STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2011
v	No. 292776 Saginaw Circuit Court
KENNY ALLEN MEADOR II, Defendant-Appellant.	LC No. 08-030703-FH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conducting a criminal enterprise, MCL 750.159i(1), two counts of first-degree home invasion, MCL 750.110a(2), three counts of receiving and concealing stolen property with a value of $1,000 but less than $20,000, MCL 750.535(3)(a), and two counts of possessing a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 12 to 40 years for the conducting a criminal enterprise and home invasions convictions, 6 to 10 years for the receiving and concealing stolen property convictions, to be served consecutively to the concurrent prison terms of two years for the felony-firearm convictions. Defendant appeals of as right. Because we conclude that defendant was not denied a fair trial by prosecutorial misconduct, that the trial court did not err in scoring offense variable 19, and that defendant was not denied the effective assistance of counsel either at trial or at sentencing, we affirm.

I. SUMMARY OF THE FACTS

This case involves the break-ins of three homes in Saginaw County: (1) the Parker residence on Swan Creek Road on February 18, 2008; (2) the Kangas residence on Marquette Street on February 24, 2008; and (3) the Rodriguez residence on North Clinton Street on March 11, 2008. All three break-ins occurred during the day. Among the items taken were five guns, including a .357 caliber revolver and a .40 caliber pistol, and two gold coins from the Parker

[1] Defendant was acquitted of one count of second-degree home invasion, MCL 750.110a(3).

house, a digital camera from the Kangas house, and a wedding band set, a flat screen television, and a gun from the Rodriguez house.

On February 18, 2008, at approximately noon, Cara Mackley, a resident of Swan Creek Road, drove past the Parker house and saw a dark-colored Grand Am in the driveway. Also on February 18, Joe Overstreet, owner of the International Coin Exchange, bought two gold coins from defendant. The two coins had been taken from the Parker residence.

At night on February 18, 2008, members of the Saginaw Gang Task Force stopped a vehicle occupied by Peter Escobedo and Rolando Santoya. Before the vehicle stopped, Santoya tossed a .357 caliber revolver out the driver's side rear window. Santoya testified that he got the gun, which had been taken from the Parker residence, from Joe Gawthrop earlier that evening in the West Genesee Market parking lot. According to Santoya, Gawthrop arrived in the parking lot as a passenger in a dark-colored Grand Am.

In February 2008, a detective with the Saginaw Township Police Department was investigating a series of home invasions, for which defendant had become a suspect. The detective learned that defendant was staying in local motels with Stephanie Mazur and Eric Torrez, and that on February 25, defendant and Mazur planned to move out of the Super 8 motel. The detective set up surveillance. He saw defendant walk out of the motel, go to a Grand Am, take an item from the trunk, and throw the item into a drainage ditch. After defendant left the area, the detective retrieved the item; it was the digital camera that had been taken from the Kangas residence. The detective went inside the motel with the intent to search defendant's room. He ran into Eric Torrez, who ran when confronted. While running, Torrez dropped a .40 caliber pistol. The pistol had been taken from the Parker residence.

On March 11, 2008, Amanda Nickles, who lived across the street from 2433 North Clinton Road, was washing dishes when she saw a dark blue Grand Am pull into the driveway of the Rodriguez residence. There were four people in the car. A female, who was driving, stayed in the car, while the other three, at least two of whom were males, got out of the car. One went to the back of the house, one went to the front door and knocked, and the third stayed by the car. The one that went to the back of the house then opened the front door. Nickles saw them carry a television and two jewelry boxes out of the house. Nickles did not call 911, but she wrote down the license plate number to the Grand Am. When Diana Rodriguez came home, Nickles told Rodriguez what she had seen and she then gave the license plate number to the police. After an officer "played" with the number,[2] the officer learned that the Grand Am was registered to a person living at 4077 Green Street. The officer went to the address, where he had contact with a relative of Mazur.

According to Sherry McQuiston, an employee of the Saginaw Gold and Diamond Center, defendant and Mazur came into the store to sell jewelry on March 11, 2008. Pursuant to an earlier request from the Saginaw Township Police Department, she asked her boss to alert the

[2] Nickles had substituted an "O" or a "0" for a "Q."

police of defendant's presence at the store. McQuiston tried to stall defendant and Mazur, but the two left the store without selling any jewelry. However, after defendant and Mazur walked to a dark-colored Grand Am, the police followed defendant and Mazur out of the store's parking lot.

A marked patrol vehicle initiated a traffic stop of the Grand Am. Defendant and Mazur were placed in the back of the patrol vehicle, while the Grand Am was searched. A pry bar and a set of gloves were found in the trunk. Defendant and Mazur were transported to the police station, where each was interviewed. During her interview, Mazur handed the interviewing officer the wedding band set that had been taken from the Rodriguez residence.

Mazur testified that for a time in early 2008 defendant was her boyfriend and that defendant would sometimes drive her car, a Grand Am, while she worked during the day. She and defendant stayed at hotels. Defendant would often have his friends, including Eric Torrez, Mikey Torrez, and Gawthrop, stay in other rooms.

According to Mazur, on March 11, 2008, she drove defendant, Mikey Torrez, and Gawthrop to the Rodriguez residence. She drove there under Gawthrop's direction. She believed that Gawthrop's ex-girlfriend lived there, and that Gawthrop was going to retrieve his possessions. At the house, Mazur stayed in the car, while the three men got out. Gawthrop walked to the back of the house, and a few minutes later he let defendant and Mikey Torrez into the house through the garage door. The three men exited the house, each carrying something. Defendant carried two jewelry boxes, Mikey Torrez carried a flat screen television, and Gawthrop had a gun. It was then that Mazur realized the three men had burglarized the house.

Mazur dropped Mikey Torrez and Gawthrop off, before she and defendant went to the Saginaw Gold and Diamond Exchange, where defendant unsuccessfully tried to sell some jewelry. After she and defendant left the store, they were pulled over. They were placed in the back seat of a patrol vehicle. Defendant had given Mazur a wedding band set taken from the Rodriguez house. While in the patrol vehicle, defendant first told Mazur to tell the police that she had gotten the wedding band set from Gawthrop and then he told her to swallow the rings.

II. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor denied him a fair trial when the prosecutor argued that he was of bad character and was therefore guilty. Specifically, defendant asserts that the prosecutor made ad hominem attacks on his character when the prosecutor described him as "selfish," as having a "sociopathic way of going through life," as him "just wanting to stay with his girlfriend, have sex in motels and not be bothered by the families, just have some money," and as a "true sociopath."

We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Defendant must show that a clear or obvious error occurred and that he was prejudiced by the error, i.e., that the error affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, with the prosecutor's remarks evaluated in context and in light of the entire record. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Prosecutors are afforded great latitude regarding their arguments at trial. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). A prosecutor is free to argue all the evidence and the reasonable inferences as they relate to the prosecution's theory of the case, *id.*, and a prosecutor is not required to use the blandest terms possible, *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). However, a prosecutor may not interject issues broader than the defendant's guilt or innocence. *Dobek*, 274 Mich App at 63-64. A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks," *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995), and he may not comment on a defendant's character when the defendant's character is not at issue, *McGhee*, 268 Mich App at 635.

In his closing argument, the prosecutor stated:

> At one point in this interview, if I haven't made him [defendant] out to be selfish enough already by my argument, you got a glimpse into his mind about how selfish he is and what he would do to gain his freedom to avoid going to jail that day. . . .
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> Detective Luth, in making conversation . . . said . . . Kenny [defendant], I know you care a lot about [Mazur]. To which the defendant immediately replied, what I care about is maybe going to jail or prison for these crimes. That's what I care about. My sociopathic way of working through life, I just got to get paid. I have to do licks, which are burglaries, robberies, crimes, so I don't have to really work, so that I can have money to do what I want.
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> You didn't hear any testimony from anybody that he's trying to pay child support, he's trying to avoid a foreclosure on his home or the home of a parent. You have him just wanting to stay with his girlfriend, have sex in motels and not be bothered by the families, just have some money.
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> He became very angry at Detective Luth and Detective Kerns. . . .
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> He gets angry at them when they say, you're going to go to jail, and although they were back and forth, you could tell they were going out and making calls to the prosecutor's office, is this receiving and concealing, is it home invasion? And at first it sounded like it was just receiving and concealing the coins, but then Detective Luth comes back and . . . said no, it's going to be for home invasion.
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> And what does the defendant say? I got to go to jail for home invasion when I got caught in no home. True sociopath. He's not concerned about whether he did something wrong or is remorseful or bothered by what he did. Did I get caught? Do you have evidence? Because you're not going to find any

fingerprints. You're not going to find my involvement with any of these things. Well, no, you're not. You're not and you didn't. . . .

We find no misconduct in the prosecutor calling defendant "selfish" or describing defendant as having a "sociopathic way of working through life." The comments, when read in context, were proper argument based on the evidence introduced at trial. Nor do we find misconduct in the prosecutor's statement that defendant used the money obtained from selling stolen jewelry to "stay with his girlfriend, have sex in motels and not be bothered by the families." This comment was also proper argument based on the evidence.[3]

However, we conclude that the prosecutor exceeded the boundaries of permissible argument when he called defendant a "true sociopath." The remark, which was a comment on defendant's character, was prejudicial and intemperate. Nonetheless, defendant is not entitled to a new trial because he fails to carry his burden of showing prejudice. *Carines*, 460 Mich at 763. The fact that the jury acquitted defendant of the second-degree home invasion charge related to the Kangas home invasion weakens any argument by defendant that the jury convicted him based on his character, rather than the evidence presented. Indeed, the improper remark was an isolated comment, and much evidence was presented that connected defendant to the home invasions and to the items taken from the three residences. The evidence established that defendant sold the two gold coins that were taken from the Parker residence, that two of defendant's acquaintances were, at one time, in possession of guns taken from Parker residence, and that a Grand Am, the same kind of car that defendant's girlfriend drove, was seen in front of the Parker residence on the day of the home invasion. In addition, the evidence showed that defendant was in possession of and discarded the digital camera that was taken from the Kangas residence. Further, Mazur testified, and her testimony was corroborated by that of Nickles, that defendant was involved in the Rodriguez home invasion and that defendant attempted to sell jewelry taken from the Rodriguez residence. Based on the evidence connecting defendant to the home invasions, the prosecutor's improper remark did not affect the outcome of defendant's trial. *Id.* Defendant was not denied a fair and impartial trial by prosecutorial misconduct.

In the alternative, defendant claims that trial counsel was ineffective for failing to object to the prosecutor's remarks. We disagree.

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "A reasonable probability is a probability sufficient to undermine

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[3] We reject defendant's claim that the prosecutor impermissibly used defendant's financial status as evidence of motive. See *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980) ("Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive."). The prosecutor did not argue that defendant committed the crimes because he was poor or unemployed.

confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation omitted).

Counsel is not required to make a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Thus, trial counsel was not ineffective for failing to object to the challenged comments that were not improper.

Assuming that trial counsel's failure to object to the prosecutor's remark that defendant was a "true sociopath" fell below objective standards of reasonableness, counsel's deficient performance did not prejudice defendant. Based on the evidence linking defendant to the home invasions and to the items taken from the three residences, there is no reasonable probability that, but for counsel's deficient performance, the result of defendant's trial would have been different. *Uphaus*, 278 Mich App at 185. Defendant was not denied the effective assistance of counsel at trial.

III. OV 19

Defendant claims that the trial court erred in scoring ten points for offense variable (OV) 19, MCL 777.49. We disagree.

Defendant preserved this issue when he filed a motion for remand with this Court. MCL 769.34(10); see also *People v Meador*, unpublished order of the Court of Appeals, entered August 4, 2010 (Docket No. 292776). We review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A scoring decision for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, the interpretation and application of the sentencing guidelines are questions of law reviewed de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

Ten points may be scored for OV 19 if the defendant "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). The trial court scored ten points for OV 19 based on defendant's attempt to destroy or hide evidence when, in the back of the patrol vehicle, he instructed Mazur to swallow the wedding band set that had been taken from the Rodriguez residence. Defendant claims that based on *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), the scoring was improper because the sentencing offense, the home invasion of the Parker residence, had been completed weeks earlier.

In *McGraw*, 484 Mich at 133, our Supreme Court held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." However, our Supreme Court recently held that "OV 19 specifically provides for the 'consideration of conduct after completion of the sentencing offense.'" *People v Smith*, ___ Mich ___; ___ NW2d ___ (2010), quoting *McGraw*, 484 Mich at 133-134. Thus, a trial court may consider conduct that occurred after the sentencing offense was completed when scoring OV 19. *Id.* Accordingly, defendant's argument, which is based solely on *McGraw*, that the trial court erred in scoring OV 19 is without merit.

Defendant also asserts that trial counsel was ineffective for failing to object to the trial court's scoring of OV 19. We disagree. Pursuant to the Supreme Court's decision in *Smith*, any objection to the scoring of OV 19 based on *McGraw* would have been meritless. Trial counsel was not ineffective for failing to make a meritless objection. *Fike*, 228 Mich App at 182.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello