill. Even after this concession by the city, however, Markham continued his rhetoric on his website. Golat saw that Markham posted a letter allegedly written to the FBI on February 1, 2010, in which Markham urged the agency to explain why "municipal extortion" was a civil matter "before I consider settling the related dispute in a violent physical manner." He was arrested shortly thereafter, and a search of his home resulted in the seizure of weapons and computer equipment.

## I. SUFFICIENCY OF THE EVIDENCE

Markham first argues his extortion convictions are not supported by sufficient evidence. Specifically, Markham argues that the so-called "threats" communicated to the identified victims were merely political hyperbole, and therefore were protected as free speech under the First Amendment. Markham also asserts that he always conditioned his statements on possible future events. Thus, there was no threat that he would certainly or immediately take any action. He further argues that he did not seek pecuniary gain and none of the alleged victims acted out of fear of the statements on his website.

We review an issue of sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecutor to determine not whether there was any evidence to support the conviction but whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.[5]

We conclude that there was sufficient evidence to support the charges against Markham. The extortion statute provides as follows:

> Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars.[6]

As such, the prosecutor had to prove (1) the existence of an oral or written communication maliciously encompassing a threat, (2) to injure the person or property or immediate family of

[5] *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

[6] MCL 750.213.

the person identified in each count, (3) which was made with the intent to extort money, to obtain a pecuniary advantage, or to compel the person to do or refrain from doing any act against his or her will.[7] Immediate harm is not required as extortion is generally "characterized by threats of future harm if the victim does not comply with the extortionist's wishes."[8] Nor does the relevant statute[9] require any inquiry into the effect on the person threatened[10] or an overt act to carry out the threat.[11] The phrase "injury to the person" includes emotional injury.[12] If the words might be construed as something other than a threat, whether the necessary intent was proven is a question for the jury.[13]

The essence of Markham's First Amendment argument is that the statements were not threats. He does not dispute that if they were, in fact, threats made in violation of criminal laws, they would not be shielded by constitutional protections.[14] Thus, the first part of Markham's argument turns on whether the evidence was sufficient for the jury to find that he made a threat.

With respect to extortion, "threat" is defined in the jury instructions as:

> a written or spoken statement of an intent to injure another person or that person's property or family. A threat does not have to be stated in any particular words. It can be said in general or vague terms, without saying exactly what kind of injury is being threatened. It can also be made by suggestion. However, a threat has to be definite enough to be understood by a person of ordinary intelligence as being a threat of injury.[15]

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[7] See *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985).

[8] *People v Trevino*, 155 Mich App 10, 19; 399 NW2d 424 (1986); see also *People v Peña*, 224 Mich App 650, 656; 569 NW2d 871 (1997) (An extortion "conviction may be secured upon the presentation of proof of the existence of a threat of immediate, continuing, or future harm."), mod and remanded in part on other grounds, denied in part 457 Mich 885 (1998).

[9] MCL 750.213.

[10] *People v Percin*, 330 Mich 94, 99; 47 NW2d 29 (1951).

[11] *People v Fort*, 138 Mich App 322, 332; 361 NW2d 346 (1984).

[12] *People v Igaz*, 119 Mich App 172, 188-189; 326 NW2d 420 (1982), vacated on other grounds 418 Mich 893 (1983).

[13] *People v Atcher*, 65 Mich App 734, 738; 238 NW2d 389 (1975); see also *People v Braman*, 30 Mich 460, 463 (1874), Cooley, J. ("If the meaning of the communication were doubtful, the intent would be a question for the jury[.]").

[14] *RAV v City of St Paul*, 505 US 377, 388; 112 S Ct 2538; 120 L Ed 2d 305 (1992) ("[T]hreats of violence are outside the First Amendment").

[15] CJI2d 21.3, citing *Fobb*, 145 Mich App at 786, and *People v Krist*, 97 Mich App 669; 296 NW2d 139 (1980).

A threat is also defined as "[a] communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent."[16] None of these definitions requires an intent to actually carry out the action or an actual ability to do so. And, as the prosecution points out, there is no statutory requirement that the threat cause the person to feel any fear or respond to the threat in any way.

Markham repeatedly communicated his intent to inflict violent and "bloody" harm in a context and manner that suggested the seven alleged victims were his present targets. He made these statements directly to the people present at the October 26, 2009, city council meeting and indirectly through his website and through the FBI agents, who he knew would inform the potential "targets" of the threat. The statute does not require direct communication. Although Markham might not have actually intended any real harm and "conditioned" harm on the occurrence of a future event, his intent to harm is irrelevant.[17] Indeed, *Random House Webster's College Dictionary* (1997) defines "threat" in the context used by the statute as "a declaration of an intention to inflict punishment, injury, etc. as in retaliation for, or conditionally upon, some action or course." In fact, the conditional nature of the threat is exactly what makes it extortion; otherwise, it would simply be a prediction of inevitable harm. His argument that he was merely "considering" committing such acts does not make his words a lesser threat, only a less predictable threat. Moreover, the jury heard the evidence and decided that the words constituted threats. Markham's words were not mere hyperbole or heat-of-the-moment exaggerations but planned statements intended to provoke a particular response. They were threats.

If the threat is communicated and its purpose is pecuniary gain or to compel the person to act against his or her will, the crime is complete. Markham protests that he did not seek to gain anything, but merely sought information about the legality of the fee. At the same time, however, he insisted that the city stop collecting the fee if it was not legal, and he also refused to accept any argument or evidence that the fee was, in fact, legal. Thus, in addition to a potential economic benefit of property free of the ready-to-serve fee, he attempted to compel city officials to bypass the legal procedures for repealing or amending ordinances and adopt his interpretation of what the ordinance should entail, particularly in his letter of January 11, 2010. The officials' lengthy resistance to his efforts is sufficient evidence that they would only change the existing law against their will.

Moreover, Markham's own words provide sufficient evidence to support the verdict for each count. His website repeatedly refers to "those that choose to prey on me," "local human predators," and "government officials that continue to ignore me." In his conversation with the FBI agents, he identified the city officials by name. His protests during trial that he was merely responding to a question regarding who the officials were was apparently not believed by the jurors, as was their prerogative. In his letter of January 11, 2010, Markham makes clear that his target is "the city," and it did not seem to matter to him whether his satisfaction came from the mayor, the city manager, the city attorney, or city council members acting either separately or

[16] Black's Law Dictionary (9th ed).

[17] *Percin*, 330 Mich at 99.

together. Thus, even though council member Evonich, who agreed with Markham that the fee might be illegal, testified that he was not afraid, fear of the person is not an element of the crime, and the same threat was communicated to Evonich for the same purpose; thus, the extortion count affiliated with him was sufficiently supported.

Most remarkably, in the letter Markham gave to Aldrich on January 11, 2010, Markham admitted to intentionally making threats in order to compel action from city personnel: "I realized, eventually, that City government and administration personnel were not inclined, without the voiced possibility of bloody confrontation, to reveal the source of their assumed right to coerce and extort;" "I failed to motivate the City by suggesting, earlier, the possibility of bloody retribution for the unauthorized municipal coercion and extortion[.]" It does not matter whether Markham may have never considered actually harming anyone.

There was also sufficient evidence that Markham made a threat of terrorism:

> A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.[18]

"It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism."[19]

> As used in this chapter:
>
> (a) "Act of terrorism" means a willful and deliberate act that is all of the following:
>
> (*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
>
> (*ii*) An act that the person knows or has reason to know is dangerous to human life.
>
> (*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.[20]

[18] MCL 750.543m(1).

[19] MCL 750.543m(2).

In his own words, Markham attempted "to motivate the City by suggesting . . . the possibility of bloody retribution." If he was serious, he violated MCL 750.543m(1)(a); if he was merely exaggerating in an effort to get his own way, he violated MCL 750.543m(1)(b). Because of the extremity of the violence Markham expressed, and because of the nature of the victims as members of a public body attempting to perform their civic duty, the evidence supporting the convictions of extortion was sufficient for the jury to conclude that the requirements of this crime were met.

Because direct, face-to-face communication of the threat is not required under either extortion or terrorism, the statements on Markham's website constitute use of a computer to commit a crime[21] and satisfy his conviction.[22]

## II. PRIVILEGED COMMUNICATIONS

The trial court allowed into evidence conversations between Markham and his attorney and between Markham and a nurse and doctor at the VA hospital, recordings of which had been found on the computer equipment seized from Markham's home. The trial court disagreed with Markham that the conversations were protected by privilege and denied Markham's motion to suppress the evidence. The trial court's determination of an evidentiary issue is reviewed for an abuse of discretion.[23] An abuse of discretion occurs when a trial court chooses an outcome that falls outside the range of principled outcomes.[24] Markham has the burden of establishing it is more probable than not that a different outcome would have resulted without the error.[25] Statutory privileges are strictly construed.[26]

We agree that Markham's conversations with his trial attorney and with the VA hospital personnel were protected by statutory privileges, and the recordings should not have been admitted. The trial court's error, however, was harmless.

> Any communications between attorneys and their clients, between members of the clergy and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys, members of

[20] MCL 750.543b(a).

[21] "A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime." MCL 752.796(1).

[22] Person violated MCL 752.796 and the underlying crime is a felony punishable by a maximum prison term of 20 years. MCL 752.797(3)(f).

[23] *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

[24] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[25] *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); see also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[26] *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994).

> the clergy, or physicians to serve as such attorney, member of the clergy, or physician.[27]

As can be seen, the statute does not condition the privilege on the source of the communication.

Markham called his attorney after one of the FBI agents gave him counsel's telephone number and advised Markham to seek legal assistance. When Markham spoke with his attorney, she established that "everything you tell me is confidential." While the conversation rambled, its focus was on the "pending confiscation" of Markham's property, and Markham asked, "What would you suggest that I do from a legal point of view?" His attorney advised him to go to the hearing when it occurred and make his argument there. This conversation was a communication between an attorney and her client that was necessary for her to advise Markham of his legal options. His statements were not made in advancement of his crime. Thus, the conversation was privileged and should not have been admitted.[28]

Similarly, Markham's conversation with the VA physician should not have been admitted. Markham contacted the mental health personnel because he was "seeking some resolution to a perceived problem," which he described as "see[ing] the world different than ninety-five percent of the people I run into," and he "want[ed] to know that what I see is real, that it's not my imagination." The communication was made for the purpose of evaluation and possible treatment. "Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings . . . unless the patient has waived the privilege, except [under limited circumstances, none of which apply here]."[29] The statute does not limit the source of the disclosure. It also prohibits disclosure of the much lengthier conversation Markham had with the nurse before she determined that he warranted an evaluation by a physician.[30] Although lawfully seized by warrant, the conversations should have been suppressed because they were privileged.

Nonetheless, the evidence of Markham's guilt was substantial, and the two privileged conversations were in large part cumulative. Markham wrote letters to several outside agencies about the matter that included his threats of bloody violence, and his website was certainly open to public viewing. Given the volume of evidence with similar content, the erroneous admission

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[27] MCL 767.5a(2).

[28] MCL 767.5a(2).

[29] MCL 330.1750(1).

[30] MCL 330.1700(h) provides:

> "Privileged communication" means a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law.

of the recordings did not result in an outcome different than would have been obtained had they been kept out.[31]

## III. STANDARD 4 ISSUES

Markham first argues that the extortion statute is unconstitutionally vague.[32] A statute may be void for vagueness if its coverage is overly broad and impinges on First Amendment freedoms.[33] Under the relevant part of the statute, a person is guilty of extortion if he or she

> orally or by any written or printed communication maliciously threaten[s] any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will . . . .[34]

Markham does not point to any particular word or phrase that he considers vague, and the conduct prohibited is clearly stated. Accordingly, we find no plain error affecting Markham's substantial rights.[35]

Markham next argues that numerous evidentiary errors occurred and as a result he was deprived of a fair trial. Some of these issues are preserved, and thus reviewed for abuse of discretion.[36] Some are unpreserved, and thus are reviewed for plain error affecting substantial rights.[37]

Evidence that Markham asserts was improperly admitted[38] to show his propensity to commit violent acts includes testimony about a 2007 discussion Markham had with Aldrich about possibly carrying a "bang stick," a photograph of his shotgun with its pistol grip attached (it was found with the shotgun stock attached), the video and pdf files found on the computer regarding weapons construction and tactics (none dated later than 2008), and Golat's testimony providing the names Golat said the FBI agent told him were targets. The last piece of evidence Markham claims was hearsay and the other evidence, Markham argues, were not relevant and were unduly prejudicial. Markham also asserts that Golat was improperly allowed to testify as an expert and to offer his opinion that what Markham said and did constituted threats. Finally,

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[31] *Lukity*, 460 Mich at 495.

[32] MCL 750.213.

[33] *People v Morey*, 230 Mich App 152, 164; 583 NW2d 907 (1998).

[34] MCL 750.213.

[35] *Carines*, 460 Mich at 764.

[36] *Smith*, 456 Mich at 549; MCL 769.26; *Lukity*, 460 Mich at 495.

[37] *Carines*, 460 Mich at 774.

[38] MRE 404(b).

Markham argues that the mass of testimony from Golat and other sources that was not the direct testimony of the alleged victims was confusing to the jury and was never actually linked to any of the specific counts.

Generally, relevant evidence is admissible.[39] Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]"[40] Admission of evidence of other crimes, wrongs, or acts for the purpose of showing a person acted in conformity therewith is prohibited.[41] Other-acts evidence, however, may be admitted to show "motive, opportunity, intent, preparation, scheme, plan, or system."[42] That is, "[e]vidence is inadmissible under this rule only if it is relevant solely to the defendant's character or criminal propensity."[43] If the prosecution intends to present other-acts evidence it must provide reasonable notice in advance of trial of the general nature of the evidence and the rationale for admitting it.[44] The notice provision of the rule "is designed to ensure that the defendant is aware of the evidence and to provide an enlightened basis for the trial court's determination of relevance and decision whether to exclude the evidence under MRE 403."[45]

None of Markham's arguments have merit. While the testimony about the "bang stick" discussion was arguably other acts evidence for which the required notice was not provided, the purpose of the statute[46] was nonetheless satisfied because the record shows that Markham was aware of the evidence, having raised it at the preliminary examination, and the court had sufficient opportunity to consider the matter for relevance because defense counsel objected on that ground at trial. At trial, the evidence was not used to show Markham committed extortion in 2007, or even that his banter was necessarily a threat. Rather, it was used because it marked the beginning of a change in Markham's manner toward city hall personnel. Additionally, given the vast amount of evidence supporting Markham's guilt, it cannot be said that the evidence affected Markham's substantial rights, i.e., it did not affect the outcome of the proceedings.

The photograph of the shotgun with the pistol grip attached was not evidence of "other crimes, wrongs, or acts," but physical evidence of the res gestae of the crime, admissible without regard to MRE 404(b).[47] Golat testified that when Markham registered the gun, he installed the

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[39] MRE 401; MRE 402.

[40] MRE 403.

[41] MRE 404(b)(1).

[42] *Id*.

[43] *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010).

[44] MRE 404(b)(2).

[45] *People v Sabin*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000).

[46] MRE 404(b)(2).

[47] *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996).

pistol grip which made the firearm short enough so that Markham could legally register it as a pistol, which is what he did. The computer file evidence is likewise not "propensity" evidence. These things were relevant to show Markham's statements might be more than political hyperbole. As for Golat's testimony, he provided the list of names given to him by the FBI agents in response to questions establishing what action Golat took after being notified by the FBI of the named possible targets. It was not "propensity" evidence because it did not concern something Markham did, but rather what Golat did after being told the names by the FBI agents. Nor was the evidence being offered to prove that Markham had named those people or that they were, in fact, targets of threats.

Also, Golat did not testify as an expert. Golat spent considerable time looking at Markham's website. He also had been present during the October 26, 2009, city council meeting and had been in frequent contact with Peterson and Aldrich throughout the critical months leading up to Markham's arrest. His testimony tied together many of the pieces provided by other witnesses.[48] Moreover, like that of other witnesses, defense counsel closely monitored his testimony for times when it slipped from statements about how he felt about Markham to whether Markham was a threat in general.

Markham argues that the prosecutor engaged in misconduct that denied him a fair trial. According to Markham, not only did the prosecutor propound the evidentiary errors asserted above, but he also allowed only selected quotes from the website to be read into evidence, that were mischaracterized as threats, giving the jury a one-sided and incomplete view of what the website contained and confusing the jury regarding which victims were aware of which website statements. Markham also argues that the prosecutor communicated to the jury his personal belief regarding Markham's guilt, and improperly stated that as a matter of fact it was fortunate that law enforcement intervened before Markham could carry out the things he was prepared to do.

As discussed above, the evidentiary errors, if any, did not affect the outcome of the trial. Additionally, the prosecution was well within bounds by eliciting only some of the website statements through testimony as a prosecutor "has the discretion to prove his case by whatever admissible evidence he chooses."[49] The prosecutor was not required to argue both sides of the case. Moreover, the print copy of the entire website was available to the jury, and defense counsel was free to present the full context of the statements on the website, which he did, both in cross-examination and in direct examination of the defense witnesses.

The prosecutor's opening statements did not convey his belief that Markham was guilty, but that he believed sufficient evidence existed to support a verdict of guilt beyond a reasonable doubt. The closing statement was merely a pointed way of arguing the reasonable inferences arising from the evidence that Markham was guilty of threatening behavior and that he was

[48] See *id*. at 741 ("[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.").

[49] *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002).

prepared to carry out his threats, as evidenced by the weapons and weapons training manuals. "[Prosecutors] are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'"[50] Further, the jury was properly instructed that the attorneys' arguments were not evidence.[51]

Markham also raises sentencing issues and argues that offense variables (OVs) 4 and 13 were improperly scored at ten and 25 points, respectively, and both variables should have been assessed zero points. We review for abuse of discretion a trial court's scoring under the sentencing guidelines.[52]

The record shows that the prosecution agreed that OV 4 had been misscored for one of the counts and that it should have been zero for all counts. This correction, however, was not made to the PSIR. Moreover, there is no evidence that the victim identified in count three suffered any psychological injury or that he was at all fearful. Indeed, the court determined that none of the other victims suffered serious psychological injury requiring treatment. As such, the PSIR must be modified to show a score of zero points for OV 4 with respect to count three.[53]

OV 13 considers the "continuing pattern of criminal behavior."[54] A score of 25 points is appropriate when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[55] In determining the appropriate points for OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."[56] This Court has already determined that concurrent convictions are included when calculating a defendant's score under OV 13.[57] Accordingly, OV 13 was correctly scored at 25 points.

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[50] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

[51] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

[52] *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010).

[53] *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006). Because we agree with Markham that OV 4 was incorrectly scored and because the score for OV 13 was correctly based on Markham's convictions for nine felonies, we need not address Markham's argument that *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006), was incorrectly decided. Neither OV 4 nor OV 13 was assessed points for facts not decided by the jury.

[54] MCL 777.43.

[55] MCL 777.43(1)(c).

[56] MCL 777.43(2)(a).

[57] *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

Markham's PRV score was 20. With a score of 0 for OV 4, his OVs would all be scored at 35,[58] keeping him in the 35-49 point range, and C-IV cell of MCL 777.63 (class B offenses). Because Markham's guidelines range is unchanged, resentencing is not required.

Finally, Markham argues that he was provided ineffective assistance of counsel. Markham asserts that no strategic reason can support counsel's failure to ensure the sentencing guidelines were scored correctly and failure to object to the pictures and testimony regarding firearms and ammunition dates of purchase, the ammunition, the lack of a hunting license, the computer files regarding weapons techniques, and the testimony regarding the pistol grip on the shotgun. Because there was no motion for a new trial and no evidentiary hearing, this Court's review is limited to errors apparent on the already-existing record.[59]

Markham does not overcome the heavy burden of proving that counsel's performance was deficient and that the deficiency resulted in prejudice to him.[60] The scoring error was corrected by trial counsel but the correction was not noted on the PSIR. This Court's remand for ministerial correction negates that oversight. The evidence Markham complains about was not improperly admitted. Defense counsel is not required to make fruitless objections.[61] Our examination of the record indicates that defense counsel provided thorough and zealous advocacy by filing appropriate motions, extensively cross-examining witnesses, objecting to evidence or proceedings where appropriate, and earnestly arguing at both the open and close of the trial.[62]

We affirm Markham's convictions and sentences and remand for the ministerial correction of his PSIR; OV 4 for count 3 should have been assessed zero points. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan

[58] 10 for OV 9 (number of victims) and 25 for OV 13.

[59] *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

[60] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[61] *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

[62] *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011).