STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2013
v	No. 307529 Muskegon Circuit Court
ANTHONY RAY STOKES, Defendant-Appellant.	LC No. 11-060780-FH

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

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of assaulting a prison employee, MCL 750.197c(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to four years and six months to 15 years' imprisonment. We affirm.

Defendant's conviction arose from an altercation that occurred while he was lawfully confined as a prison inmate. The altercation began with a scuffle between defendant and another inmate, during which defendant punched the other inmate. A corrections officer, Johnny Mitchell, approached the men and instructed them to separate. As the other inmate left, defendant punched Mitchell in the face. Defendant then brandished a trash can lid toward Mitchell. Eventually, after several other corrections officers arrived and observed defendant brandishing the lid, defendant complied with the officers' commands to submit to being placed in handcuffs.

Defendant first contends that the prosecutor committed misconduct during closing argument by appealing to the sympathy of the jury and by improperly vouching for Mitchell's credibility. Defendant finds the following argument objectionable:

> But I submit to you, Ladies and Gentlemen, that the officer's testimony in that regard is far more credible.
>
> And ask yourself this. Why would the officer lie? He doesn't even know the Defendant. The Defendant himself says: "I didn't know who he was. I had no idea who he was." What possible reason would the officer have for coming in here today and lying about this? None.

> Does defendant report [his alleged] injuries to anybody? No. The lump on the back of his head that would back up his theory that he was just struck in the back of the head with handcuffs here? No.
>
> Who's [sic] testimony is corroborated here? The officers' testimony, all very consistent with each other about how this took place.
>
> So I want you to look at all the evidence in this case. I want you to look at the testimony. I want you to recall the testimony and recall the demeanor of the witnesses and try to imagine this situation taking place.
>
> Put yourself in that situation. And was the officer assaulted and battered by the Defendant? I submit to you, Ladies and Gentlemen, that this evidence has proven beyond a reasonable doubt that absolutely he was.

At trial, defendant did not object to the argument and did not request a curative instruction. "[W]e will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

When reviewing the prosecutor's comments, this Court examines the context in which the comments were made. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Although we afford a prosecutor wide latitude in his or her arguments at trial, a prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor also may not "[a]ppeal[] to the jury to sympathize with the victim[.]" *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Thus, prosecutors are generally prohibited from asking jurors to place themselves in the position of the victim, as this unfairly appeals to the sympathy of the jury. See *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999).

In this case, the prosecutor did not commit misconduct by asking the jurors to put themselves in Mitchell's position. When read in context, the argument did not ask the jurors to sympathize with the victim. The prosecutor did not improperly appeal to the jurors' self-interest or ask the jurors to sympathize with the plight of the victim. Rather, the crux of the prosecutor's argument was that Mitchell testified credibly. Therefore, "[w]hile it may have been preferable if the prosecutor had not used terminology regarding what a juror would have done in [the victim's] place," defendant is not entitled to relief because "the crux of the prosecutorial argument was proper." *Cooper*, 236 Mich App at 653. Moreover, defendant is not entitled to relief because the prejudicial effect of the argument, if any, could have been cured by a timely curative instruction. *Id.* at 654.

We also find that the prosecutor did not improperly vouch for Mitchell's credibility. While a prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *Bahoda*, 448 Mich at 276, he or she may argue that a witness is credible based on the evidence presented. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, the prosecutor did not imply that he had

special knowledge of Mitchell's credibility, but merely argued that, based on the evidence presented, Mitchell was a credible witness. The prosecutor's argument was not improper. *Id.*[1]

For all of these reasons, defendant's related claim of trial counsel ineffectiveness fails. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.")

Defendant next argues that he was entitled to a jury instruction on either self-defense or imperfect self-defense where he testified at trial that he thought Mitchell was another inmate who came to assist the other inmate in the fight, and that he only struck Mitchell in the face because he was trying to protect himself. We find defendant waived this issue by expressly approving the jury instructions given by the trial court. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

However, defendant also contends that his trial counsel rendered ineffective assistance by failing to request the instructions. Consequently, we will review defendant's challenge to the completeness of the jury instructions to determine whether his trial counsel provided ineffective assistance by failing to request the instructions.

In order to be entitled to a jury instruction on an affirmative defense, a defendant must produce evidence on each element of the defense. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). In regard to defendant's claimed entitlement to a self-defense instruction, MCL 780.972(2) provides that

> [a]n individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

In addition, a person may not assert self-defense where he or she was the initial aggressor. *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990). In this case, defendant was not entitled to a jury instruction on self-defense because the evidence indicated he was engaged in the commission of a crime at the time he punched Mitchell—namely, assaulting the other inmate, see MCL 780.972(2), and because defendant was the aggressor throughout the entire incident,

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[1] Citing US Const Am IX, defendant attempts to assert a separate argument regarding prosecutorial conduct. Defendant does not develop this argument and does not cite proper supporting authority. Therefore, he has abandoned the argument, and this Court need not consider it. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Heflin, 434 Mich at 509. Trial counsel was not ineffective for failing to make a futile request for a self-defense instruction. *Erickson*, 288 Mich App at 201.

We also conclude that trial counsel did not provide constitutionally deficient representation when he failed to request an instruction on imperfect self-defense. Defendant was not entitled to this instruction. The doctrine of imperfect self-defense was formerly recognized as a qualified defense that would mitigate second-degree murder to voluntary manslaughter "where the defendant would have been entitled to self-defense had he not been the initial aggressor." *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Moreover, in *People v Reese*, 491 Mich 127; 815 NW2d 85 (2012), our Supreme Court indicated that the doctrine of imperfect self-defense does not exist as an independent mitigation in Michigan. *Id*. at 153. For these reasons, defendant was not entitled to an instruction on the defense. Consequently, because defendant was not entitled to a jury instruction on either self-defense or imperfect self-defense, any request by his trial counsel for the instructions would have been futile. We will not find trial counsel ineffective for failing to make these futile arguments. *Ericksen*, 288 Mich App at 201.

Next, defendant contends that the trial court erred by scoring offense variable (OV) 9 at ten points, reflecting the existence of 2 to 9 victims, where the evidence established only one victim. We find that defendant waived this claim of error because he expressly approved the trial court's scoring of OV 9. *Carter*, 462 Mich at 216. We will review the issue, however, within the context of defendant's related ineffective assistance of counsel claim.

MCL 777.39(1)(c) directs the trial court to score ten points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." In terms of who can be considered a "victim" for purposes of scoring OV 9, MCL 777.39(2)(a) directs the trial court to "[c]ount each person who was placed in danger of physical injury or loss of life . . . as a victim." Thus, the term "victim" is not limited to the defendant's intended victim or victims, but also includes those placed in danger during the commission of the offense. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). For instance, a person who intervenes during an offense can be "placed in danger of injury or loss of life" for purposes of MCL 777.39. *Id.* Here, the trial court did not err by scoring OV 9 because there were several corrections officers who intervened during the assault to protect Mitchell while defendant was brandishing the trash can lid. By intervening, the officers were "placed in danger of injury or loss of life" and were appropriately considered "victims" under MCL 777.39. *Morson*, 471 Mich at 262. Thus, defendant's ineffective assistance of counsel claim fails because any objection to the scoring of OV 9 would have been meritless. *Ericksen*, 288 Mich App at 201.

Next, defendant raises a host of unpreserved sentencing issues. We review those unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For the reasons set forth below, we find no sentencing error and, consequently, no viable related claim of trial counsel ineffectiveness.

Defendant asserts that the trial court engaged in impermissible fact-finding in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Michigan's indeterminate sentencing scheme is not affected by *Blakely*. *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006). Thus, defendant's argument fails.

Defendant next asserts that the trial court failed to take into account mitigating factors, such as his mental health and substance abuse histories, when it determined his sentence. Defendant's argument fails. First, the trial court was not required to consider mitigating factors when it sentenced defendant; instead, the trial court needed only to rely on the applicable guidelines range when fashioning the sentence. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011); *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000). Second, despite defendant's assertions to the contrary, there is no evidence in the record that the trial court failed to consider defendant's alleged mitigating factors. The record reveals that the trial court reviewed the PSIR, and the PSIR detailed defendant's mental health and substance abuse histories. Third, because defendant's sentence was within the recommended sentencing guidelines range, we must affirm. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791-792; 790 NW2d 340 (2010).

Defendant also argues that the trial court erred by failing to articulate whether its decision to increase defendant's sentence because of his status as an habitual offender was proportionate to the offense. "A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id.* Here, the trial court satisfied the articulation requirement by noting the applicable guidelines range before imposing defendant's sentence. *Id.*

Defendant argues that the severity of the sentence indicates that the trial court punished him for rejecting a plea agreement and exercising his right to go to trial. Defendant was offered a *Cobbs*[2] agreement pursuant to which he would receive a sentence of approximately two to eight years' imprisonment if he pleaded guilty. Defendant argues that his 4-1/2 to 15 year sentence demonstrates the trial court's intent to punish him for exercising his right to trial. A trial court may not punish a defendant for exercising his right to a trial. *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). "However, it is not per se unconstitutional for a defendant to receive a higher sentence following a jury trial than he would have received had he pleaded guilty." *Id.* A defendant faces certain risks by proceeding to trial, one of which is that he or she may receive a higher sentence than that offered in a plea agreement. *Id.* We find no indication from the record that the trial court punished defendant for proceeding to trial. Rather, the trial court expressly stated on several occasions during sentencing that it was not penalizing defendant for his decision to proceed to trial. The trial court also expressly noted that it was basing defendant's sentence on information learned during the trial. The fact that damaging information was revealed at trial was a risk that defendant faced by proceeding to trial, and the trial court's decision to sentence defendant based on this newly revealed information rebuts defendant's claim that he was penalized for exercising his right to a trial. See *id.*

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Next, defendant argues that he was entitled to a downward departure from the guidelines range because of his mental illness. A downward departure requires a "substantial and compelling reason" for departing from the guidelines range. *People v Babcock*, 469 Mich 247, 251; 666 NW2d 231 (2003). Defendant's argument fails because, even if a mental illness could be a substantial and compelling reason for departing downward, there is no indication in the record that he suffered from an ongoing mental illness.

Defendant also argues that the trial court failed to assess his rehabilitative potential as required by MCR 6.425(A)(1)(e) and, as a result, sentenced defendant based on incomplete information. Defendant's argument fails because MCR 6.425(A)(1)(e) requires no such assessment.

Next, defendant argues that his sentence amounted to cruel or unusual punishment, or both, in violation of both the United States and Michigan Constitutions. Defendant's sentence is proportionate, as reflected by the fact that the minimum sentence fell within the correctly calculated sentencing guidelines range, and because it is proportionate, the sentence is neither cruel nor unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Finally, defendant argues that US Const Am IX protects his right to a lawfully imposed sentence. Defendant abandoned this argument by failing to develop the argument. *Kelly*, 231 Mich App at 640-641. Moreover, defendant fails to identify any errors in his sentence that would suggest his sentence was unlawfully imposed.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Christopher M. Murray