STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2004
v	No. 245259 Oakland Circuit Court
RALPH ANDREWS, Defendant-Appellant.	LC No. 01-180983-FH

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Ralph Andrews appeals as of right his jury trial conviction and sentence for felonious assault.[1] Defendant's conviction arose from a police stand-off in which defendant took his six-year-old son, Brandon Wilks, hostage using a steak knife. Defendant was sentenced as a fourth habitual offender[2] to fifty-eight months to fifteen years' imprisonment. We affirm.

I. Facts

On the morning of October 14, 2001, defendant and his girlfriend, Beverly Wilks, began arguing in a second-story bedroom of their home. Ms. Wilks went into a second upstairs bedroom and received a telephone call from her friend, Kim Terry. Defendant descended to the first floor alone, but continued to rant and rave that he was frustrated and under pressure. In his rage, defendant literally threatened to cut his son, Brandon, into pieces and bury him in the backyard. Ms. Wilks told Ms. Terry of defendant's aberrant behavior, but asked her not to call the police. Hearing defendant's threats, Ms. Wilks ran downstairs to check on Brandon and her twelve-year-old son Bernard, leaving the phone lying on the bed with the line open. In the meantime, Ms. Terry used three-way calling to contact 911. The following events were captured on tape by the 911 operator and were played for the jury at defendant's trial.

Ms. Wilks sat with Brandon and Bernard in their first-floor bedroom. Defendant grabbed a steak knife from the kitchen and entered the boys' bedroom. Defendant grabbed Brandon, who

[1] MCL 750.82.

[2] MCL 769.12.

was in the top bunk of the boys' bunk beds, and pulled him over the side causing Brandon to cry. Defendant again threatened to cut Brandon into pieces. Defendant then released Brandon and returned the knife to the kitchen.

At that time, there was a knock on the front door. Ms. Wilks answered the door and informed defendant that the police had arrived. Defendant again grabbed Brandon and the steak knife and ran upstairs. Bernard and Ms. Wilks ran out of the home, both crying out that defendant had taken Brandon. The police entered, but were unable to reach Brandon. Defendant swore that if he anyone came within his sight he would cut off Brandon's head and roll it down the stairs. Brandon was sobbing. After ten to fifteen minutes, defendant released Brandon and allowed the police officers to arrest him. At defendant's trial, Brandon testified that defendant kept him in the upstairs hallway with the knife to his throat. Brandon also testified that he was terrified and believed that defendant was going to kill him.

Defendant testified in his own behalf at trial. He admitted that he threatened to cut Brandon into pieces and that he held a steak knife in his hand while holding onto Brandon. He also admitted that he told the police to stay out of sight or he would cut off Brandon's head and roll it down the stairs. Defendant denied ever pointing the knife at Brandon or placing the knife near his throat. Defendant testified that he did not intend to harm his child. He stated that he just did not want to be arrested.

II. Ineffective Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel as defense counsel conceded to facts supporting the elements of felonious assault in his opening statement and closing argument. We disagree. Absent a *Ginther*[3] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[4]

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[5] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[6] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[7]

In light of the overwhelming evidence against defendant, including defendant's own admissions on the stand, defense counsel chose to concede those facts that tended to prove defendant's guilt and put forth the argument that defendant overreacted under pressure. Only a

---

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

[4] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[5] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[6] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[7] *Id.* at 600.

complete concession of guilt constitutes ineffective assistance of counsel.[8] It is reasonable to conclude that defendant's counsel made a tactical decision to focus his argument on defendant's intent at the time of the crime. This court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight.[9] Therefore, we conclude that defense counsel was not constitutionally ineffective.

III. Prosecutorial Misconduct

Defendant next claims that he was denied a fair trial due to an instance of prosecutorial misconduct. We disagree. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[10] Because defendant failed to object to the alleged instance of prosecutorial misconduct, our review is limited to plain error affecting substantial rights.[11] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[12] We further note that the trial court instructed the jury to decide the case solely on the evidence, and that the remarks of counsel were not evidence. Jurors are presumed to follow their instructions.[13]

Defendant asserts that the prosecutor improperly commented in closing argument that "Brandon's memory is pretty darn good for a six year old." A prosecutor enjoys wide latitude in fashioning arguments and may argue the evidence and all reasonable inferences arising from it.[14] A prosecutor may not vouch for the credibility of a witness, however, by conveying that he has some special knowledge that the witness is testifying truthfully.[15] Examining this comment in context, it is not apparent that the prosecutor engaged in improper vouching.[16] The prosecutor was merely noting that Brandon's testimony was corroborated by other evidence presented at trial. This was a permissible argument based on the evidence.[17] Therefore, we find that the prosecutor's comment does not warrant reversal.

---

[8] *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

[9] *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

[10] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[11] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[12] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[13] *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).

[14] *Id.* at 721.

[15] *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

[16] See *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

[17] See *People v Avant*, 235 Mich App 499, 511-512; 597 NW2d 864 (1999) (finding that a prosecutor may argue from the evidence that a witness was not credible).

IV. Sentencing

Defendant asserts that the trial court improperly scored sentencing guidelines variables OV 12, contemporaneous felonies, and OV 19, interference with the administration of justice or the rendering of an emergency service. We disagree. The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score.[18]

MCL 777.42(1) provides that OV 12 is to be scored five points if "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed" or if "[t]wo contemporaneous felonious criminal acts involving other crimes were committed."[19] The contemporaneous act must have occurred within twenty-four hours of the charged offense and must not have resulted in a separate conviction.[20] The evidence supports a finding that defendant actually committed two counts of felonious assault as defendant twice held a knife while threatening Brandon. Therefore, the trial court did not abuse its discretion in scoring five points for OV 12.

OV 19 is scored fifteen points when:

> The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services.[21]

Interference with the administration of justice is equivalent to obstruction of justice and has been interpreted to involve "an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved."[22] A defendant does not engage in "conduct aimed at undermining the judicial process" where he tries to evade charges altogether.[23]

In this case, the trial court assigned fifteen points to OV 19. This score is valid, based on defendant's conduct in using Brandon as a hostage in his stand-off with the police and on numerous letters defendant sent to Ms. Wilks from jail instructing her not to attend his trial or bring Brandon and Bernard to his trial. Although the trial court improperly considered defendant's attempt to evade arrest in scoring OV 19, defendant did obstruct justice by attempting to prevent the attendance of the witnesses against him. Therefore, the trial court did not abuse its discretion in scoring fifteen points for OV 19.

---

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

[19] MCL 777.42(1)(d)-(e).

[20] MCL 777.42(2)(a).

[21] MCL 777.49(b).

[22] *People v Deline*, 254 Mich App 595, 597; 658 NW2d 164 (2002), lv denied 468 Mich 943 (2003), lv held in abeyance upon reconsideration 469 Mich 969 (2003).

[23] *Id.*

Defendant was assigned seventy-two points for his PRV score and seventy-five points for his OV score. Accordingly, defendant was placed at PRV level E and OV level IV, which set his minimum guidelines range at fourteen to fifty-eight months. As we find that the trial court correctly calculated defendant's OV score and defendant's minimum sentence is within the statutory minimum sentencing guidelines range, we must affirm defendant's sentence.[24]

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

[24] MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).