STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2011
v	No. 295760 Bay Circuit Court
WILLIAM EDWIN JACOB, Defendant-Appellant.	LC No. 08-011160-FH

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction and sentence for assault with intent to commit great bodily harm, MCL 750.84.[1] Following his conviction, defendant was sentenced, as a fourth habitual offender, MCL 769.12, to serve 152 to 228 months in prison. We affirm.

I

Defendant's conviction resulted from a domestic altercation between defendant and his ex-wife, Christina Alvarado, on November 28, 2008. Alvarado testified that defendant slapped her across the left side of her face, strangled her, called her names, and repeatedly threatened to kill her. Defendant had recently begun residing with Alvarado because he was having marital difficulties with his current wife, Shannon Gallagher.[2] Alvarado testified at trial that on the day in question, defendant called her several times while she was at work, showed up at her work, and brought her home. He told her that "everything was getting to" him and that they had to talk. Alvarado asked defendant if he was going back to his wife; defendant said that he was "done." Defendant threw a Christmas decoration at Alvarado and began swearing at her. He told Alvarado that he was leaving, and he went upstairs to pack his things. Alvarado followed

[1] Defendant was also charged with extortion, but was acquitted of this charge and it is not at issue in this appeal.

[2] Alvarado indicated that defendant had been staying with her for approximately two and a half weeks; defendant testified that he been staying with Alvarado for ten days.

defendant so that he would not take, or break, any of her belongings. Defendant continued calling Alvarado names. After Alvarado attempted to convince defendant that he did not have to leave, he hit her across the left side of her face. Alvarado began crying. Defendant hugged her and said he was sorry and that he loved her. He then said that he "can't do this" and that he had to go.

Alvarado testified further that she sat on the bed so that defendant could pack his belongings. Defendant again began swearing at her. Later, as Alvarado was attempting to convince defendant not to leave, he began shoving her face, taunting her and laughing at her, and telling her to hit him. Defendant continued pushing and shoving Alvarado. She asked him to stop and pushed him away from her. Defendant then laughed, threw Alvarado on the bed, and began strangling her. Defendant asked her, "[b]itch, how do you like that bitch," "[h]ow do you like that, you fucking bitch"; he told her "[t]his is what you deserve bitch," and "I'm gonna kill you bitch. This is what you get." This lasted a few seconds. Alvarado did not know whether defendant stopped of his own accord or whether she pushed him off of her. She told defendant that she was going to call 911. When she did, he called her a "rat-ass bitch." He continuously called her names and tried to intimidate her. While Alvarado was speaking with the 911 operator, defendant again said that he was going to kill her.[3]

Defendant's neck was scratched during the altercation in the area where he had Shannon's name tattooed. During cross-examination, Alvarado denied that she became angry when defendant continued packing despite her attempts to get him to stay; she denied that she attacked defendant, or that she intentionally scratched his neck where Shannon's name is tattooed. Alvarado thought she must have unintentionally scratched defendant when he was strangling her, as a "natural reaction."

In sharp contrast, defendant testified that he merely pushed Alvarado away from him after she twice attacked him, scratching his neck in the area where Shannon's name was tattooed. Defendant testified that Alvarado became angry after he informed her that he was getting back together with Shannon. Defendant denied arguing with Alvarado, hitting her across the face, choking her, or threatening to kill her at any time. He acknowledged calling her a name, but indicated that it was only after, and in response to, her scratching his neck severely enough to draw blood.

Bay City police officer Kristin Thomas was dispatched to Alvarado's home following a 911 call for a domestic assault complaint. Thomas testified that upon her arrival, she found Alvarado to be very frightened. Alvarado told Thomas that defendant was going to kill her because she had called the police. She told Thomas that she had gotten into a verbal argument with defendant that had escalated into a physical assault, during which defendant had slapped her across the face, pushed her down onto the bed, and choked her. Alvarado also said that while defendant was choking her she could not breathe, and that she was afraid she was going to die.

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[3] The recorded 911 call was admitted into evidence and played for the jury.

Thomas testified that she observed and photographed red marks, and possible swelling, on Alvarado's neck, along with some marking on the left side of her face.[4]

Bobbi Rood, Alvarado's employer, testified that the day after the assault, she noticed bruising under Alvarado's left eye, as well as "four bruises – individual bruising going across, like the sideways of" the right side of Alvarado's neck. Rood had not observed any bruising on Alvarado's face or neck the previous day.[5]

II

Defendant argues that two isolated comments made by Alvarado during cross-examination, which referenced defendant's criminal history, deprived him of a fair trial. We disagree.

At the beginning of trial, after defense counsel expressed concern that Alvarado may divulge defendant's criminal history to the jury, the court asked the prosecutor to instruct Alvarado not to "get into that voluntarily." The prosecutor agreed that he would do so. However, during cross-examination regarding whether she was the aggressor during the altercation, Alvarado commented that:

> when my son first came upstairs, [defendant] had already smacked me across the face. There were no scratches on him at all. I did not do nothing to him. He is 6 foot 3. *I am not going to try to fight a man that has a history of fighting and stabbing people.* I will not try to fight him. I'm not a man. I did not scratch particularly on Shannon's name. [Emphasis added.]

Defendant asserts that the emphasized portion of this testimony constituted an intentional, impermissible reference to defendant's criminal history. Defendant further argues that a subsequent reference by Alvarado to defendant's prior imprisonment was likewise intentional and impermissible, warranting a new trial. After being asked whether she has a tattoo referring to defendant, Alvarado testified:

> I have a tattoo that says "Asteca Queen." And four – over four years ago, I put "Asteca Romeo" on my arm. And I got it covered up the first time we split up. That was years ago. I never received a ta – you can call my – you can go to my tat – you can subpoena my tattoo artist. I have not – and it says "Asteca Romeo," and now it says, "Asteca Queen." *We got married while he was in prison*, that did not occur. [Emphasis added.]

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[4] The photographs were admitted into evidence.

[5] Alvarado's two sons, Nicholas and Anthony Cardenas, also testified at trial. Neither witnessed their mother being physically assaulted by defendant; both offered only very general testimony, which tended to corroborate Alvarado's testimony as to events peripheral to the assault.

Defendant did not object to either of Alvarado's references to his criminal history at trial. Therefore, this Court reviews defendant's unpreserved claim of error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 150, 774; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, a defendant must establish 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). Reversal 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).

Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not grounds for reversal unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Reversal is warranted for unresponsive or volunteered testimony only where the remarks were so grave that there is no other cure for the prejudice inflicted on defendant. *People v Coles*, 417 Mich. 523, 554-555; 339 NW2d 440 (1983). When determining whether nonresponsive comments of a witness unduly prejudiced a defendant, this Court must consider the entire record to determine if defendant received a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988).

Considering that Alvarado's comments were offered during cross-examination, there is no evidence that the prosecution knew in advance that Alvarado would make the references, or that the prosecutor conspired with her or encouraged her to do so. *Hackney*, 183 Mich App at 531. Further, Alvarado's comments were brief and isolated, they came well into cross-examination, and they occurred in the context of Alvarado explaining why she would not have been the aggressor and would not have fought defendant (because of his history of fighting and stabbing people and his size advantage), and as a temporal reference in the context of the discussion of the issue of the parties' respective tattoos. Additionally, neither the witness nor the prosecutor focused on the comments any further after their brief mention. Therefore, defendant was not denied a fair trial by Alvarado's statements. See *Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988) (finding no abuse of discretion in the trial court's denial of a mistrial, despite that two witnesses injected comments suggesting that the defendant had committed an uncharged murder, given the fleeting nature of the remarks and the fact that they were not subsequently "emphasized to the jury").

Defendant asserts that Alvarado's references to his criminal history were deliberate and intentional. That Alvarado was instructed not to refer to defendant's criminal history might suggest that her comments were indeed deliberate. However, we note that Alvarado made no such reference during direct examination, that her remarks fit within the context of her respective answers to defense counsel's questions, and that overall, Alvarado's answers were appropriate to those questions. Additionally, it is not pertinent whether *Alvarado* deliberately interjected the improper references into the trial; rather, the issue is whether the prosecution bears any culpability for her having done so. *Hackney*, 183 Mich App at 531. There being no evidence that the prosecution played any role in Alvarado making her statements, or that it was aware that she would make such statement in response to cross-examination by defense counsel, reversal is not required. *Id.*

Defendant asserts further that the trial court should have acted of its own accord to remedy Alvarado's testimony. While the trial court undoubtedly had the authority to caution Alvarado not to refer to defendant's prior acts, Alvarado's brief and isolated remarks did not deny defendant a fair trial. Further, defendant did not ask for a curative instruction regarding the improper references, and "where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

III

Defendant argues that the trial court abused its discretion by permitting the late endorsement of Rood as a prosecution witness. We disagree.

A trial court's decision to permit the late endorsement of a witness is reviewed for an abuse of discretion. MCR 6.201(J); *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008); *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379; *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

After the jury was seated, the trial court provided preliminary instructions and the prosecutor and the defense each made their opening statements. During his opening statement, defense counsel represented to the jury that there would be no evidence, other than Alvarado's testimony, indicative that a choking or strangling – as opposed to mere pushing – had occurred between the parties. Counsel specifically commented that the jury would not be presented with evidence of any handprint or "anything else" to indicate that Alvarado was strangled by defendant.

At the conclusion of the opening statements, the court recessed for lunch. When it reconvened, the prosecution sought the court's permission to call Rood as a witness, advising the court that she was not listed previously as a prosecution witness because the prosecution was "unaware of her" until the immediately preceding break in the proceedings, when she showed up at the courthouse. The prosecution explained that it expected Rood to testify to seeing bruises on Alvarado's neck the day after the assault, which were not present the day before the assault. In response to an inquiry by the trial court, defense counsel indicated that he had spoken with Rood during the break and that the defense opposed the prosecution's request to add Rood as a witness because Rood indicated that she intended to testify that the bruises on Alvarado's neck were fingerprints. Defense counsel argued that allowing Rood to testify, after defendant had committed to a theory of defense during opening statements, would constitute "trial by surprise."

The trial court ruled that the prosecutor could not ask Rood whether she thought the bruises she observed resembled finger marks, but that he could ask her about the presence of the bruising. Consistent with the court's ruling, as noted above, Rood testified that on the day after the assault Alvarado had bruising under her left eye and four individual bruises across "the sideways" of her neck.

MCL 767.40a(3) provides, "[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(4) provides, "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." As our Supreme Court explained in *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995), MCL 767.40a "contemplates notice at the time of filing the information of *known* witnesses who might be called and all other *known* res gestae witnesses" and "imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses *as they become known.*" (Emphasis added.) Late discovery or identification of a witness can constitute good cause. See *id*. at 284-285; *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). Through no apparent fault of its own, the prosecution first learned of Rood on the day of trial, and it moved to endorse her promptly upon discovery. Thus, there was no unreasonable delay by the prosecutor in moving for the late endorsement. Therefore, the trial court did not abuse its discretion by permitting the late endorsement. *Canter*, 197 Mich App at 563. Indeed, defendant does not argue otherwise. Rather, he asserts that Rood's late endorsement unfairly prejudiced his defense.

Regardless of whether the prosecution established good cause, a defendant must show that he was *unfairly* prejudiced to be entitled to any relief. *Callon*, 256 Mich App at 328. Typically, unfair prejudice results when defense counsel is unable to adequately prepare for the witness's cross-examination. *Burwick*, 450 Mich at 296. Defendant asserts that he was not able to prepare adequately to cross-examine Rood. However, defense counsel had the opportunity to interview Rood before the court considered the prosecutor's motion, and he did not seek additional time to prepare to cross-examine or rebut Rood's testimony. The granting of a continuance, when requested, can obviate any prejudice resulting from late endorsement of a witness. *People v Meadows*, 80 Mich App 680, 690; 263 Nw2d 903 (1977).

Additionally, defendant was aware that the photographs taken by Officer Thomas, showing redness on Alvarado's neck, were going to be admitted as evidence to establish that he choked Alvarado. Officer Thomas also testified that she observed redness and swelling on Alvarado's neck. This supports an inference that defendant used a higher degree of force than was required merely to push Alvarado away from him. And, the trial court prevented Rood from testifying that the bruises on Alvarado's neck looked like finger marks or hand prints, leaving the jury to infer from her testimony, as well as from Thomas's, whether the evidence was more consistent with Alvarado's testimony or with defendant's testimony. Under all of the circumstances presented, we conclude that the trial court did not abuse its discretion by permitting Rood to testify.

IV

Defendant argues that the prosecutor committed misconduct, necessitating reversal, by discussing the September 11, 2001 terrorist attacks and the possibility that defendant might, or might not, have prior convictions during *voir dire*. Additionally, defendant argues that the prosecutor committed misconduct during closing argument by demonstrating that Rood had put her hands to her throat when describing the bruises she observed on Alvarado's neck. We disagree.

To preserve a claim of prosecutorial misconduct, there must be a contemporaneous objection and request for a curative instruction. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant did not object to the prosecutor's comments at trial. Therefore, this Court reviews his unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *Ackerman*, 257 Mich App at 448. Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *Id*. at 448-449.

Issues of prosecutorial misconduct are decided on a case-by-case basis by reviewing the pertinent portion of the record in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test is whether the defendant was denied a fair trial. *Id.* The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship of the remarks to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995); *Brown*, 279 Mich App at 135. Prosecutors are afforded great latitude during argument; they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to the theory of the case and need not state the inferences in the blandest possible terms. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007); *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001).

Defendant first asserts that the prosecutor committed misconduct by referencing the September 11, 2001 terrorist attacks during *voir dire*. Read in context, it is clear that the prosecutor was simply attempting to illustrate the difference between reasonable doubt and possible doubt. The remarks were not inflammatory or designed to evoke sympathy for the victim, and they did not make any comparison between the instant case and the tragic events of that day. While there certainly are more appropriate, and less emotionally-charged, examples to illustrate the prosecution's point, the instant remarks did not deny defendant a fair trial.

Next defendant asserts that the prosecutor's remarks regarding the absence of evidence as to whether defendant had a criminal history also constituted misconduct. Again, read in context we do not find the prosecutor's remarks to be improper. While they raise the specter that defendant may have a prior criminal history, they instruct the potential jurors that they may not consider whether or not he has such a criminal history when rendering a verdict, and therefore, that they will not be provided with evidence addressing that point. Further, the subjects being addressed by the prosecutor – sympathy, prejudice, and concern over penalty – are proper subjects of *voir dire*. As this Court explained in *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996), "[t]he function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." The prosecutor's comments regarding the lack of relevance of any criminal history, fulfilled this function.

Finally, defendant argues that the prosecutor committed misconduct during closing argument by demonstrating that Rood had placed her hands around her own neck when describing the bruises she observed on Alvarado's neck, because the trial court had prohibited Rood from testifying that the bruises looked like finger marks. Reviewing the comments in

context, we find that they constitute a fair comment on the evidence admitted at trial and the inferences to be drawn there from, in relation to the prosecution's theory of the case. As such, the comments were permissible. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66; *Knapp*, 244 Mich App at 381-382. Further, the comments were responsive to the defense theory that Alvarado was the aggressor and that defendant was merely acting in self-defense. *Reed*, 449 Mich 398-399; *Brown*, 279 Mich App at 135. Defendant has not established that the prosecutor committed misconduct. Therefore, reversal of his conviction on this basis is unwarranted.

V

Defendant argues that his trial counsel was ineffective for failing to object to, or seek a remedy for, Alvarado's comments regarding his criminal history, or the prosecutor's comments during *voir dire* that the jury would not be presented with evidence as to whether or not defendant had a criminal record. We disagree.

This Court's review of defendant's unpreserved assertions of ineffective assistance of counsel is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the outcome of the proceeding would have been different. *Id*. at 146. Defense counsel has wide discretion regarding matters of trial strategy. *People v Odom*, 279 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Henry*, 239 Mich App at 145-146 This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009); *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

For the reasons previously discussed, the prosecutor's comments during *voir dire* regarding the lack of relevance of any criminal history did not constitute misconduct. Therefore, defense counsel was not ineffective for failing to object to them. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Regarding Alvarado's testimony, defendant seems to concede that counsel's decision not to object to the testimony may have been trial strategy. Given the brief nature of Alvarado's remarks, defense counsel may not have wanted to draw the jury's attention to them. Our Courts have recognized that "there are times when it is better not to object and draw attention to an improper comment." *Unger*, 278 Mich App at 242-243, quoting *Bahoda*, 448 Mich at 287 n 54. As noted previously, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Payne*, 285 Mich App at 190; *Unger*, 278 Mich App at 242-243. Additionally, for the reasons set forth above, Alvarado's remarks did not warrant a mistrial. Therefore, defense counsel was not ineffective for failing to request one. *Horn*, 279 Mich App at 39-40; *Fike*, 228 Mich App at 182.

Further, while defense counsel could have requested a curative instruction, his decision not to do so likewise may have been a matter of trial strategy, so as not to draw the jury's

attention to Alvarado's fleeting statements. Considering the discretion afforded defense counsel in matters of trial strategy, *Odom*, 279 Mich App at 415, defendant has not overcome the presumption that counsel's conduct was within an objective standard of reasonableness. *Henry*, 239 Mich App at 145-146. Moreover, even if counsel's failure to request a curative instruction is deemed to have been below an objective standard of reasonableness, defendant has not established that this failure deprived him of a fair trial. *Id.* Alvarado's testimony, corroborated by the testimony of Rood and Officer Thomas, and by the photographs of Alvarado's face and neck following the incident, established defendant's guilt. The references by Alvarado to defendant's criminal past were isolated and fleeting, and they were not emphasized further after their utterance. Thus, there is no indication that, had counsel requested a curative instruction, the outcome of the proceedings would have been different. Therefore, the reversal of defendant's conviction on this basis is not warranted. *Id.*

VI

Finally, defendant argues that the trial court erred by scoring offense variable (OV) 7 at 50 points. We disagree.

Defendant timely objected to the scoring of the sentencing guidelines below. Therefore, this issue is properly preserved for this Court's review. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). This Court reviews a trial court's scoring decision for an abuse of discretion and to determine whether the record evidence adequately supports the score given. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Sentencing guidelines scoring decisions for which there is any supporting evidence will be upheld on appeal." *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995); see also, *Hornsby*, 251 Mich App at 468. "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993). To the extent that a scoring issue calls for statutory interpretation, review is de novo. *McLaughlin*, 258 Mich App 671.

OV 7 addresses aggravated physical abuse, and it provides for a score of 50 points where "[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." MCL 777.37(1)(a). There are only two possible scores for OV 7, zero points or 50 points. *People v Cline*, 276 Mich App 634, 653; 751 NW2d 563 (2007). OV 7 was scored at 50 points here based on a finding that defendant's actions substantially increased the fear and anxiety Alvarado suffered during the offense.

In *Hornsby*, 251 Mich App at 704-705, this Court upheld the scoring of OV 7 at 50 points based on the defendant's conduct in pulling out a gun, cocking the gun and threatening to kill the clerk and everyone in the store during an armed robbery. This Court explained that "[d]efendant did more than simply produce a weapon and demand money" as needed to complete the offense of armed robbery, and that his "actions in cocking the weapon and repeatedly threatening the life of the shift supervisor and the other employees supported the court's finding that he deliberately

engaged in 'conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." *Id.* at 705.

Here, defendant's repeated threats to kill Alvarado were conduct beyond that necessary to commit the offense of assault with intent to commit great bodily harm. Further, undoubtedly they were intended by defendant to increase the fear and anxiety Alvarado was feeling during the assault; we cannot envision any other purpose for defendant's threats. And, there was evidence, from Alvarado and from Officer Thomas, that defendant's threats did in fact increase Alvarado's fear and anxiety during the assault. Therefore, we find that there was record evidence to support the trial court's determination that defendant engaged in conduct designed to substantially increase the fear and anxiety a victim suffered during the offense," so as to warrant a score of 50 points for OV 7.

We affirm.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering