STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2010
v MATTHEW JAMES SABIN, Defendant-Appellant.	No. 289987 Wayne Circuit Court LC No. 08-009030

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CLIFFORD ALLEN SABIN, Defendant-Appellant.	No. 289988 Wayne Circuit Court LC No. 08-009030

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendants Matthew Sabin and Clifford Sabin were tried jointly before a single jury on charges of first-degree premeditated murder, MCL 750.316(1)(a), six counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The jury convicted both defendants of the lesser offenses of manslaughter, MCL 750.321, and six counts of assault with intent to do great bodily harm less than murder, MCL 750.84.[1] Defendant Matthew Sabin was sentenced to concurrent prison terms of 120 to 180 months for the manslaughter conviction and 60 to 120 months for each assault conviction, and defendant Clifford Sabin was sentenced to concurrent prison terms of 84 to 180 months for his manslaughter conviction and 60 to 120 months for each assault conviction.

[1] Clifford Sabin was also charged with and acquitted of an additional count of felon in possession of a firearm. MCL 750.224f(2).

Defendant Matthew Sabin appeals as of right in Docket No. 289987, and defendant Clifford Sabin appeals as of right in Docket No. 289988. We affirm both defendants' convictions and also affirm defendant Clifford Sabin's sentences, but vacate defendant Matthew Sabin's sentences and remand for resentencing.

Defendants' convictions arise from a neighborhood confrontation that led to the shooting death of Sheila Lawson. Evidence at trial indicated that defendant Matthew Sabin was involved in an earlier physical altercation with Matthew Locklear. Later that day, several members of the Locklear family and others associated with them encountered defendants Matthew and Clifford Sabin, who were then joined by Nicholas Phillips, Brian Phillips, Michael Hatifield. The two groups began arguing. Testimony at trial indicated that all five members of defendants' group either displayed a firearm or acted in a manner suggesting that they possessed a weapon. Gunfire erupted and Sheila Lawson, the girlfriend of Darryl Locklear, was shot and killed while standing in the doorway of the Locklears' house.

I. PROSECUTORIAL MISCONDUCT

Both defendants argue that the prosecutor's conduct denied them a fair trial. Because neither defendant objected to the prosecutor's conduct at trial, this issue is unpreserved. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).[2] Therefore, our review is limited to plain error affecting defendants' substantial rights. *Id.*

Defendants argue that the prosecutor improperly argued, without supporting evidence, that revolvers may have been used during the shooting. We disagree. "A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, a prosecutor is free to comment on the evidence and reasonable inferences that may be drawn from the evidence, and to argue how the evidence relates to the prosecution's theory of the case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Testimony at trial suggested that all five persons in defendants' group were armed with a gun, but only two types of shell casings were found in the area where defendants' group was standing. Police officers testified that unlike automatic and semi-automatic firearms, revolvers do not eject their shall casings automatically. This evidence supported the prosecutor's argument that one or more revolvers may have been used during the offense. There was no plain error.

We also find no merit to defendants' argument that the prosecutor improperly vouched for the credibility of Louis Mazgai. The prosecutor merely argued that despite Mazgai's loss of composure while testifying, his testimony was credible to the extent that it was consistent with the testimony of other witnesses. A prosecutor properly may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Thus, the prosecutor's argument was not improper.

II. MOTION FOR A MISTRIAL

[2] Abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Both defendants argue that the trial court erred in denying their motion for a mistrial after the prosecutor elicited, on redirect examination of a police witness, that evidence of other firearms and ammunition was discovered during a search of defendants' home.

A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A trial court should not grant a mistrial unless "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v Jorn*, 400 US 470, 475; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Before trial, defendants moved to suppress evidence of guns and ammunition that was discovered during a search of defendants' home on the ground that the evidence was the product of an improper warrantless search. Although the prosecutor informed the trial court that the search was conducted pursuant to a search warrant, the trial court was not required to determine the validity of the search because the prosecutor indicated that he did not intend to use the challenged evidence at trial and, therefore, defendants withdrew their motion. At trial, however, defense counsel attempted to elicit testimony that no incriminating evidence was found inside defendants' home. On redirect examination, the prosecutor elicited that a facsimile firearm, a pellet gun, and four types of ammunition were found.

Although the prosecutor had previously agreed not to introduce the disputed evidence at trial, defense counsel opened the door to the evidence on cross-examination. The prosecutor was entitled to respond on redirect examination.[3] *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Further, defense counsel was permitted to clarify that the weapons and ammunition found in defendants' home could not be directly linked to the charged offense. Under the circumstances, the trial court did not abuse its discretion in determining that a mistrial was not warranted.

III. ADMISSIBILITY OF EVIDENCE TECHNICIAN'S REPORTS

Both defendants argue that the trial court erred in admitting an evidence technician's report and supplemental report into evidence under the business records exception to the hearsay rule, MRE 803(8).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary questions of law concerning admissibility are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[3] On appeal, neither defendant argues that the evidence was inadmissible because it was discovered during an illegal search, which was the basis for the original motion to suppress.

MRE 803(8) provides that business records are admissible as an exception to the hearsay rule if they meet the following requirements:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*, and subject to the limitations of MCL 257.624. [Emphasis added.]

Defendants argued below that the challenged reports were not admissible because they were police reports. The trial court overruled their objections, reasoning that the reports were evidence technician reports, not police reports.

We agree with defendants that the trial court erred in admitting the reports. The reports were prepared by an evidence technician who was a police officer, and they concerned matters that the officer observed during the course of his duties as an evidence technician. Therefore, the reports were inadmissible under the plain language of the evidentiary rule. See *People v McDaniel*, 469 Mich 409, 412-413; 670 NW2d 659 (2003). However, an error in the admission of evidence is harmless if, considered in light of the weight and strength of the untainted evidence, it is not more probable than not that a different outcome would have resulted but for the error. *Lukity*, 460 Mich at 495-496. Here, the reports were not the only evidence against defendants, or even the principal evidence against them. Moreover, as defendants acknowledge, the reports were cumulative of the evidence technician's testimony at trial. In light of this record, it is not more probable than not that a different outcome would have resulted had the reports not been admitted. Accordingly, the error was harmless and does not require reversal.

IV. SEQUESTRATION ORDER

Both defendants argue that the trial court deprived them of due process and a fair trial by failing to investigate a witness's alleged violation of a sequestration order. Constitutional claims of due process violations are generally reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Because neither defendant raised this issue below, it is unpreserved and our review is limited to plain error affecting defendants' substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

First, the trial court here did not have a duty to sua sponte investigate whether there was a violation of the court's sequestration order. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). Second, it is not apparent that the court's sequestration order was violated. Before the start of trial, the trial court granted the prosecutor's motion for a mutual sequestration order. MRE 615 authorizes the court to order that witnesses be excluded "so that they cannot hear the testimony of other witnesses." "The purposes of sequestering a witness are to prevent him from coloring his testimony to conform with the testimony of another, and to aid in detecting testimony that is less than candid." *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008) (internal quotations and citation omitted). Defendants do not contend that the witness in question was present during the testimony of any other witness. Although defendants argue that the witness improperly discussed the case with other witnesses in the witness room, there is no indication in the record that the trial court's sequestration order prohibited any such discussions

or, if so, that the witness was ever notified of any such restriction.[4] Thus, there was no plain error.

Furthermore, defendants cannot demonstrate that any alleged violation affected their substantial rights. "A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). "[E]xclusion of a witness's testimony is an extreme remedy that should be sparingly used." *Meconi*, 277 Mich App at 654. "[S]ignificant mitigating factor[s]" include that the "violation of the sequestration order resulted from an innocent mistake," was not blameworthy, and "was not purposeful." *Id*. at 654-655. "So is the fact that the [witness] only heard short opening statements, not testimony, given that MRE 615 specifically provides for sequestration of witnesses 'so that they cannot hear the testimony of other witnesses.'" *Id*. at 655, quoting MRE 615 (emphasis added in *Meconi*).

The witness in question was a mail carrier who was present during the shooting. She admitted during her testimony that she had spoken to some of the victim's family members in the witness room concerning defendants' family name. However, defendants' family name had already been addressed by other witnesses. Further, the witness did not identify Clifford as a participant and admitted that she was uncertain whether Matthew was the person who spoke to her on the street. There is no basis for concluding that defendants were prejudiced by any alleged violation of the sequestration order by the witness.

Defendants also argue that their defense attorneys were ineffective for failing to raise this issue at trial. Given our conclusion that there was no clear violation of the trial court's sequestration order, and that no basis exists for finding that defendants were prejudiced by any alleged violation, defendants' ineffective assistance claim must also be rejected. A defense attorney is not ineffective for failing to raise a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

V. SUFFICIENCY OF THE EVIDENCE

Next, both defendants argue that the trial court erred in denying their motions for a directed verdict of the original charges of first-degree premeditated murder and assault with intent to commit murder. They contend that there was insufficient evidence of premeditation to support a conviction of first-degree murder, and insufficient evidence of an intent to kill to support a conviction of assault with intent to commit murder.

When reviewing a trial court's decision on a motion for a directed verdict, "this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proven beyond a reasonable doubt." *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996). The resolution of credibility disputes is within the exclusive province of the trier of fact,

[4] The record indicates that the trial court instructed the victim's father not to discuss the case with other witnesses, but there is no indication that a similar instruction was given to any other witness.

People v Vaughn, 186 Mich App 376, 380; 465 NW2d 365 (1990), which is also permitted to draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant acted with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both "characterize a thought process undisturbed by hot blood." *Id.* "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a second look at his contemplated actions." *Id.*; see also *Anderson*, 209 Mich App at 537. Defendants were also charged under an aiding and abetting theory. To convict a defendant of premeditated murder under an aiding and abetting theory, "the prosecutor was required to show that at the time of the [killing] the defendant either had the premeditated and deliberate intent to kill the victim or that [he] participated knowing that the principal possessed this specific intent." *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). The intent to kill may be proven by inference from any facts in evidence, and the intent may exist without being directed at a particular victim. *Id.* at 658. Minimal circumstantial evidence of intent is sufficient to prove intent to kill. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The evidence showed that defendants were involved in an earlier altercation with Matthew Locklear. During that altercation, Brian Phillips, Nicholas Phillips, and Michael Hatifield each assisted the two defendants and each produced a weapon. Defendants later confronted a group of Locklear's family and friends, told them to wait, drove back up the street, and sought assistance from the Phillips brothers and Hatifield, who were known to be armed. Witnesses testified that both defendants walked toward the Locklear group with handguns in their waistbands. Gunfire then erupted and Lawson was fatally wounded. Viewed in a light most favorable to the prosecution, the evidence that defendants confronted the Locklear group after being involved in an earlier altercation with Matthew Locklear, that they sought the assistance of three others who were known to be armed, and that they, along with the Phillips brothers and Hatifield, acted in concert as they approached the Locklear group and began firing, was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendants had sufficient time to think about what they were doing and acted with a premeditated intent to kill as several shots were fired toward the Locklear group. Therefore, the trial court did not err in denying defendants' motions for a directed verdict.

VI. FLIGHT INSTRUCTION

Both defendants argue that the trial court erred in instructing the jury on flight. Because neither defendant objected to the trial court's flight instruction and both defense attorneys expressed satisfaction with the instructions given, this claim of error has been waived and is not susceptible to review on appeal. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417

(2002). Defendants argues, however, that each defense counsel was ineffective for failing to object to the trial court's flight instruction. We disagree. The court's instruction was supported by evidence that defendants fled the scene after the shooting and refused demands to come out of their home when the police responded. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993). Because the instruction was not improper, neither defense attorney was ineffective for failing to object. Defense counsel is not required to make a meritless objection. *Kulpinski*, 243 Mich App at 27.

VII. SCORING OF THE SENTENCING GUIDELINES

Both defendants argue that the trial court erred in scoring 25 points for offense variable (OV) 3 of the sentencing guidelines, and in scoring ten points for OV 4. We disagree.

Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). "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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.* (citation omitted).

A trial court should score 25 points for OV 3 if a life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c). Defendants argue that because this case involved a death, and MCL 777.33(2)(b) provides that 100 points are not to be scored for OV 3 if homicide is the sentencing offense, the trial court should not have scored any points for OV 3. As defendants concede, however, our Supreme Court rejected this identical argument in *People v Houston*, 473 Mich 399, 401-402; 702 NW2d 530 (2005), in which it upheld a 25-point score where the sentencing offense was a homicide. Therefore, OV 3 was properly scored at 25 points.

Ten points should be scored for OV 4 where "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Ten points are appropriate where the serious psychological injury may require professional treatment; the fact that treatment has not been sought is not conclusive. MCL 777.34(2). Under the crime victim's rights act, a deceased victim's parents and siblings are considered victims where, as here, the deceased victim was unmarried and had no children. See MCL 780.752(1)(m)(ii)(C) and (E). The record indicates that the deceased victim's mother and father both gave statements explaining how their lives had been affected by their daughter's death, and that the deceased victim's brother takes medication daily to help him deal with the loss of his only sister. The trial court did not err in scoring OV 4 at ten points.

VIII. DEPARTURE FROM THE SENTENCING GUIDELINES RANGE

Lastly, defendant Matthew Sabin argues that the trial court erred by departing from the sentencing guidelines range of 43 to 86 months for involuntary manslaughter for reasons that were not substantial and compelling. We agree and remand for resentencing.

MCL 769.34(3) provides that "[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling

reason for that departure and states on the record the reasons for departure." A "substantial and compelling reason" for departure must be "objective and verifiable" and one that "keenly" or "irresistibly" grabs a court's attention and is of "considerable worth" in deciding the length of a sentence. *Babcock*, 469 Mich at 257-258 (citation omitted). An objective and verifiable reason is one that is "external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). "[T]he 'substantial and compelling' circumstances articulated by the court must justify the *particular* departure [imposed] in a case, i.e., 'that departure.'" *Babcock*, 469 Mich at 259, quoting *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001) (emphasis in original). "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Babcock*, 469 Mich at 262, 264.

In reviewing whether substantial and compelling reasons exist to justify a departure from the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion." *Id.* at 265. "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.* at 269.

At sentencing, the trial court departed from the sentencing guidelines range of 43 to 86 months and imposed the maximum permissible sentence of 10 to 15 years for the following reasons:

> I intend to exceed the guidelines for the following reasons. But for the actions and the fight brought on by Matthew Sabin, there would have been no shooting. All of his actions were thought out and evidenced deliberation. In this case, there were an extraordinary number of victims to be sure in terms of the Information and the convictions by the jury, there were at least seven victims. One victim died as a result of involuntary manslaughter and six other victims were victimized by assault with intent to do great bodily harm less than murder.
>
> Additionally, this Defendant subjected the neighborhood to a form of urban terror which defies the bounds that a civilized society sets for its members. In short, the Defendant has shown himself to be a scofflaw in the extreme. It's the sentence of the Court on count one, homicide, involuntary manslaughter, you be committed to the state's prison for a minimum period of 120 months and a maximum period of 180 months.

Although we tend to agree with the trial court's assessment that Matthew's actions "were thought out and evidenced deliberation," Matthew's state of mind is a conclusion drawn from other facts rather than a fact that exists outside the minds of those involved in the decision and is

capable of being confirmed. Thus, Matthew's apparent intent was not a proper basis for departure. See *People v Young*, 276 Mich App 446, 458; 740 NW2d 347 (2007).

The number of victims is an objective and verifiable factor. However, Matthew had already been assessed ten points under OV 9, MCL 777.39(1)(c), because there were two to nine victims who were placed in danger of physical injury or death. The trial court did not find that OV 9 had been given inadequate or disproportionate weight. Therefore, that factor was not a legitimate basis for departure. MCL 769.34(3)(b).

Similarly, the number of Matthew's concurrent convictions is an objective and verifiable factor. Again, however, Matthew was assessed the maximum 20 points on PRV 7 for two or more concurrent convictions and the trial court did not find that PRV 7 failed to adequately account for the number of concurrent convictions. Therefore, that factor also was not a legitimate basis for departure. MCL 769.34(3)(b).

The trial court also commented that Matthew had "subjected the neighborhood to a form of urban terror which defies the bounds that a civilized society sets for its members" and had "shown himself to be a scofflaw in the extreme." Once again, this is a subjective conclusion drawn from other facts, not a verifiable fact that exists outside the minds of those involved. Therefore, this factor was not a proper basis for departure.

Lastly, the trial court observed that Matthew was the person who initiated the original fight that led to the shooting. We agree that this factor is objective and verifiable. It was undisputed that Matthew initiated the earlier confrontation with Matthew Locklear. However, that fight was limited to a physical altercation that did not involve any shooting. We question whether such an event, standing alone, properly may be considered substantial and compelling. Regardless, where a court articulates multiple reasons for departure and this Court determines that some are substantial and compelling and some are not, resentencing is required unless this Court is able to determine that the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock*, 469 Mich at 260. In this case, nothing in the record indicates that the trial court would have imposed the same sentences absent the improperly considered reasons. Therefore, we vacate Matthew's sentences and remand for resentencing. On remand, the trial court shall sentence Matthew within the appropriate sentencing guidelines range or state on the record a substantial and compelling reason for the departure, in accordance with MCL 769.34(3) and *Babcock*, 469 Mich 247.

Affirmed in part and remanded for resentencing with respect to defendant Matthew Sabin. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto