

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTEEZ DONOVAN LAIDLER,

Defendant-Appellant.

FOR PUBLICATION

December 28, 2010

9:10 a.m.

Nos. 294147; 295111

Wayne Circuit Court

LC No. 09-012575-FH

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

BANDSTRA, J.

In Docket No. 294147, defendant appeals as of right his conviction, following a jury trial, of first-degree home invasion. MCL 750.110a(2). Defendant was originally sentenced to a prison term of 110 months to 20 years. After the trial court discovered that it had utilized an incorrect sentencing guidelines grid at defendant's original sentencing, defendant was resentenced to a lesser prison term of 48 months to 20 years. Defendant appeals that sentence as of right in Docket No. 295111. Defendant's appeals have been consolidated for this Court's consideration. We affirm defendant's conviction, but remand for resentencing. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in which he and Dante Holmes broke into a house that they apparently believed was unoccupied. The homeowner was present and fatally shot Holmes as he reached inside a broken window to unlock it. Defendant admitted that he was with Holmes at the house. The prosecutor's theory at trial was that defendant assisted Holmes by helping him up to the window, which was six feet off the ground.

Defendant argues that he is entitled to a new trial because of the prosecutor's improper conduct during closing argument. Because defendant did not object to the prosecutor's comments at trial, relief is precluded unless defendant establishes plain error that affected his substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Defendant also contends that trial counsel was ineffective for failing to object to the prosecutor's conduct. Because defendant did not raise this issue below, review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

The prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor may the prosecutor express a personal belief in the defendant's guilt. *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). Contrary to defendant's assertion, however, the record does not support defendant's claim that these rules were violated by the prosecutor during her closing argument. Rather, the prosecutor's addressed the evidence presented at trial and the conclusions that reasonably could be drawn from it. *Bahoda*, 448 Mich at 282. Although the prosecutor noted that the jury had the option to find defendant not guilty, she argued that doing so would be contrary to what the facts showed and what the law required. There was nothing improper in arguing that the jury should convict defendant because the evidence showed that he was guilty. And, because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to object. Counsel is not ineffective for failing to raise a meritless objection. *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).

Defendant also argues that he is entitled to resentencing because the trial court erroneously scored 100 points for offense variable 3. The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Offense variable 3 (OV 3) considers "physical injury to a victim," MCL 777.33(1), and it assesses points depending on the degree of injury suffered by "a victim," MCL 777.33(1)(a)-(f). In relevant part here, it requires that 100 points be assessed when "[a] victim was killed." MCL 777.33(1)(a), (b). For purposes of OV 3, the term "victim" means "any person harmed by the criminal actions of the charged party." *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003).

MCL 777.33(2)(b) instructs further that 100 points are to be scored "if death results from the commission of a crime and homicide is not the sentencing offense." In this non-homicide sentencing offense case, the trial court determined that the death of defendant's co-felon, Holmes, justified a 100-point score for OV 3. It reasoned that "it doesn't have to be the victim" that was killed to warrant such a score, and that 100 points could be assessed whenever "someone died as a result of the commission of [the] crime," because subsection (2)(b) does not specifically refer to a victim. We disagree.

As already noted, MCL 777.33(1) authorizes the assessment of points only where a "victim" of the sentencing offense is killed or injured. Contrary to the reasoning of the trial court, subsection (2)(b) does not expand the applicability of this offense variable. Instead, it limits the offenses for which 100 points can be assessed. A 100-point score can only be imposed for non-homicide sentencing offenses where the death results from the commission of a crime. Neither of those limiting conditions can enlarge OV 3 so that it would authorize the imposition of points where there is no physical injury to a "victim" as required by subsection (1).

Here, Holmes simply was not a "victim" because he was not harmed by defendant's criminal activity, or by the crime that was committed, jointly, by defendant and Holmes. *Albers*,

258 Mich App at 593. Rather, the “victim” of the crime here was the homeowner, and he was not injured.¹ So, there being no “physical injury to a victim,” here, OV 3 is simply inapplicable. MCL 777.33(1).²

Because the scoring error affects the appropriate guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). Defendant’s conviction is affirmed but his sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Christopher M. Murray

¹ In *Albers*, 258 Mich App at 580, defendant was convicted of involuntary manslaughter after her young son set fire to their apartment, resulting in the death of a child residing in another apartment in the same complex. The defendant challenged the assessment of 25 points under OV 3, for life-threatening or permanent injury to a second child resulting from that same fire. Our Court upheld the scoring, concluding that the other child was also a “victim” of the sentencing offense, and explaining, as noted above, that a “‘victim’ includes any person harmed by the criminal actions of the charged party.” *Id.* at 591-593. Nothing in *Albers* supports the prosecutor’s assertion here, adopted by the trial court, that under the circumstances presented in this case, defendant’s co-felon is a “victim” within the meaning of OV 3. Nor has the prosecutor offered, or this Court found, any authority for such a proposition.

² We further note that the requirement of MCL 777.33(2)(b), that a death result from the commission of a crime, was not satisfied here. Even if Holmes might properly be considered a “victim,” his death resulted from the actions of the homeowner, not from the commission of a crime.