STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2008
v	No. 273908 Oakland Circuit Court
DENNIS ANTHONY HALL, Defendant-Appellant.	LC No. 2006-206890-FC

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 30 to 60 years for the murder conviction and 2 ½ to 15 years each for the felonious assault and felon in possession convictions, to be served consecutive to concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from two connected incidents that occurred on December 30, 2005. The prosecution's theory was that defendant first feloniously assaulted David Smith at 303 Going Street in Pontiac, and then later shot at a person he believed to be Smith at 24 Short Street in Pontiac, mistakenly shooting his girlfriend's son, Bernard Williams, killing him.

According to prosecution witnesses, on December 30, 2005, at approximately 6:00 p.m., defendant barged into the home of Ysha Polk at 303 Going Street in Pontiac. Ernest Polk, Ysha's father, was with defendant at the time. Defendant, armed with a gun, confronted and grabbed David Smith and asked him "where is my s**t?" or something along those lines. Smith denied taking any of defendant's property and ran out of the house. After Smith ran out, defendant informed Ysha Polk that Smith had taken some of his CDs and that Smith, Ysha's boyfriend, was going to get her killed. Defendant left and Smith then returned to Polk's house. According to Smith, he remained there for 20 minutes, obtained a ride home from his cousin, and then he and his cousin returned to Polk's home several hours later. Smith's burgundy Chevy Lumina remained at Polk's house until Smith drove it home early the next morning.

According to defense witnesses, earlier in the day Mark Johnson informed defendant that he saw Smith in front of defendant's home. Defendant then went home and discovered that it

had been broken into and various items stolen. Defendant put "two and two together" and went looking for Smith to get his property back. Defendant went to Ernest Polk to seek assistance in this effort. Defendant, Ernest Polk, and the eventual homicide victim, Bernard Williams, subsequently went looking for Smith, eventually arriving at Ysha Polk's home. Smith's car was parked in front of the house. Defendant looked in the car and saw some of the items that had been stolen from his home. The three men went to the door of Ysha Polk's home, and defendant confronted Smith, but Smith denied taking defendant's items. Defendant testified that he and Smith briefly tussled and that Smith threatened to "f**k him up" after defendant threatened to contact the police. Smith then ran away.

Defendant, Ernest Polk, and Bernard Williams then left Ysha Polk's home, and defendant dropped Williams off at a restaurant. From there, defendant and Ernest Polk proceeded to drive to the home of defendant's girlfriend, Samantha Jones, at 24 Short Street. Jones was Williams's mother and Williams also resided at the home. At Jones's house, defendant, Jones, and Ernest Polk sat at the kitchen table discussing the break-in of his home and the earlier confrontation with Smith. Jones's other children, Brandon Williams, Terrance Tucker, Jr., and Mercedes Tucker were also present at the time. Some occupants of the home heard a gunshot, and defendant and Tucker heard a car pull up to the house. Jones looked out the window and supposedly saw a burgundy Lumina. Defendant then said, "Here these n*****s come" or "Here they go." According to Tucker, defendant pulled out a gun, cocked it back, and aimed it toward the back door. At some point, defendant said, "Come on with it, motherf****r" or something to that effect. People fled to the rear of the house. Multiple gunshots were heard from inside the home. Ernest Polk testified that defendant fired three shots at the side door. Polk could not see who defendant was firing at, nor did he see the bullets hit anyone, because by that time he was running away from the area. In the meantime, Williams had arrived at the home and was struck by gunfire and killed.

Terrance Tucker, Sr., Williams's stepfather, was outside the home around the time the incident occurred. He arrived at 24 Short Street and pulled up into the driveway in his van, behind defendant's vehicle. He came over that evening to visit his children, Terrance Tucker, Jr., and Mercedes Tucker. When Tucker Sr. observed that defendant was there, he decided not to go in. Instead, he turned up the music in his van and sat there in the driveway. He then saw Bernard Williams walking down the street with two of his friends. Tucker Sr. conversed briefly with Williams and asked him to tell Brandon to come outside. Bernard Williams and the other two men then walked together past the side of the house toward the back door. Tucker Sr. testified that he next observed one of the men run past him down Short Street, and he saw the other man run toward the back of the house. Tucker Sr. then witnessed the side door swing open and a man standing there with a gun in his hand. Tucker Sr. did not get a good look at the man because his focus was on the gun, and he could not say whether the man was defendant, who he knew from past interactions. Tucker Sr. ducked down and backed out of the driveway. He saw the man with the gun go back into the house. Tucker Sr. had not heard any noises while he sat in his van because the van's music was turned up so loud; he also saw no other vehicles while he was sitting in his van. Tucker Sr. later caught up with one of the men who had run off, and that person was highly distraught and informed him that they had walked into the house and guns started firing.

Defendant adamantly denied ever shooting a gun, and he claimed that he never had a weapon. According to defendant, he ran to the back of the house with everyone else after hearing a gunshot, a commotion at the side of the house, and someone saying "Where that motherf****r at?" As he was lying down behind a door, defendant heard a scuffle and gunshots in the house.[1]

Defendant was convicted of second-degree murder, MCL 750.317, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He appeals as of right.

Defendant first argues that trial counsel was ineffective for failing to properly impeach Ernest Polk and for failing to call Kenneth Quisenberry, defendant's private investigator, as a witness. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant's argument regarding failure to impeach Polk on the basis of inconsistent trial and preliminary examination testimony does not merit reversal, where the jury was indeed made aware that Polk's trial testimony, in which he stated that he had not heard a gunshot from outside the home before defendant fired his gun, was inconsistent with Polk's testimony at the preliminary examination. Therefore, there was no prejudice. Moreover, defendant's claim that trial counsel failed to impeach Polk with prior convictions for crimes involving theft and

[1] Jones corroborated defendant's testimony that he did not have a weapon at her house and that he ran from the kitchen with everyone else.

dishonesty lacks merit. The prosecutor, in posttrial proceedings, established to the court's satisfaction that Polk's criminal record revealed no such criminal history falling within the time limit set forth in MRE 609(c), which court rule addresses impeachment by evidence of convictions. Moreover, defendant does not give any specifics regarding the alleged convictions, but simply makes a broad, cursory assertion without supporting documentation. With respect to investigator Quisenberry, defendant's affidavit simply indicates that Quisenberry had "valuable relevant information which would have aided the jury in their deliberations." The failure to call a witness may constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, defendant has completely failed to explain what information Quisenberry had in his possession that would have changed the outcome of the trial or that would have assisted in establishing a substantial defense. Therefore, these claims of ineffective assistance of counsel fail.

Defendant next argues that trial counsel was ineffective for failing to move for a directed verdict on the first-degree murder charge where there was no evidence of premeditation. For that same reason, defendant further contends that the trial court erred by not dismissing the first-degree murder charge sua sponte. We first note that the jury acquitted defendant of first-degree murder, creating a prejudice failure for defendant under *Carbin, supra* at 599-600, with respect to the ineffective assistance claim and under MCL 769.26 and *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), with respect to the alleged trial court error. Regardless, there is no merit to defendant's arguments. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). Premeditation and deliberation may be established by evidence of the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing itself, and the defendant's conduct after the homicide. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Viewing the evidence in a light most favorable to the prosecution for purposes of a motion for directed verdict, *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001), a jury could reasonably have inferred that defendant intended to kill and acted with premeditation and deliberation where he cocked and aimed his gun while challenging the victim, especially given the events of the day. Accordingly, counsel was not ineffective for failing to raise a meritless and futile motion, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), and the trial court did not commit error when it failed to dismiss the first-degree murder charge sua sponte.

Defendant also argues that trial counsel was ineffective because he advised defendant to falsely testify that he did not fire a weapon and, as a result, the trial court did not give a voluntary manslaughter instruction and the jury looked unfavorably on defendant. Our review is limited to the record because no *Ginther*[2] hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). There is no record support for defendant's contention, and we decline to remand for an evidentiary hearing on the basis of defendant's self-serving affidavit. Even were we to assume that counsel actually advised defendant to lie regarding the firing of the weapon, it is illogical to conclude that defendant would thus feel compelled to take the stand and perjure himself. The claim that one's attorney told him or her to lie on the stand is not a sound reason to

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

commit perjury under the guise that one was simply following the attorney's legal advice. We are not prepared to reward a defendant with a new trial if the defendant knowingly, voluntarily, and willingly went along with a fabrication in an effort to deceive the trier of fact.

Next, we address defendant's severance argument. Defendant was charged with several offenses, some arising from his earlier altercation with Smith and some arising from the later shooting incident at defendant's girlfriend's house. Defendant argues that these charges involve two separate incidents and, therefore, the trial court erred in denying his motion for severance. We disagree.

The question whether charges are related for purposes of consolidating them for trial is a question of law that this Court reviews de novo. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). The trial court's ultimate ruling on a motion for severance is reviewed for an abuse of discretion. *Id.* Where a trial court selects a reasonable and principled outcome from a spectrum of possible principled outcomes, deference is given and the court's decision does not constitute an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Joinder is appropriate if the offenses are related." MCR 6.120(B)(1). And "offenses are related if they are based on (a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan." *Id.* Pursuant to MCR 6.120(C), a court must sever for separate trials offenses that are not related as set forth in subrule (B)(1), quoted above in the preceding sentence, where a defendant moves for severance. Our Supreme Court stated, by way of example, that "if a person were to escape prison, steal an automobile and take hostages, all the offenses might be tried together as a series of connected acts." *People v Tobey*, 401 Mich 141, 152; 257 NW2d 537 (1977).

Here, the two series of offenses occurred on the same day, and the evidence showed that the earlier altercation precipitated and had a bearing on the later shooting incident. Defendant believed that Smith was coming after him in retaliation for the earlier confrontation. Because the offenses were based on a series of connected acts, joinder was appropriate under MCR 6.120(B)(1)(b), and the trial court did not abuse its discretion in denying defendant's motion for severance.

We next address defendant's claim that it was improper for the prosecutor to proceed on a theory of transferred intent. We find no merit to this argument.

In *People v Lawton*, 196 Mich App 341, 351; 492 NW2d 810 (1992), this Court, quoting *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979), discussed the doctrine of transferred intent, stating:

> "Before defendant can be convicted it must first be shown that he had the intention to cause great bodily harm to someone. Merely because he shot the wrong person makes his crime no less heinous. It is only necessary that the state of mind exist, not that it be directed at a particular person."

In other words, a defendant remains culpable even if he intended to shoot someone other than the actual victim. *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988).

"If the defendant intended to kill one person, but by mistake or accident killed another person, the crime is the same as if the first person had actually been killed." CJI2d 16.22.

The prosecution's theory in this case was that defendant intended to shoot Smith, with whom defendant was involved in the earlier altercation, but instead mistakenly shot his girlfriend's son, Bernard Williams. There was no evidence suggesting, nor has defendant ever asserted, that he intended to shoot Williams. Under the doctrine of transferred intent, even though defendant did not intend to shoot Williams, he remains just as culpable for the shooting death if his intent was to shoot Smith instead. The intent to kill still remains, and here, contrary to defendant's assertion, there was sufficient evidence of an intent to kill. It was not improper for the prosecutor to rely on a theory of transferred intent to prove defendant's guilt.

Defendant next argues that the prosecutor engaged in misconduct by suggesting to the jury that evidence showing defendant's guilt was unfairly kept from the jurors. In support of this claim, defendant cites a portion of the prosecutor's rebuttal argument in which the prosecutor referenced the preliminary examination transcript and police witness statements but noted that, unfortunately, the materials were not admissible under the rules of evidence. Defendant also maintains that trial counsel was ineffective for failing to object to the prosecutor's improper remarks. In *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), this Court set forth the guiding principles concerning a claim of prosecutorial misconduct:

> Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. "The propriety of a prosecutor's remarks depends on all the facts of the case." A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. [Citations omitted.]

As the prosecution correctly points out on appeal, there were repeated references throughout the trial to the preliminary examination transcript and witness statements. The prosecutor's commentary on those materials, while maybe better left unsaid, did not deny defendant a fair and impartial trial and did not result in prejudice such that reversal is warranted. Accordingly, we reject defendant's claims of prosecutorial misconduct and ineffective assistance of counsel arising out of rebuttal argument.

Defendant next argues that the trial court erred in refusing to instruct on voluntary manslaughter where a rational view of the evidence presented at trial supported a finding that defendant acted in the heat of passion.

When a defendant is charged with murder, an instruction for voluntary manslaughter must be given upon request if supported by a rational view of the evidence. *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006); *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). In *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), the Court defined the crime of voluntary manslaughter:

> "[I]f the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed . . . then the law, out of indulgence to the frailty of human nature . . . regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." [Citation omitted; omissions in original.]

Pouncey emphasized that the provocation must cause the defendant to act out of passion rather than reason. *Id.* at 389. In rejecting a claim that the defendant was entitled to a voluntary manslaughter instruction, the *Pouncey* Court stated that "the defendant's ability to reason was not blurred by passion; his emotional state did not reach such a level that he was unable to act deliberately." *Id.* at 390. The defendant's emotions must be so intense so as to distort the defendant's practical reasoning. *Id.* at 389. The act of killing is committed under the influence of passion if the killing results from temporary excitement, by which control of reason was disturbed. *Mendoza, supra* at 535.

Here, defendant testified that he never shot a gun, nor did he ever have a weapon. His girlfriend, testifying for the defense, echoed those claims. Defendant testified as follows:

> *Q*. Did you shoot Bernard?
>
> *A*. No, I didn't shoot Bernard. I didn't shoot anybody. . . .
>
> *Q*. Did you take a gun and fire through the wall thinking that you're shooting at David Smith?
>
> *A*. No, I didn't think I was shooting nobody because I didn't have a gun to even fire through the wall.
>
> *Q*. All right. You're stating to this Court that you did not have a weapon, a gun on your person on December 30th, 2005?
>
> *A*. I did not have a gun, Mr. Parker. I took off running.

Thus, the entire premise of the defense, as supported by defendant's own testimony, was wholly inconsistent with voluntary manslaughter. Defendant, therefore, relies on evidence provided in the prosecutor's case-in-chief. However, said evidence suggested that defendant was acting deliberately in a reasoned manner, and not that he had lost control, acting in an emotional state blurred by passion. Considering the events of the day leading up to the shooting, including Smith's comments, and defendant's belief that Smith was outside the house preparing to harm or kill defendant, defendant's actions in discharging the weapon, accented with a hint of bravado, reflected an act deliberately taken, reasoned on, mistakenly, self-preservation. The evidence could arguably be viewed as fitting a self-defense scenario, but it does not support a conclusion that defendant lost control and all sense of reasoning and then fired in the heat of passion. Indeed, self-defense represents a legal justification for an otherwise intentional homicide and is predicated on an honest and reasonable belief, under all of the circumstances, that one is in

imminent danger of death or great bodily harm, making it necessary to exercise deadly force. *People v Riddle*, 467 Mich 116, 119, 126; 649 NW2d 30 (2002). Thus, true self-defense does not constitute an unreasoned act with loss of control blurred by passion. Defendant, however, never presented a self-defense argument, and we render no opinion regarding the validity of such a defense. And a heat of passion defense is simply not supported by a rational view of the evidence. It is also completely contrary to defendant's own testimony and his defense theory that did not even place a gun in his hand. See *Mendoza*, *supra* at 546-547 (involuntary manslaughter instruction not appropriate because, in part, it was contrary to the defendant's theory that he never had possession of the gun used in the murder). Accordingly, the trial court did not err in denying the request for an instruction on voluntary manslaughter.

Finally, defendant raises several sentencing issues with respect to the scoring of prior record variables (PRVs) 1 and 7 and offense variables (OVs) 2, 3, and 6.

We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Scoring decisions for which there is any evidentiary support will be upheld. *Id*. We conclude that resentencing is not required.

The trial court's scoring of the sentencing guidelines resulted in a total of 47 PRV points and 80 OV points, placing defendant in OV level II (50 to 99 points) and PRV level D (25 to 49 points) in the sentencing grid for a class M2 offense, MCL 777.16p (second-degree murder classified M2), for which the sentencing guidelines range is 225 to 375 months or life, MCL 777.61. But because defendant was sentenced as a fourth habitual offender, the upper end of the guidelines range was extended to 750 months or life. See MCL 777.21(3)(c).

The trial court scored 25 points for PRV 1. Twenty-five points should be scored for PRV 1 if there is one prior high severity felony conviction. MCL 777.51(1)(c). At the time of sentencing, a "prior high severity felony conviction" was defined as a conviction for a crime listed in offense class A, B, C, D, or M2, or for a felony under a law of the United States or another state corresponding to a crime listed in those classes, if the conviction was entered before the sentencing offense was committed. MCL 777.51(2).[3]

The prosecutor argued that PRV 1 was properly scored at 25 points because defendant was convicted in 1990 of delivery of a controlled substance. Defendant does not contend that this conviction does not qualify as a high severity conviction,[4] but rather argues that it was improperly considered because it was too old. MCL 777.50(1) provides that when scoring PRVs 1 to 5, the court cannot "use any conviction or juvenile adjudication that precedes a period of 10

[3] MCL 777.51 was amended by 2006 PA 655, effective January 9, 2007, to restate the felonies that qualify as prior high severity felony convictions.

[4] A conviction for delivery of a controlled substance may be scored under PRV I because it is a class D offense. MCL 777.13m.

or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication." The "discharge date" is "the date an individual is discharged from the jurisdiction of the court or the department of corrections after being convicted of or adjudicated responsible for a crime or an act that would be a crime if committed by an adult." MCL 777.50(4)(b). At sentencing, defense counsel agreed with the prosecutor's statement that defendant was not discharged from probation for the drug delivery conviction until 2003; therefore, there was less than a ten-year span between the discharge date on the drug delivery crime and the commission of the current offenses. Accordingly, a score of 25 points for PRV 1 was proper under MCL 777.51(1)(c).

The trial court scored 20 points for PRV 7. PRV 7 is scored for subsequent or concurrent felony convictions. MCL 777.57. Twenty points should be scored if the offender has two or more subsequent or concurrent felony convictions. MCL 777.57(1)(a) and (2)(a).

Defendant appears to argue that there were no concurrent convictions because the prosecutor proceeded under a transferred intent theory. This argument is confusing and it is unclear how the prosecutor's decision to proceed under a transferred intent theory relates to the number of subsequent or concurrent convictions. Because defendant had concurrent convictions for felonious assault and felon in possession of a firearm, 20 points were properly scored for PRV 7.

Defendant also argues that scoring points for PRV 7 constituted impermissible "double counting" because that conduct was already accounted for in the scoring of OV 1 (aggravated use of a weapon) and OV 2 (lethal potential of weapon used). First, defendant fails to cite any relevant authority that precludes the Legislature from overlapping some variables. Further, this Court rejected a similar argument in *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996), and we likewise reject defendant's argument in the case at bar. PRV 7 is concerned with the commission of subsequent or concurrent felonies in general. Conversely, OV 1 and OV 2 are specifically concerned with the use of a weapon and a weapon's lethal potential. Therefore, scoring points under all of those variables was appropriate as "[e]ach variable is directed toward a different purpose." *Id.* at 164.

The trial court scored five points for OV 2. Defendant argues that the scoring of OV 2 also amounted to improper "double counting" because that conduct was scored under PRV 7. As previously discussed, defendant cites no relevant supporting authority and the variables serve different purposes. Resentencing is not warranted.

The trial court scored 25 points for OV 3. OV 3 addresses physical injury to a victim. MCL 777.33. The court should score 25 points if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). In this case, the victim was killed and therefore there was permanent injury to him. Thus, the trial court properly scored OV 3 at 25 points. *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005) (trial court properly scored 25 points for OV 3 where the victim received a fatal gunshot would to the head).

Defendant argued below that OV 6 should be scored at only ten points. The trial court disagreed and scored 25 points on the ground that defendant had an intent to do great bodily harm or create a very high risk of death. It is unnecessary for us to resolve the scoring dispute on OV 6 because a 15-point reduction does not affect defendant's placement within OV level II.

Because the appropriate guidelines range is not affected by the decrease in points, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald