

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

GLENN EVAN SUNICH,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

November 17, 2011

No. 299565

Cheboygan Circuit Court

LC No. 07-003645-FH

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant was convicted by a jury of obstruction of justice, MCL 750.505, conspiracy to obstruct justice, MCL 750.157a, and four counts of delivery or manufacture of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv). He was sentenced to concurrent prison terms of 54 months to 20 years for the delivery convictions and to a consecutive term of 18 months to five years for the obstruction of justice convictions. After another panel of this Court reinstated defendant's conviction of manslaughter, MCL 750.321,¹ the trial court sentenced defendant to 71 months to 15 years in prison for manslaughter, to be served concurrently with defendant's delivery sentences. Both parties now appeal by right. We affirm.

Defendant, a drug addict, had longstanding prescriptions for the painkillers fentanyl and morphine. Apparently it was well-known among addicts in the area that defendant would sell some of his medication from his trailer. Robert Smith was also addicted to painkillers and went to defendant, as well as other suppliers, to buy fentanyl and morphine.

On December 8, 2005, Smith overdosed on a combination of morphine and fentanyl and died in defendant's trailer. After defendant discovered that Smith was dead, he and two accomplices placed the body in Smith's car and left the car at a secluded campsite instead of

¹ *People v Sunich*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2009 (Docket No. 283577).

contacting authorities. Although an autopsy indicated that Smith had died of a drug overdose, investigating officers eventually established defendant's involvement in Smith's death.

On appeal, defendant argues that the prosecutor injected an improper "civic duty" argument in his closing argument. We disagree.

Because defendant did not object to the prosecutor's allegedly inappropriate remarks at trial, this issue is not preserved for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved issues of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Error affects substantial rights if it is outcome-determinative. *Id.* at 28. Further, "[a] reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 24.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Issues of prosecutorial misconduct are decided on a case-by-case basis. *Id.* Courts accord prosecutors great latitude in their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *Id.*, quoting *People v Gonzalez*, 178 Mich App 526, 535, 444 NW2d 228 (1989). To determine if a prosecutor's comments were improper, we must evaluate them in context and in light of defense counsel's arguments and the relationship that these comments bear to the evidence admitted at trial. *Rodriguez*, 251 Mich App 30. Thus, "[t]he propriety of a prosecutor's remarks depends on all the facts of the case." *Id.*

Although a defendant may be denied a fair trial if the prosecutor makes a clear misstatement of the law that remains uncorrected, even an erroneous legal argument made by the prosecutor can potentially be cured if the jury is correctly instructed on the law. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Reversal is not warranted if defendant could have requested a cautionary instruction that would have cured any perceived prejudice. *Stanaway*, 446 Mich at 687; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

In his closing argument, the prosecutor asserted that defendant committed manslaughter by providing Smith with the controlled substances that killed him, in reckless disregard of the likelihood that Smith might overdose on these substances. The first challenged portion of the prosecutor's closing argument addressed evidence provided by a Michigan State Police detective, who explained why the police continued to investigate Smith's death even though it was evident that Smith had died from a drug overdose. While the prosecutor highlighted this evidence at the beginning of his closing argument in order to emphasize why the police and prosecution saw defendant's provision of morphine and fentanyl to Smith as such a serious offense, the prosecutor's remarks were appropriate extrapolations based on the evidence and did not constitute an impermissible civic-duty argument.

Similarly, the second challenged portion of the prosecutor's closing argument did not

constitute a civic-duty argument; instead, the prosecutor's remarks related to the credibility of four prosecution witnesses who were drug addicts. Some of the witnesses testified that they did not want to be viewed as "snitches" because they would place themselves at risk of harm and might lose access to drugs. The prosecutor reminded the jury of this evidence, i.e., that in the drug culture, turning in criminals or providing authorities with information about drug activity was dangerous because the "snitches" were placing themselves at risk of harm and jeopardizing their access to drugs. Misconduct did not occur because the remarks were a proper effort to support the credibility of the drug-addict witnesses, not an improper civic-duty argument. Moreover, any unfair prejudice from the prosecutor's remarks was cured when the trial court instructed jurors that attorney comments are not evidence. *Green*, 228 Mich App at 693.

The prosecutor argues that the trial court abused its discretion when it refused to score Offense Variable (OV) 5 at 15 points because Smith's son and mother allegedly suffered serious psychological injury requiring professional treatment as a result of Smith's death. We disagree.

This Court must affirm a sentence that is within the guidelines range unless there were an error in scoring the sentencing guidelines, or the trial court relied on inaccurate information when determining defendant's sentence. MCL 769.34(10). We review a trial court's sentencing guidelines' scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Generally, a trial court's scoring decision will not be reversed if there is any record evidence to support it. *Id.*

Offense variable 5 addresses psychological injury experienced by a member of a victim's family. MCL 777.35(1). The trial court must score 15 points for OV 5 if it determines that "[s]erious psychological injury requiring professional treatment occurred to a victim's family," MCL 777.35(1)(a), and no points if such injury did not occur, MCL 777.35(1)(b). MCL 777.35(2) also specifies, "Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." We review the trial court's factual findings at sentencing for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

We conclude that the trial court did not clearly err when it determined that the evidence did not support a score of 15 points for this OV. Smith's son was in counseling to address issues concerning his parents' drug abuse and his subsequent adoption by his paternal grandparents. Although Smith's son and his counselor discussed Smith's death during his counseling sessions and the boy expressed feelings of sadness and loss over his father's death, the counseling reports do not expressly indicate that his reaction to his father's death exceeded the level of grief that a school-age boy would typically experience when confronted with the loss of his father. Further, the reports do not otherwise indicate that Smith's son needed counseling specifically to address issues arising from his father's death. Accordingly, the trial court did not clearly err when it concluded that the preponderance of the evidence did not establish that the boy suffered serious psychological injury requiring professional treatment explicitly as a result of his father's death.

See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (the preponderance of the evidence standard is used when determining sentencing variables).

Similarly, the trial court did not clearly err when it concluded that Smith's mother did not suffer serious psychological injury requiring professional treatment as a result of Smith's death. The trial court recognized that the reaction of Smith's mother to his death, and particularly her affirmation that burying her son was the most difficult thing she had ever done, was understandable. But the mother's statement was the only evidence presented in support of the contention that she suffered serious psychological injury requiring professional treatment. Accordingly, the trial court did not clearly err when it determined that the preponderance of the evidence did not establish that Smith's mother suffered psychological injury rising to a level justifying a score of 15 points for OV 5.

Finally, the prosecution argues that the trial court abused its discretion by failing to impose a sentence for defendant's manslaughter conviction that was consecutive to the sentence for his delivery conviction. We disagree.

We review the trial court's imposition of a particular sentence for an abuse of discretion. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). An abuse of discretion occurs when a result falls outside the range of principled outcomes. *Babcock*, 469 Mich at 269.

A court may impose a consecutive sentence only if specifically authorized by law. *People v Spann*, 250 Mich App 527, 529; 655 NW2d 251 (2002). Defendant was convicted of four violations of MCL 333.7401(2)(a)(iv), which prohibits the delivery of certain controlled substances, including morphine and fentanyl. MCL 333.7401(3) provides, "A term of imprisonment imposed under [MCL 333.7401](2)(a) may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." MCL 333.7401(3) gives the trial court the discretion to impose a sentence for a violation of MCL 333.7401(2)(a) that is consecutive to sentences imposed for other felonies. See *People v Doxey*, 263 Mich App 115, 117; 687 NW2d 360 (2004).

The prosecution claims that the trial court erred when it refused to make defendant's manslaughter sentence consecutive to his sentences for his delivery convictions because defendant's drug dealing and his involvement in Smith's death constitute two distinct events. The prosecution notes that the trial court followed similar logic when ordering defendant's sentence for his conspiracy convictions to run consecutively to his delivery sentence and argues that the trial court's failure to apply this logic to defendant's manslaughter sentence constitutes an abuse of discretion.

We conclude the trial court did not abuse its discretion when it declined to make defendant's manslaughter sentence consecutive to the sentences for his delivery convictions. The trial court provided a reasonable justification for its decision, explaining that defendant's manslaughter and delivery convictions were not two distinct events; they arose from the same act, defendant's delivery of drugs to Smith. In particular, the trial court reasoned that defendant

did not commit manslaughter by performing an independent wrongful act. His wrongful act of drug dealing also resulted in Smith's death. Consequently, the trial court's decision not to impose a consecutive sentence was reasonable and within the range of principled outcomes. *Babcock*, 469 Mich at 269.

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey