STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RICKY ALLEN NORWOOD,

Defendant-Appellant.

UNPUBLISHED
December 6, 2002

No. 226167
Berrien Circuit Court
LC No. 99-404568-FC

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, in connection with the beating death of his three-year-old granddaughter. Defendant was sentenced to eighteen to fifty-four years' imprisonment. He appeals as of right. We affirm defendant's conviction but remand for resentencing.

On October 1, 1996, the victim and her four siblings, all between the ages of eleven months and seven years, were living with defendant (their grandfather) and his wife, Dolly Norwood. Defendant and his wife were approved foster care parents for the children. Direcca Norwood, the sixteen-year-old daughter of defendant and his wife, and defendant's mother-in-law also lived in the home. As part of the foster care contract with the Family Independence Agency (FIA), defendant agreed to refrain from physically punishing the children. Notwithstanding the agreement, defendant beat the children with a belt at times. He testified that he believed that they were "a little wild" and did so in order to instill discipline in them.

After dinner on the evening the victim was murdered, defendant's grandchildren took their baths and dressed in their night clothes. Thereafter, the oldest child went into a back room to read a book while the victim and her two brothers went to the living room to watch television. When the victim came into the living room, defendant noticed that her green Teletubby slippers were on the wrong feet. Defendant pointed this out and tried to teach her how to put them on correctly. They practiced numerous times, and when the victim put them on properly, defendant praised her. The victim, however, made a number of mistakes and eventually defendant threatened the victim, telling her that if she did not put the slippers on correctly, he would get his belt. Over a period of approximately one hour, whenever the victim failed to put the slippers on correctly he struck her with the belt. Defendant did not know how many times he hit the victim. At times, the victim ran from defendant but he chased her and brought her back to the living room. Defendant testified that the victim never cried. When defendant's wife told him to leave

the victim alone, he stopped hitting her. The victim crawled on the couch and eventually became sleepy. About midnight, defendant put her to bed on a makeshift mattress in his bedroom. Defendant claimed that he did not realize the victim was badly injured because she did not act as if anything was wrong.

At approximately 3:00 a.m., defendant checked on the victim and realized that something was wrong. 911 was called, but when paramedics arrived the victim was dead. It was apparent to emergency personnel that she had been severely beaten. Defendant told police that he did not mean to kill the child or to harm the child, but he readily admitted that he "tanned" the child "really good" because the victim would not put her slippers on properly and would not listen to him. Defendant also admitted that he was frustrated with the child, not only because of her failure with respect to the slippers but because she generally would not talk to him or his wife. Responding police and paramedic personnel testified that defendant was disinterested and showed no emotion at first. Eventually, however, he became nervous and began pacing and smoking.

The forensic pathologist who conducted the autopsy testified that the victim suffered extensive bruising and scraping over her body, including to her face, head, chest, abdomen, back, arms, legs and buttocks. She also had extensive scarring from prior trauma. Several areas of bruising were continuous. For example, the back of the victim's left leg revealed one continuous bruise from the buttock down to the ankle. While it was impossible to determine how many times the child was struck in order to create the continuous bruising, the pathologist counted the continuous bruises as one strike to be conservative. Counting in this conservative manner, he found forty-six separate, fresh injuries, indicating a minimum of forty-six blows. Some of the injuries were consistent with the skin being struck by part of a belt buckle.

The pathologist also testified that a considerable amount or substantial degree of force was used and that the force was vigorously applied. While all of the injuries were to the fatty tissues of the body, the victim died because bruises generally hemorrhage and the beating was so extensive that the victim lost a great amount of blood. The victim was "literally beaten to death." The massive internal hemorrhage caused lack of adequate blood supply to the brain and, the victim's vital functions eventually ceased. It took between thirty minutes and four hours for the victim to die. After the beating, the victim would have been lethargic and sleepy and she eventually slipped into a coma.

Defendant was charged with second-degree murder. Defendant argued at trial that he was guilty of manslaughter and not second-degree murder, contending that the victim's death was accidental, that he did not realize his conduct could cause death or bodily harm, that he did not intend death or great bodily harm, and that he was, at most, grossly negligent. He also pointed out that he spanked his own children when they were growing up and that he previously spanked his grandchildren but that his prior actions never caused a death.

I

Defendant first argues that the evidence was insufficient to sustain his conviction for second-degree murder. We disagree. We review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111;

570 NW2d 146 (1997). The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998) (citation omitted).

> The malice element of second-degree murder is satisfied by showing that the defendant possessed the intent to kill, to do great bodily harm, or to create high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result. Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. [*People v Djordjevic*, 230 Mich App 459, 461-462; 584 NW2d 610 (1998) (citations omitted).]

"The offense of second-degree murder 'does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.'" *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

Defendant argues that the element of malice was not met because he was unaware that his actions were life-endangering or could cause grave bodily harm. Defendant's argument is not supported by the evidence, which must be viewed in a light most favorable to the prosecution. It was undisputed that defendant intended to strike the victim with the belt. The evidence also established that he struck the thirty-pound child a minimum of forty-six times, causing extensive bruising. The fact that defendant intentionally struck the victim with a belt until her body was covered with bruises establishes that he acted in obvious disregard of the life-endangering consequences, and set in motion a force likely to cause great bodily harm. In *People v Mackey*, 168 Mich App 154, 157-158; 423 NW2d 604 (1988), the defendant beat to death a fourteen-month-old child. This Court held that the natural tendency of the defendant's brutal beating of the young child was to cause great bodily harm. *Id.* Similarly, in this case the natural tendency of defendant's continuous and brutal beating of his three-year-old victim was to cause great bodily harm, which in turn caused the victim's death. The evidence was sufficient to support defendant's second-degree murder conviction.

II

Defendant next argues that his counsel was ineffective because his investigation and preparation of the case was inadequate, because he utilized a poor trial strategy which was destined to fail, and because he did not provide a rational defense. Our review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*[1] hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must overcome the

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant first argues that counsel was not prepared to defend a second-degree murder charge. The day before trial, the prosecutor decided not to pursue the original charge of first-degree murder. Defendant argues that, before that time, counsel was preparing to defend on

a first-degree murder charge and therefore was obviously ill-prepared to defend the second-degree murder charge on such short notice. We disagree. "A charge of first-degree murder [automatically] requires consideration of the lesser included offense of second-degree murder." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998) (citation omitted). Thus, the original information "served to notify defendant that he would have to defend charges of first-degree and second-degree murder." *Id.* Defendant's argument that his counsel was ill-prepared to defend a second-degree murder case because the first-degree charge was dropped on the eve of trial simply has no merit. Moreover, it is not apparent from the record that defense counsel was ill-prepared to try a second-degree murder case.

Second, defendant contends that counsel did not adequately prepare the case because he did not hire an expert to examine the victim's body to determine if the cause of death was something other than the beating. We disagree. Before jury selection, defendant's counsel made a lengthy record about defendant's complaints with respect to the trial preparation. Counsel defended his decision not to have another pathologist examine the body. In defense counsel's view, since the victim underwent a physical examination before she was placed in the defendant's home, there was no information to indicate that the victim had any past medical problems. Defense counsel further believed that he had adequately cross-examined the forensic pathologist at the preliminary examination and covered many of the questions that might have been addressed by another forensic examination. In addition, it was clear, based on all of the known information and circumstances, that the injuries from the beating were the cause of the victim's death. Counsel believed that further investigation into those areas would not be fruitful, and therefore concentrated his efforts on developing the theory that defendant did not have the requisite intent to commit murder. Counsel's decision was a matter of trial strategy, which will not be second guessed. *People v Knapp*, 244 Mich App 361, 386 n 7; 624 NW2d 227 (2001). "[E]ven if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *Id.* (quotation omitted). Further, in order to prevail on his claim of ineffective assistance, defendant must demonstrate that if his counsel had further investigated the medical issues, the outcome of his trial would have been different. Defendant has failed to make the requisite demonstration.

Defendant next argues that counsel was ineffective for pursuing the defense that he was guilty of manslaughter instead of second-degree murder. Defendant argues that counsel was unable to provide the jury with a legitimate presentation as to why they should convict him on the lesser offense and thus, the strategy was destined for failure. Defendant cannot overcome the presumption that counsel engaged in a sound trial strategy. The record establishes that counsel was familiar with the elements of second-degree murder and the elements of manslaughter. Counsel argued that defendant was not guilty of second-degree murder because he did not act with malice. He argued that defendant's behavior was gross negligence at most and that a manslaughter conviction should follow. In pursuing this defense, defense counsel elicited testimony that defendant did not intend to harm or kill the victim and that he made statements to

others in this regard. Counsel also elicited testimony that defendant never knew that physical discipline with a belt could kill. Further, defense counsel elicited testimony from defendant's sixteen year old daughter that defendant's house was a happy house and that defendant was involved with, affectionate to, and played with his grandchildren. On the basis of this record, we conclude that defense counsel's trial strategy of trying to convince the jury that defendant committed manslaughter and not murder was sound. It is well established that a decision to concede guilt on a lesser offense is accepted trial strategy. See *People v Walker,* 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled on other gds *People v Mitchell,* 456 Mich 693; 575 NW2d 283 (1998). Utilizing a sound trial strategy that ultimately fails does not constitute ineffective assistance of counsel. *People v Bart (On Remand),* 220 Mich App 1, 15 n 4; 558 NW2d 449 (1996).

Defendant also contends that his counsel failed to call any witnesses to testify that he used physical discipline on other occasions without killing anyone. The decision regarding what evidence to present and whether to call or question witnesses is a matter of trial strategy. *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). More importantly, defendant himself testified that he had disciplined his children and grandchildren with physical punishment before and did not know that he could kill someone by doing so. This testimony was sufficient, if believed, to support his claim that he was unaware that his conduct could result in great bodily harm or death.

Defendant's complaint about his counsel's failure to call character witnesses similarly fails because this was a matter of trial strategy, which we will not second guess. *Id.* at 76-77. Further, the record indicates that counsel's decision not to call character witnesses was a conscious, well-reasoned one. Some of the witnesses who defendant wished to call could have provided damaging testimony about the physical manner in which he previously punished his grandchildren. Further, counsel determined that calling witnesses to testify solely that they knew defendant and that he could not do "something like this" was not helpful because it was apparent that defendant beat the child and he admitted as much.

Defendant also makes a confusing argument that suggests that counsel should have challenged the voluntariness of defendant's statements made to police during the early morning hours after the crime. Defendant fails to explain his position or brief the merits of this argument. Where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned. *Knapp, supra* at 374 n 4.

Finally, defendant raises issues of the effectiveness of trial counsel with respect to the introduction of certain evidence and testimony. Those claims are addressed *infra*.

III

Defendant raises several issues of prosecutorial misconduct. None of the alleged errors were preserved with an appropriate objection at trial.

> [A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. In order to avoid forfeiture of an unpreserved error, the defendant must demonstrate plain error that was outcome determinative. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's

> comments could have been cured by a timely instruction." [*People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citations omitted).]

Defendant first argues that the prosecutor committed misconduct by eliciting prejudicial testimony from a foster care licenser from the FIA. The licenser testified that defendant and his wife understood the methods of discipline considered acceptable and unacceptable by the FIA, and signed an agreement with FIA to forego the use of physical discipline. The agreement between defendant and his wife and the FIA was admitted into evidence without objection. Defendant argues that the only purpose of the evidence was to show that he was a bad person and, as such, violated MRE 404(b). We disagree.

MRE 404(b) provides in relevant part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The testimony at issue was not evidence of another crime, wrong or bad act and it was not used to show that defendant acted "in conformity therewith." Further, the evidence of the FIA agreement was relevant and admissible. "Relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or if it would result in confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

The prosecutor was required to prove that defendant intended to kill the victim, intended to cause the victim great bodily harm, or created a high risk of death or great bodily harm with the knowledge that death or great bodily harm would result. *Djordjevic, supra.* Defendant argued that he acted stupidly and was grossly negligent, and that he did not understand that his actions could result in great bodily harm. In support of this theory, defendant testified that he used physical punishment to discipline his own children, and that he believed that the use of physical punishment was a proper way to discipline children. The evidence of the FIA agreement was relevant because it supported the prosecution's theory that it was more probable than not that defendant knew and understood that physical punishment of the child was wrong, that it was not a proper way to discipline a child, and that physical punishment could result in harm to the child. Indeed, defendant concedes in his brief on appeal that the agreement was relevant evidence as to his state of mind, one of the elements the prosecutor was required to prove in order to establish second-degree murder.

We further find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. While all relevant evidence is inherently prejudicial and damaging, only unfairly prejudicial evidence must be excluded. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Relevant considerations in

determining unfair prejudice include whether the jury will give the evidence undue or pre-emptive weight. *Id.*, pp 75-76. In this case, the prosecutor did not argue for defendant's conviction based on the fact that he violated the agency agreement. In fact, the prosecutor argued that the breach of the agreement was probably not a crime. Given defendant's admissions and the prosecutor's limited argument with respect to the agency agreement, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. We find that the introduction of the evidence was not prosecutorial misconduct. Moreover, because the evidence was properly admitted, defense counsel was not ineffective for failing to object to it. Counsel is not required to make frivolous objections. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that the prosecutor improperly pursued a line of questioning with Detective O'Brien, implying that defendant lied to O'Brien and breached an obligation to fully confess. Defendant complains that this line of questioning and the prosecutor's attendant argument was irrelevant and was a "back door way" of vouching for O'Brien's credibility and for characterizing defendant as a liar. Defendant's argument is not only confusing, but it improperly portrays the prosecutor's questions. Defendant wanted to be portrayed as cooperative and forthcoming (Tr II, pp 330, 372-373). O'Brien interviewed defendant after the crime. While defendant admitted that he beat the child, he left O'Brien with the impression that he had struck the child approximately seven times. Defendant further told O'Brien that he struck the child only with the leather part of the belt, not the buckle, that he struck her in the legs and buttocks, and that he never knew that "you could kill somebody by disciplining them with a belt." At the time of the interview, O'Brien was unaware of the extent of the injuries to the victim. The information O'Brien received from defendant led him to believe that the death was, in fact, an accident, and therefore, O'Brien did not ask for more detailed information during the interview. The prosecutor's questions to O'Brien, eliciting that defendant was not entirely forthcoming with respect to what occurred before the victim's death, were proper and relevant to defendant's credibility and the credibility of his statement to the police. All fact issues relevant to the weight and credibility of a defendant's statement, except for voluntariness, are issues for the jury. *People v Weatherspoon*, 171 Mich App 549, 554; 431 NW2d 75 (1988).

Further, the prosecutor's argument that O'Brien would have asked different questions if he was aware of the extent of the victim's injuries was not improper vouching. Improper vouching occurs when the prosecutor expresses his opinion about the witness' truthfulness or suggests that the government has some special knowledge that a witness will testify truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, the prosecutor's argument did not express or suggest that O'Brien was truthful. Further,

> "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." [*Id.* at 282 (citations omitted).]

The prosecutor's argument was based on the proper evidence of defendant's failure to fully inform the police of his actions and the reasonable inferences to be drawn from that evidence.

Defendant next claims that the prosecutor improperly argued that "actions speak louder than words," that actions often evidence true intent, that defendant should be held accountable for the natural consequences of his actions, and that at some point during the beating, defendant

knew that great bodily harm would likely result. Defendant argues that these statements took the "element of intent out of the deliberative process" and were misstatements of the law because there is no legal presumption that a person intends the ordinary consequences of his voluntary acts.

We agree that the trial court should not instruct the jury that a person is presumed to intend the natural consequences of his actions unless the testimony satisfies the jury to the contrary, *People v Wright*, 408 Mich 1, 11; 289 NW2d 1 (1980), however, that did not occur in this case. The prosecutor did not argue to the jury that it should presume that defendant intended the natural consequences of his actions, nor did the prosecutor argue that there was any legal presumption to this effect. Thus, the burden of proof was not improperly shifted to defendant. Rather, the prosecutor argued that, based on the evidence and reasonable inferences, defendant should be held responsible for the natural consequences of his actions. The prosecutor also asked the jury to decide the case based on the facts as "you find them" and on the law the trial court would give. The jury was later instructed that the arguments of the attorneys were not evidence to be considered and that the law given by the court is what should be followed. The argument was not improper. We note that even if the comments bordered on advocating that the jury should presume that defendant intended the consequences of his action, any prejudicial effects of such comments could have been cured by a timely instruction. Thus, the prosecutor's argument does not constitute plain error requiring reversal. *Watson, supra.*

Defendant also argues that the prosecutor's rebuttal argument denigrated his right to remain silent and to avoid self-incrimination, elicited sympathy for the victim, and constituted an improper civic duty argument because the prosecutor asked the jurors to put themselves at the crime scene and speculate about what occurred. None of these arguments have any merit. A prosecutor's comments are to be considered in light of defense counsel's arguments. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

In closing, defense counsel emphasized that defendant worked to provide for his family and that he willingly agreed to take responsibility for his grandchildren. He even bought a bigger home to accommodate them. Counsel further discussed defendant's feeling that the children were wild and that defendant used a belt to teach them discipline. Defense counsel asked the jury to consider that defendant was doing his best, making a living and trying to care for the children. Counsel pointed out that defendant spanked his children and grandchildren in the same manner before and none had suffered the same fate. He argued that, for whatever reason, defendant lost control and acted in a negligent or grossly negligent manner but that he did not intend to cause the victim harm and did not know that his actions would cause such harm. In rebuttal, the prosecutor argued that defendant was playing on the jury's sympathy and he reminded the jury that they were to decide the case without sympathy for the defendant or prejudice against him. This argument did not improperly elicit sympathy for the victim.

Further, the prosecutor's rebuttal argument asked the jury to visualize the facts of the case and decide after how many belt strikes it would have occurred to a reasonable person that harm was imminent. This was not an improper civic duty argument. An improper civic duty argument plays on the fears or prejudices of the jury, *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999), or injects issues broader than the defendant's guilt or calls upon the jury to suspend their powers of judgment, *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996).

Further, defendant's right to remain silent and right against self-incrimination were not at issue in the case. A defendant waives his privilege against self-incrimination when he takes the witness stand and testifies. *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). Moreover, defendant never exercised his right to remain silent because he made post-*Miranda*[2] statements to the police. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). Thus, the prosecutor's argument about defendant's failure to tell O'Brien all of the facts of the incident was not in violation of either of those rights. Further, a prosecutor may argue from the facts that the defendant is not worthy of belief, even if the characterization is that defendant is a "liar." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In this case, the prosecutor properly elicited testimony that, while defendant appeared cooperative and contrite, he omitted the true facts when speaking with the police. It was permissible for the prosecutor, based on that testimony, to argue that defendant was not honest with the police and thus, not worthy of belief.

Finally, defendant argues that the prosecutor committed misconduct by arguing that defendant delayed in calling the police and reporting the incident. We disagree. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence. *Bahoda, supra*. In this case, the prosecutor argued, utilizing the evidence elicited at trial, that defendant checked on the child and knew something was wrong around 3:00 a.m. and that emergency personnel were not immediately called. The prosecutor pointed out the delay in the call to emergency personnel. The prosecutor argued that when defendant found the child dead, he knew he was the cause of her death. The delay must have occurred because he was thinking about what options he had other than calling the police. This comment was based on the evidence and reasonable inferences to be drawn from it.

IV

Defendant next raises two issues with respect to the jury instructions. Neither allegation of error has merit. Both issues are unpreserved because defendant never requested the instructions at issue nor objected to their absence. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Accordingly, we review the issues for plain error affecting defendant's substantial rights. *Aldrich, supra* at 124-125, citing *People v Carines*, 460 Mich App 750, 763; 597 NW2d 130 (1999).

Defendant argues that the trial court erred when it failed to instruct the jury in accordance with CJI2d 4.1, which provides:

> (1) The prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following:
>
> (2) First, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you should not consider it. If you find that [he/she] made part of the statement, you may consider that part as evidence.

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> (3) Second, if you find that the defendant did make the statement you must decide whether the whole statement, or part of it, is true. When you think about whether the statement is true, you should consider how and when the statement was made, as well as all the other evidence in the case.
>
> (4) You may give the statement whatever importance you think it deserves. You may decide that it was very important, or not very important at all. In deciding this, you should once again think about how and when the statement was made, and about all the other evidence in the case.

In this case, defendant did not dispute that he made statements to the police and paramedics. He also did not dispute the truth of the statements attributed to him. Further, defendant's trial testimony was consistent with the statements attributed to him. The portions of CJI2d 4.1 relating to whether defendant made the statement and whether it was true are irrelevant to this case. Moreover, the trial court instructed the jurors that they were to decide the importance of the testimony in the case, which effectively conveyed the substance of CJI2d 4.1(4). Under the circumstances, defendant cannot demonstrate that the failure to instruct the jury in accordance with CJR2d 4.1, affected his substantial rights, i.e., that it affected the outcome of the trial. There was no plain error requiring reversal. We further find that counsel was not ineffective for failing to request the instruction where defendant cannot demonstrate that but for counsel's failure to request the instruction, the outcome of trial would have been different.

Defendant also complains that the trial court's failure to instruct the jury with regard to his theory of the case was error requiring reversal and that counsel was ineffective for failing to request such an instruction. Defendant argues that it is fundamental law that a defendant is entitled to an instruction on his theory of the case if there is evidence to support that theory. We find no plain error requiring reversal. Defendant's closing argument outlined his theory of the case. More importantly, an instruction on the defendant's theory of the case is not mandatory and is required only *if* requested. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995), citing *People v Wilson*, 122 Mich App 1, 3; 329 NW2d 513 (1982); MCR 2.516(B)(3). We further reject defendant's claim that defense counsel was ineffective for failing to request an instruction on defendant's theory. Defendant cannot demonstrate that, but for counsel's error, the outcome of trial would have been different. *Stanaway, supra.* Defense counsel argued defendant's theory to the jury and, therefore, failure to have the trial court reiterate that theory was not objectively unreasonable or so prejudicial as to deprive defendant of a fair trial.

V

Defendant finally argues that the trial court improperly assessed one hundred points for OV-3 and five points for OV-17, which resulted in an inaccurate sentencing guidelines range being used at sentencing. The prosecution agrees that defendant was improperly assessed one hundred points for OV-3, which provides that the points should be assessed only where homicide is not the sentencing offense. MCL 777.33(2)(b). Further, the prosecution concedes that defendant should not have received five points for OV-17, which is scored only if the conviction involves the operation of a vehicle. MCL 777.22(1). Defendant failed to object to these scoring deficiencies at sentencing and failed to properly move for resentencing or remand. Thus, our

review of these unpreserved scoring issues is for plain error. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002).

We find plain error requiring resentencing. Defendant's guidelines range was improperly calculated based on the undisputed scoring errors. The correct range is 90 to 150 months, not 162 months to 270 months. MCL 777.61. Thus, defendant was sentenced on the basis of an improper guidelines range. This is plain error requiring remand for resentencing.

We further note that while defendant also contends that counsel was ineffective for failing to challenge the scoring of OV-3 and OV-17, we need not address this issue in light of our remand for resentencing.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder