STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v	No. 299484 Wayne Circuit Court
JOHNNY LEE WILLIAMS, Defendant-Appellant.	LC No. 09-031564-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 23 to 40 years' imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arose from the fatal shooting of Henry Morgan at a motorcycle club in Detroit. Morgan, defendant, and defendant's fiancée, Tiffany Pritchett, had gathered with several others for an event at the club. Testimony indicated that defendant and Morgan were involved in an altercation, and that club members separated the two men. Later the same night the men had another argument, and defendant shot Morgan once in the abdomen. Following the shooting, defendant left the scene with Pritchett. Defendant turned himself in to the police 15 days later. The defense theory at trial was that defendant acted in self-defense. Defendant testified that immediately before the shooting, Morgan pursued him and reached for a gun. Pritchett corroborated defendant's testimony to the extent that she claimed to observe Morgan reach toward his back or waist-area before defendant shot him.

I. PROSECUTOR'S CONDUCT

Defendant first argues that certain questions and remarks by the prosecutor denied him a fair trial. We disagree.

Defendant presents four challenges to the prosecutor's conduct, three of which he preserved at trial: he objected when the prosecutor asked Pritchett if defendant had a "jealous heart;" when the prosecutor asked defendant if he "used" people; and when the prosecutor commented during closing argument about defendant's failure to come forward. Defendant did

not object when the prosecutor asked Pritchett if defendant had a violent temper; that challenge is unpreserved. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the challenged conduct in context to determine whether the defendant received a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370, overruled in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

"[A] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). Here, defendant has not shown that the prosecutor acted in bad faith. Defendant's demeanor was a matter of concern to both parties in light of the defense theory that defendant acted in self-defense. Defense counsel noted during opening statement that defendant was calm on the evening in question. Defense counsel asserted that in contrast to defendant's calm demeanor, Morgan was aggressive, drunk, and furious, and had a "gun mentality." Given the parties' theories, defendant has not demonstrated that the questions concerning his temper and jealousy on the night in question were improper. Viewed in context, the challenged questions were not intended to inject improper character evidence, but rather sought information that was both relevant and responsive to the defense theory. Regardless, Pritchett denied that defendant had a jealous heart or a violent temper, so reversal is not warranted on this issue.

Defendant next argues that the prosecutor improperly sought to elicit irrelevant character evidence that defendant manipulated people, as demonstrated by his acquiring money from multiple women. Defense counsel objected to this line of questioning on relevancy grounds, and the trial court sustained the objection. Defendant has made no showing that the prosecutor acted in bad faith in asking these questions. *Dobek*, 274 Mich App 72. The prosecutor had evidence that defendant acquired money for his legal fees from multiple women, and that defendant attempted to keep this information from Pritchett. In an offer of proof, the prosecutor attempted to rationally link defendant's covert management of the women to his manipulation of all women, including Pritchett. While the trial court ruled that the evidence was not relevant, defendant has not demonstrated that the prosecutor engaged in the line of questioning in bad faith. Moreover, the trial court instructed the jury that the lawyers' questions and comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the court's instructions. The instructions were sufficient to dispel any undue prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant also argues that the prosecutor impermissibly shifted the burden of proof by referencing defendant's silence during closing argument, as follows:

> Then he wants you to believe that he is the victim in this case. [Defendant] is the victim in this case, that he's an innocent man because his actions were justified. He reasonably believes that his life was in danger. He wanted to wait for the police. He wanted to wait for the police outside. That's what he says, but do his actions suggest that in any way? He said he stood outside

> the club for less than a minute, that he ordered his girlfriend to drive away, that she did so, that the police were coming in their direction, but yet he doesn't go to the police. He doesn't tell her to take him to where they are. The reasons he left was because he was scared because Narco was coming after him, but he still doesn't have anyone take him to the police station until fifteen days later.
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> Ladies and gentlemen, an innocent man, a victim is someone that's going to not run out a front door and stay gone for fifteen days. An innocent man is someone that's going to want the police and everyone to know my life was in danger, my life was threatened—you need to know what happened.
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> * * *
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> If he was really a victim and wanted, as he said, wanted the police initially to know what happened, he would have went back, and he would have told them.

The trial court sustained defendant's objections to these remarks and ruled that defendant "has an absolute right not to make any statements" and "has no obligation to talk to the police." To the extent that the challenged comments here could be viewed as improper, the trial court's instructions to the jury cured any error. See *Long*, 246 Mich App at 588.[1]

II. SENTENCING

Defendant next argues that he is entitled to resentencing because the trial court erroneously scored five points for prior record variable (PRV) 2, MCL 777.52, and ten points for offense variable (OV) 19, MCL 777.49. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted). "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A. PRV 2

PRV 2 requires that the trial court assess five points against an offender for a prior low severity felony conviction. MCL 777.52(1)(d). According to the presentence investigation report, defendant was convicted by plea in Texas of "Abandon/Endanger Child Criminal Negligence," sentenced to five years probation, subsequently discharged and the case dismissed

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[1] We likewise reject defendant's claim that the cumulative effect of the prosecutor's misconduct denied him a fair trial. Because no cognizable errors have been identified, there is no cumulative effect of multiple errors that denied defendant a fair trial. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

"due to delayed sentence status." Defendant contends that his prior Texas case was dismissed pursuant to the community supervision statute by a procedure similar to that set forth in MCL 333.7411(1), which provides that a discharge and dismissal "shall be without adjudication of guilt and . . . is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions." Thus, defendant contends that PRV 2 was misscored because his prior offense was not a "conviction" for the purposes of scoring the sentencing guidelines. We disagree.

Under Texas law, a trial court may defer adjudication of guilt in a criminal case. See Tex Code Crim Proc Ann art 42.12 § 5. In order for the court to enter such an order, the defendant must plead guilty or nolo contendere, and there must be evidence to substantiate the defendant's guilt. See *id.* § 5(a). The court then makes a finding substantiating the defendant's guilt, defers further proceedings without entering an adjudication of guilt, and places the defendant on community supervision. *Id.* At the conclusion of the period of community supervision, and if the defendant has not violated the terms of his community supervision, the court dismisses the proceedings and discharges the defendant. See *id.* § 5(c).

For purposes of PRV 2, the Texas offense was a conviction. In Michigan, a "conviction" in "an adjudication of guilt in a criminal matter." *People v James*, 267 Mich App 675, 679; 705 NW2d 724 (2005), quoting Michigan Sentencing Guidelines Manual (2003), p 7. Defendant pleaded to an offense in Texas and was placed on probation. Thus, there was an adjudication of guilt that meets the definition of "conviction" for purposes of imposing penalty under Michigan law. Cf. *State v Cooper*, 263 P 3d 1283, 1286 (Wash App 2011) (Texas deferred adjudications are convictions for purposes of Washington sentencing guidelines); accord, *State v Macias*, 39 P 3d 85, 88 (Kan App 2002) (Texas deferred adjudications are convictions for purposes of Kansas sentencing guidelines). Moreover, defendant fails to mention that unlike MCL 333.7411, Section 5(c) of the community supervision statute in Texas expressly provides for the consideration of a deferred adjudication in the penalty phase. The Texas statute provides:

> For any defendant who receives a dismissal and discharge under this section:
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> (1) upon conviction of a subsequent offense, the fact that the defendant had previously received community supervision with a deferred adjudication of guilt shall be admissible before the court or jury *to be considered on the issue of penalty*[.] [Emphasis added.]

Consequently, the trial court did not err in assessing five points against defendant on PRV 2.

B. OV 19

OV 19 requires a trial court to assess ten points where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. OV 19 has a broad application. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Any acts by a defendant that interfere or attempt to interfere with the judicial process or law enforcement officers and their investigation of a crime may support a score for OV 19. *Id.* In

scoring OV 19, the trial court may consider "conduct that occurred after the sentencing offense was completed." *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

Here, there was trial testimony that defendant left the scene by jumping in Pritchett's van and driving away with her. When the police arrived soon after the shooting, there was no gun on the premises and both defendant and Pritchett had left. Although defendant did not directly flee from police at the scene, he admittedly left the scene and did not contact the police for 15 days, even though he was aware that he was wanted in connection with the shooting. Thus, defendant hindered law enforcement efforts by leaving the scene and by remaining at large for more than two weeks. Because there is some support in the record for the trial court's scoring of OV 19, we uphold the trial court's scoring decision.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant also raises an ineffective assistance of counsel claim in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Because defendant did not raise this claim in the trial court, our review of the issue is limited to determining whether the record supports defendant's assertions. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

We presume that counsel was effective, and defendant bears a heavy burden to prove otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Counsel's decisions about what questions to ask and how to argue are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that defense counsel was ineffective for failing to adequately challenge the credibility of key prosecution witness Lynch. We disagree. The record demonstrates that defense counsel consistently and vigorously sought to challenge Lynch's testimony. In opening statement, defense counsel highlighted that Lynch could not have observed the shooting from his vantage point, and that Lynch gave the police two contradictory statements—first stating that he did not see the shooting, but "a couple of days later then all of a sudden" he supposedly saw what occurred. As the trial proceeded, the jury was made aware of alleged inconsistencies in Lynch's testimony, and Lynch was called upon by defense counsel to explain previous statements and testimony that were inconsistent. Lynch admitted that he initially lied to the police, telling them that he heard a shot and then went to help Morgan, and that he decided to change his statement and testify only after meeting with Morgan's brother and other club members. Defense counsel also questioned Lynch about his location and vantage point during the shooting, as well as his claims regarding who had control of Morgan's firearm throughout the night. Defense counsel also elicited that Lynch, as well as other testifying club members, had a longer and closer relationship with Morgan than defendant. In closing argument, defense counsel summarized the testimony, highlighted Lynch and Morgan's close relationship, and extensively argued that Lynch's testimony was inconsistent and incredible, specifically stating that Lynch was "biased"

and "told you that he lied." The record does not establish that defense counsel's performance fell below an objective standard of reasonableness. Consequently, defendant has failed to establish that his counsel was ineffective.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell