STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2011
v	No. 295293 Wayne Circuit Court
DAMOND SHAWN ARMSTRONG, Defendant-Appellant.	LC No. 09-014636-FC

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder ("AWIM"), MCL 750.83, and possessing a firearm in the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced to 25 to 45 years' imprisonment for the murder conviction, 17-½ to 30 years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. SPEEDY TRIAL

Defendant argues that he was denied his right to a speedy trial. We disagree. The determination whether a defendant has been denied a speedy trial presents a mixed question of fact and constitutional law. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20; *Williams*, 475 Mich at 261. In determining whether a defendant has been denied a speedy trial, a court must balance these four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Vermont v Brillon*, ___ US ___; 129 S Ct 1283, 1290; 173 L Ed 2d 231, 239-240 (2009); *Williams*, 475 Mich at 261-262.

The delay period commences when a defendant is arrested. *Williams*, 475 Mich at 261. A delay of six months is necessary to trigger an investigation into a claim that a defendant has

been denied a speedy trial. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). The defendant must prove prejudice when the delay is less than 18 months. *Waclawski*, 286 Mich App at 665. But a delay of more than 18 months is presumptively prejudicial to the defendant and shifts the burden of proving lack of prejudice to the prosecution. *Williams*, 475 Mich at 262.

Here, defendant was arrested in Ohio on February 7, 2009, and was in custody continuously until his trial started on October 13, 2009. Thus, the pretrial delay was slightly over eight months or approximately 250 days. Of those 250 days, defendant was in Ohio for approximately 90 days, before he was extradited back to Michigan in early May 2009. Regardless of how the 250-day delay is broken down, it falls well short of the 18-month threshold. Therefore, defendant had the burden to show how he was prejudiced. *Waclawski*, 286 Mich App at 665. The only prejudice that defendant claimed was the sole fact that it required him to be in the county jail for a prolonged period of time. While being incarcerated for an extended period of time can be prejudicial to *the person*, the constitutional balancing is more concerned with how any delay jeopardized a fair trial. *Williams*, 475 Mich at 264. Moreover, because defendant's time spent in jail before trial was credited towards his sentence, it is difficult to glean any prejudice at all.

We note that to the extent that defendant relies on the 180-day rule of MCL 780.131 and MCR 6.004(D), such reliance is misplaced. The purpose of the statutory 180-day rule is to dispose of untried charges against prison inmates so that sentences can run concurrently. *Id.* at 252. The statute applies only to a defendant who, at the time of trial, is serving in a state penal institution and not to a defendant awaiting trial in a county jail, as defendant was. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

Accordingly, because the pretrial delay was well below the 18-month threshold, and defendant failed to establish how this delay prejudiced his opportunity for a fair trial, defendant's claim of being denied his right to a speedy trial fails.

II. DUE PROCESS – IDENTIFICATION

Defendant claims that the out-of-court and in-court identifications, provided by witnesses Gina Durbin and Adolfa Ramos-Plascencia ("Ramos"), deprived him of his right to due process because the initial photographic lineups were unduly suggestive. We disagree.

In order to preserve a claim on appeal that an in-court identification was improper because a prior identification was impermissibly suggestive, a defendant must either object at trial to the admission of the photographic line-up identification or to the witness's in-court identification of the defendant. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Here, defendant only objected to the identifications on the basis that a single photograph showing his unique dental work was unduly suggestive – defendant never made any argument based on defendant being only one of two bald-headed men in the photo array. Therefore, the issue is preserved with respect to the single photograph aspect but unpreserved with respect to there being only two bald-headed men in the array.

Generally, a trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* However, unpreserved issues are reviewed for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Furthermore, reversal for unpreserved matters is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Due process protects defendants "against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004), citing *Moore v Illinois*, 434 US 220, 227; 98 S Ct 458; 54 L Ed 2d 424 (1977). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 302.

Defendant first argues that the two witnesses were shown a single photograph, depicting defendant with his distinctive dental work.[1] However, at the evidentiary hearing that was held, it was clearly established by the officer in charge and Ramos that Ramos was never shown this single photograph by the police. Defendant attempted to show that Ramos did see the photograph by introducing testimony from the preliminary examination:

> *Q.* [Did] Detective Jimenez ever show you a picture that looks like that [the single photograph depicting defendant smiling with his dental work]?
>
> *A.* Yes.
>
> *Q.* He did? Okay. All right.
>
> *A.* It was with a lot more people on it, though. It wasn't just one single picture.
>
> *Q.* Okay. All right. Did he ever show you just a single picture at a time?
>
> *A.* No.

[1] Defendant had some kind of conspicuous silver or gold dental work on his front teeth.

Defendant's position was that this statement clearly established that Ramos had seen this particular photograph before. However, defendant ignores the clear problems with this interpretation. First, defense counsel did not ask whether Ramos had seen *that* photograph – only one that merely looked "like" it. Second, Ramos's subsequent testimony, where she described that the photograph she actually saw in the array "wasn't *that* picture of him," makes it clear that Ramos never saw that single photograph. Therefore, there is no basis for defendant's argument that Ramos's identifications of defendant were influenced by this single photograph when she never saw it until defense counsel introduced it to her at the preliminary examination.

Defendant's argument related to witness Durbin fails for similar reasons. In Durbin's case, both the officer in charge and Durbin admitted that she was shown that single photograph *after* she identified defendant from a photo array, which did not contain that photograph. Therefore, the single photograph that defendant takes issue with played no part in Durbin's pretrial identification of defendant. Moreover, even if the subsequent viewing of the single photograph was somehow unnecessarily suggestive, Durbin knew of defendant from before the night of the shooting. She testified that she had met him before and they had talked about the father of Durbin's children. Thus, because Durbin had an independent basis for identifying defendant, any suggestiveness introduced with the single photograph would not have resulted in a "substantial likelihood of misidentification." See *Id.* at 303. Accordingly, defendant's arguments centered on this single photograph, which depicts defendant with his distinctive dental work, all fail.

Defendant next argues that the photo arrays were unduly suggestive because defendant was one of only two bald-headed men in the arrays. Defendant did not raise this issue at the trial court; thus, the issue is reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

"Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Kurylczyk*, 443 Mich at 304. Again, only differences in the photographs that can lead to a substantial likelihood of misidentification are violative of due process. *Id.* at 305. Here, the array in question shows that, while two of the six men depicted had a bald or shaved head, three others had hair that was cut extremely close to the head. The sixth person's hair was still short, but noticeably longer than the others. We find nothing to support defendant's contention that the array was impermissibly suggestive. Given the short hair styles, the photos were "fairly representative" of defendant's physical features. Defendant seems to suggest that, at least for a defendant's hair, the photographs must all match the same characteristic, but this is not what the law requires. Accordingly, defendant failed to establish the presence of any error – let alone plain error – and his claim fails.

III. PROSECUTOR'S REMARKS

Defendant alleges that prosecutorial misconduct deprived him of a fair trial. We disagree. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Rodriguez*, 251

Mich App 10, 30; 650 NW2d 96 (2002). However, defendant did not preserve the issue by objecting or requesting a curative instruction. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Thus, the unpreserved claim is reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

During closing arguments, prosecutors are allowed to argue the evidence and make reasonable inferences to support their case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). Defendant argues that the prosecutor made improper remarks during closing arguments when the prosecutor stated that defendant obtained another handgun before attempting to reenter the after-hours house after the initial shooting. Defendant claims that this was impermissible because no witness testified that defendant had possession of more than one gun. However, there was a witness that testified that defendant *owned* two handguns. Specifically, Officer Moises Jimenez testified that, after conducting a check on defendant's name, he determined that two different .40-caliber guns were registered to defendant.[2] Defendant is correct, though, when he states that no witness saw defendant actually retrieve a second gun before returning to the house. But defendant misconstrues the purpose of closing argument. The purpose is not to simply reiterate the evidence that was presented at trial; the purpose is to *argue certain inferences* from the evidence presented. See *id.*; *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), aff'd 431 Mich 506 (1988). The inference that defendant returned to the house with a second gun was one possible, reasonable inference, which was supported by the fact that defendant owned two guns and had tried to reenter the house after the shootings. The jury, as the fact finder, was free to accept it or reject it. Accordingly, defendant cannot establish any plain error, and his claim fails.

IV. PRIOR ACTS EVIDENCE

Defendant argues that evidence of him having two handguns registered in his name was improperly admitted. We disagree. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant did not object to the introduction of the evidence of him having two handguns registered in his name[3]; thus, the issue is not preserved and we review for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

As a cornerstone of evidentiary law, relevant evidence is admissible and irrelevant evidence is not admissible. MRE 402. However, "[w]here the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit crime, the

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[2] The admissibility of this evidence is addressed in Part IV, *infra*.

[3] There was an objection to the admission of the physical certificates themselves based on them not qualifying as an exception to the business record exception to hearsay. However, there was no objection to the officer's actual testimony relaying this information.

evidence must be excluded." *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004); see also MRE 404(b)[4]. For evidence that implicates MRE 404(b) to be admissible, the evidence must be offered for a proper purpose. *Knox*, 469 Mich at 509. A proper purpose is one other than establishing a defendant's character to show his propensity to commit the charged offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

Here, defendant correctly identifies, in his brief, the purpose of the evidence: to establish that defendant had the "tools" or means to commit the shootings. The evidence was not offered to show that defendant's character demonstrated a propensity to assault and murder, which would have to be the case, in order for defendant to prevail on this issue. Thus, the evidence was offered for a proper purpose, and MRE 404(b) does not act as a bar to its admission.

However, even evidence not excluded under MRE 404(b) must satisfy the requirements of MRE 403. *Knox*, 469 Mich at 509. MRE 403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Defendant's assertion that the evidence was "highly prejudicial" is inadequate. *All* evidence is prejudicial or damaging to one side or the other at trial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Only *unfairly* prejudicial evidence is covered by this aspect of MRE 403. *Id.* "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, defendant failed to show how the evidence was given undue or preemptive weight by the jury. Of course, the evidence, that defendant owned guns that were consistent with the type of gun used in the shootings, was prejudicial to defendant, but defendant failed to show how it was *unfairly* prejudicial.

Therefore, because the evidence of defendant's gun ownership was relevant, was offered for a proper purpose, and was not substantially more unfairly prejudicial than probative, the evidence was properly admissible. Hence, there was no plain error, and defendant's claim fails

V. FLIGHT INSTRUCTION

Defendant argues that the trial court erred when it gave the jury an instruction on flight because there was no evidence to support that defendant fled the scene. We disagree. A claim of instructional error involving a question of law is reviewed de novo, while a trial court's determination that a jury instruction applies to the facts of a case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "A trial court may be

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[4] MRE 404(b)(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."

said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). In order for a trial court to provide a particular instruction, there must be evidence presented that supports the giving of the instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

The trial court provided the following instruction on flight, which was consistent with CJI2d 4.4:

> Now the Prosecutor has suggested that there was flight at the time – immediately after the time of the crime and by the move to Wooster, Ohio. This evidence does not prove guilt. A person may run or hide for innocent reasons[,] panic, mistake or fear. He may move for totally innocent reasons as well. A person may also run or hide because of a consciousness of guilt. You must decide whether or not there is evidence of guilt – of flight and – if true, whether it shows the Defendant had a guilty state of mind.

Giving this instruction was within the range of principled outcomes. "Flight" includes not only fleeing the scene of the crime, but also leaving the jurisdiction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). There was evidence presented that police identified defendant as the main suspect a week after the shootings. Police finally located defendant in Ohio and commenced extradition proceedings. Thus, the evidence was sufficient to support an inference that defendant fled the jurisdiction after the crimes were committed. Furthermore, the instruction did not state that defendant actually "fled," but instead left that determination with the jury. Accordingly, defendant's claim fails.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at various points during the trial. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Unpreserved issues of ineffective assistance of counsel are reviewed for errors apparent on the record. *Rodriguez*, 251 Mich App at 38. "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282

Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

On September 16, 2009, defense counsel filed a notice that he was intending to call two alibi witnesses at trial, Angela Ratliffe[5] and Timothy Blair. On October 15, 2009, before the jury was brought into the courtroom that morning, defense counsel explained to the trial court some concerns he had with respect to the alibi witnesses:

> Well, as you know, I've got two alibi witnesses, Judge. A Miss Angela Ratliff, um, is my primary alibi witness. Much less important is Mr. Timothy Blair. When – working with my client, we figured out a timeline for this tragic event that occurred about a year-and-a-half ago. He led me to contact Miss Ratliff. Miss Ratliff was quite certain that my client was with her on this weekend in Worchester [sic], Ohio, and she can actually document a timeline with evidence that she's mailed me showing me that she can document this timeline of events, that she knows what happened, and she was a very good witness I thought.
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> * * *
>
> I've had probably about ten telephone conversations with her over this period of time. She – the most recent telephone – I got two recent telephone messages from her. Maybe about ten days ago she called and said that two homicide detectives in Worchester [sic] came to her house and she seemed very worried about that. I had already told her that they were going to contact her, you just tell them the truth like you told me. And I called her back and reassured – left a message for her and reassured her that's all she had to do and that was completely normal.
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> After this trial started I got a telephone message from Miss Ratliff stating that neither she nor Mr. Blair would be coming up here.
>
> My concern is that – I can't prove this – my concern is that Miss Ratliff may have been threatened in – or threats, intimated. She just got custody of a

[5] The transcript used the "Ratliff" spelling, while defendant's motions used the "Ratliffe" spelling. We presume the motions are correct and will use "Ratliffe."

> boy, that she has regained custody. She's had a troubled life. She's a former drug user. She was up here a year-and-a-half ago for Narcotic Anonymous convention. She is rehabilitating herself and going to college.
>
> And there's absolutely no reason for this person to be so certain and so confident and so engaged in this case on Mr. Armstrong's behalf that she would come up here and spend time with me and be consistent and now not even return my phone calls. I'm concerned that she's being threatened. I can't prove it. But I got a message after the trial started. She's not returning my phone calls and that's kind of a jarring event for me.
>
> I need to spend some time with my client, put a little space between us for this and we need to go over whether it's appropriate for him to testify in this case or not because Miss Ratliff was what my defense was resting on and now that's being blown away from me.
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> * * *
>
> [S]o I'm respectfully requesting a continuance before we start our defense.

The trial court granted the continuance, setting the next trial date five days later on October 20, 2009. On October 20, 2009, without any further explanation, defense counsel withdrew the alibi defense.

Defendant claims that he is entitled to a new trial because defense counsel was ineffective by failing to issue subpoenas to compel Ratliffe and Blair to testify at trial. This claim fails for many reasons. First, even if subpoenas were issued, and Ratliffe and Blair were forced to testify, no one knows how they would testify at trial. There is no affidavit or other testimony from either witness, confirming what they would have said at trial. There is only the hearsay statements of defense counsel himself, saying that they would place defendant in Ohio at the time of the crimes. Even assuming the fact that the witnesses indicated before trial that they would testify to defendant's benefit, there is no evidence that the witnesses held these intentions *at the time of trial*. Thus, without knowing how the witnesses would actually testify at trial, it is impossible for defendant to meet the second prong of the test, which requires showing that counsel's actions caused prejudice. Second, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. After defense counsel notified the trial court of his concerns regarding the two alibi witnesses, there was a four-day break. Immediately after this break, defense counsel notified the court that he would be withdrawing the alibi defense. The record is silent regarding whether defense counsel made further contact with the witnesses during this adjournment. It is possible that defense counsel learned that the witnesses, for whatever reason, would not be able to testify as they previously indicated. Accordingly, trial counsel's strategy decisions regarding which witnesses to present should not be disturbed. We note that the failure to call witnesses can constitute ineffective assistance but only if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). While an alibi is certainly a

substantial defense, as noted earlier, the record does not show that the witnesses, even if compelled to testify, would have testified at trial in a helpful manner for defendant. Accordingly, defendant cannot overcome his heavy burden, and his claim fails.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to make certain objections at trial. We disagree.

Defendant claims that defense counsel should have objected to the introduction of the evidence that showed that defendant owned two .40-caliber handguns. Defendant also claims that defense counsel should have objected to the prosecutor's closing argument remarks regarding defendant attempting to reenter the after-hours house after obtaining his second gun. However, as discussed in Part IV, *supra*, the gun-ownership evidence was properly admitted and Part III, *supra*, the prosecutor's remarks were permissible. Thus, defense counsel objecting to either of these instances would have been unsuccessful. Because counsel is not ineffective for failing to make a futile objection, *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004), defendant's claim necessarily fails.

VII. OV 5 AND OV 7 SCORING

Defendant contends that he should be resentenced because, as a result of misscored variables, the guidelines range used at sentencing was incorrect. We disagree. Generally, the application of statutory sentencing guidelines is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Preserved scoring issues are reviewed to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *McLaughlin*, 258 Mich App at 671.

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. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "Scoring decisions for which there is any evidence in support will be upheld." *Hornsby*, 251 Mich App at 468.

Defendant first argues that the trial court erroneously scored 50 points for Offense Variable (OV) 7. MCL 777.37(1)(a) provides that 50 points are to be scored for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The trial court determined that 50 points was warranted because "the firing of ten shots into a person . . . is excessive brutality."

"Excessive brutality" is not statutorily defined. "[W]hen terms are not expressly defined by statute, a court may consult dictionary definitions." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). Here, "brutality" is defined by *Random House Webster's College Dictionary* (1997), as "the quality of being brutal,"[6] as well as meaning "cruelty" and "savagery." "Excessive" means "going beyond the usual, necessary, or proper limit or degree." *Random House Webster's College Dictionary* (1997). Thus, excessively brutal conduct, in this context, is conduct that exceeds the norm for committing the crime, AWIM.

Here, the trial court scored the 50 points by relying on the mere fact that Travon Williams was shot ten times. It is debatable whether this conduct alone exceeds the norm for an assault with intent to murder crime. However, what are not debatable are the circumstances surrounding the shootings. Travon was initially shot while sitting down next to defendant. After realizing he was shot, Travon immediately jumped up from his seat and started to run for the front door. But, as he was running, defendant shot him twice in the back, causing Travon to fall face down to the ground. When Travon turned over, defendant had closed upon him and had the gun pointing at Travon's head. Travon yelled, "You're not shooting me in the face," and, after the two briefly wrestled over the gun, defendant shot Travon many more times, for a total of ten times.

For the instant case, the facts are clearly more than just shooting ten times. The evidence shows that defendant shot a fleeing victim in the back multiple times, moved up to the victim who was then lying on the ground, held the gun near the victim's face, and then shot the victim approximately seven more times. Viewing the evidence in this manner shows that it was reasonable to conclude that defendant's conduct was "excessively brutal" because it exceeded the norm for AWIM. Accordingly, the trial court's scoring of 50 points, although perhaps for different reasons, was not erroneous.

Defendant next argues that the trial court erred when it scored 15 points for OV 5. Fifteen points may be scored for OV 5 if "serious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). It is important to note that there is no requirement that the family member actually receive psychological treatment. MCL 777.35(2).

The trial court scored 15 points for OV 5 based on the testimony of the murder victim's[7] nine-year-old daughter. The daughter stated to the court:

> I loved him and miss him so much. I hurt when I think about him. . . . [M]y mom tells me it will get a little easier in time, but I keep asking her when

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[6] In turn, "brutal" is defined as "savage," "cruel," and "inhuman." *Random House Webster's College Dictionary* (1997).

[7] The murder victim was Mark Williams, who was not related to Travon Williams.

> will it get easier because I hurt now just as much as I did the day that I found out I lost my daddy forever.

Although the trial court did not reference it, Mark's mother also testified. She stated that "no one could be hurt more than I am. Mark was my only child and he was taken away from me too soon."

Contrary to defendant's argument, the above record does support scoring 15 points for OV 5. Both family members described the huge amount of hurting and pain they have endured. A reasonable inference is that at least one of them has suffered a serious psychological injury. Since this evidence supports scoring 15 points for OV 5, the scoring should be upheld.

Because the record supported the trial court's scoring of 50 points for OV 7 and 15 points for OV 5, the court's determinations should not be disturbed. Accordingly, defendant's challenges fail.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly