

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWAYNE DEMETRIUS ELLIS,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2005

No. 252368

Wayne Circuit Court

LC No. 03-007448-01

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of thirty to fifty years each for the robbery and assault convictions, and 3-1/2 to 5 years for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Res Gestae Witnesses

At trial, the complainant testified that he was talking to Paul Montgomery and an unidentified woman when defendant rode up on a bicycle, announced a robbery, and subsequently shot and robbed him. Defendant now argues reversal is required because the prosecutor failed to produce these res gestae witnesses<sup>1</sup> for trial or notify him of their existence. Because defendant failed to move for a new trial on this issue; made no attempt at trial to call the witnesses in question, request their presence, or request assistance in locating them; and did not object to the witnesses' absence at trial or otherwise indicate to the trial court he was dissatisfied with the absence of the witnesses, this issue is not preserved. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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<sup>1</sup> A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

The prosecutor must attach to the information a list of all known res gestae witnesses and is under a continuing duty to disclose the names of any further res gestae witnesses as they become known. MCL 767.40a(1) and (2); *People v Koonce*, 466 Mich 515, 520-521; 648 NW2d 153 (2002). The prosecutor must also render reasonable assistance in locating and serving process upon a witness at the defendant's request. MCL 767.40a(5); *Koonce, supra* at 521. But the prosecutor is not required to locate, endorse, or produce potential res gestae witnesses who are unknown. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995).

First, because defendant does not claim that he requested assistance in locating the two witnesses, we reject defendant's suggestion that the prosecutor had a duty to provide assistance in locating the witnesses and serving process on them. *People v Lawton*, 196 Mich App 341, 347; 492 NW2d 810 (1992). Because the prosecutor is only required to list the names of known witnesses, and because there is no indication in the record that the prosecutor had information concerning the identity of the unidentified woman, defendant has not shown that the prosecutor's failure to list this woman was plain error. While the record indicates that the prosecutor had information concerning the identity of Paul Montgomery and, therefore, should have listed him as a witness, defendant has not demonstrated that his substantial rights were affected by this omission. Significantly, defendant does not contend that he was unaware of this witness, and does not give any basis for concluding that the witness could have provided testimony favorable to defendant. Therefore, appellate relief is not warranted on this issue.

## II. False Testimony

Defendant argues that reversal is required because his convictions were obtained by perjured testimony. See *People v Anderson*, 44 Mich App 222, 229; 205 NW2d 81 (1972). Defendant did not argue at trial or in a motion for a new trial that the prosecutor presented false evidence to secure his convictions. Therefore, this issue is not preserved, and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763. Because Officer Kraszewski testified that Secretary of State records indicated that *four* different vehicles were registered to defendant, defendant's reliance on documentation showing that he owned a four-door sedan does not demonstrate that Officer Kraszewski falsely testified that a station wagon was registered to defendant.

Likewise without merit is defendant's reliance on medical records to argue that the complainant gave false testimony concerning the extent of his wounds when the complainant merely testified that he was shot "approximately" nine times. Defendant further argues that the complainant gave false testimony concerning the length of his hospitalization. But even if the complainant's testimony on this point was inaccurate, reversal is not warranted unless "false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986), quoting *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). Here, the principal issue at trial was defendant's identity as the perpetrator. The testimony concerning the length of the complainant's hospital stay involved a collateral matter; it was not relevant to establishing the elements of any of the charged crimes, or defendant's identity as the perpetrator. There is no reasonable likelihood that it affected the jury's verdict. Therefore, reversal is not required.

## III. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to prove that he intended to kill the victim and, thus, his conviction for assault with intent to commit murder must be vacated. When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have concluded that the elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Assault with intent to murder requires “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Elements of a crime may be established by circumstantial evidence and reasonable inferences drawn from the evidence. *Id.* Because it is difficult to prove an actor’s state of mind, only minimal circumstantial evidence is required. *Id.*

The complainant’s testimony that defendant shot him multiple times with a gun at close range, robbed him, and then left him lying in the street, viewed in a light most favorable to the prosecution, was sufficient to support an inference that defendant intended to kill him.

#### IV. Ineffective Assistance of Counsel

Defendant argues that he is entitled to a new trial because trial counsel was ineffective. We disagree. Because defendant did not raise this issue in a motion for an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A defendant has a heavy burden of establishing that trial counsel was ineffective. Reversal under either the federal or state constitutions is justified only if the defendant satisfies the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must demonstrate that counsel's performance was deficient; the errors must have been so serious that they denied the defendant “counsel” as guaranteed by the Sixth Amendment. *Id.* at 600. To establish this, the defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Id.* Next, the defendant must show that he was prejudiced by the deficient performance. Prejudice may be demonstrated by showing a reasonable probability that the result of the proceeding would have been different but for counsel's error. *Id.*

##### A. Contact with Defendant

Relying on *Mitchell v Mason*, 325 F3d 732 (CA 6, 2003), defendant contends that counsel was ineffective because she failed to have adequate contact with him before trial. The court in *Mitchell*, citing *Bell v Cone*, 535 US 685; 122 S Ct 1843; 152 L Ed 2d 914 (2002), observed that prejudice will be presumed where there is a complete denial of counsel at a critical stage in the proceeding. *Id.* at 742. In *Mitchell*, the court presumed prejudice because the record showed that the defendant’s attorney never consulted with the defendant, he only met with the defendant for a total of six minutes in three separate meetings in the bullpen over a seven-month period, and the defendant was completely unrepresented during the entire month before his trial. *Id.* at 741-742, 748.

In support of his claim, defendant relies on jail “phone call requests” to show that he requested that counsel visit him in jail to discuss his case in August and September 2003. Defendant admits, however, that counsel visited him at the jail shortly before his trial. Further, defendant fails to explain how additional contact with counsel would have helped his case. Therefore, defendant has not established any basis for concluding either that he was without the presence of counsel at a critical stage or that counsel was unprepared to represent him, or that further development of the record is necessary.

#### B. Identification Testimony

Defendant also argues that defense counsel was ineffective for failing to challenge the complainant’s in-court identification. Although defendant maintains that counsel should have argued that the complainant’s in-court identification was tainted by an impermissibly suggestive pretrial identification procedure, defendant does not explain why the pretrial identification procedure was unduly suggestive. See *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Further, the complainant testified that he was familiar with defendant, having seen him around the neighborhood hundreds of times. In this circumstance, any suggestion that the complainant’s in-court identification was tainted by a pretrial identification procedure would have been meritless. *Id.* at 303. Counsel was not required to make meritless objections. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

#### C. Impeachment of the Complainant

Defendant also contends that defense counsel was ineffective because she failed to impeach the complainant on various points with his hospital records. We disagree. The principal issue at trial was the complainant’s identification of defendant as the perpetrator. The record discloses that counsel focused on this issue at trial and was able to attack the complainant’s identification testimony by eliciting evidence indicating that the complainant initially reported that he did not know the perpetrator’s identity. Defendant has not shown that counsel was deficient for failing to pursue additional impeachment opportunities or that there is a reasonable likelihood that the result would have been different had she done so.

#### D. Felon in Possession Stipulation

Defendant next argues that counsel was ineffective for stipulating that defendant’s right to possess or use a firearm had not been restored. Defendant is unable to establish that the results probably would have been different; MCL 750.224f(2) provides among other things that a felon may not use a firearm until five years after completion of imprisonment, and defendant was not discharged from his previous sentence for assault with intent to rob while armed and armed robbery until 2002 according to his presentence information report. The prosecutor demonstrated the ease with which defendant’s previous convictions could have been established when he presented to the court a certified record of the convictions at sentencing. Therefore, defense counsel’s stipulation did not prejudice defendant in this regard.

#### E. Cautionary Instruction

Defendant also argues that defense counsel erred in failing to request that the trial court instruct the jury that it was to consider his prior felony conviction only as it related to the felon in

possession charge. However, counsel could have validly decided that such an instruction would only call undue attention to defendant's status as a convicted felon. Defendant has not overcome the presumption that counsel's conduct constituted sound trial strategy. *Carbin, supra* at 600. See also *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

## V. Sentencing

### A. Habitual Offender Notice

Defendant asserts that the habitual offender notice in the criminal information was defective because it inaccurately stated that he had a prior conviction for a drug offense. Defendant therefore argues that he was improperly sentenced as a third-felony habitual offender under MCL 769.11.

The information filed by the prosecution included a notice indicating that, if defendant was convicted, it would seek to enhance his sentence as a third-felony habitual offender under MCL 769.11. The notice listed two prior felony convictions, a 2002 conviction for delivery of a controlled substance, and a 1997 conviction for assault with intent to rob while armed. At sentencing, defendant's presentence report identified three prior felony convictions, a 1994 conviction for attempted receiving or concealing stolen property, and 1997 convictions for both armed robbery and assault with intent to rob while armed. Although defendant argued that he was not convicted of assault with intent to rob in 1997, only armed robbery, the prosecutor presented a certified copy of defendant's judgment of sentence, which the trial court properly found was sufficient to establish both convictions. See MCL 769.13(5)(a). Defendant did not challenge his 1994 conviction for attempted receiving or concealing stolen property. No mention was made of a 2002 drug conviction, nor was any such conviction listed in defendant's presentence report. Further, defendant never challenged his status as a third-felony habitual offender.

A defendant who has received notice that the prosecuting attorney will seek sentence enhancement under MCL 769.11 may challenge the accuracy or validity of one or more prior convictions listed in the notice by filing a written motion. MCL 769.13(4). Because defendant did not challenge the accuracy of the habitual offender notice in the criminal information, the accuracy of the prior convictions listed in that notice, or his status as a third-felony habitual offender, this issue is not preserved, and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Even if the 2002 drug conviction listed in the habitual offender notice was inaccurate, defendant's substantial rights were not affected. Had defendant timely challenged the accuracy of the habitual offender notice, the prosecutor could have amended the information to accurately reflect defendant's criminal record. *People v Manning*, 163 Mich App 641, 644-645; 415 NW2d 1 (1987); see also *People v Hornsby*, 251 Mich App 462, 469-473; 650 NW2d 700 (2002). In light of this, and because the record establishes that defendant had at least two other felony convictions that would support sentence enhancement as a third-felony habitual offender under

MCL 769.11,<sup>2</sup> defendant has not shown that his substantial rights were affected by the alleged inaccuracy. Accordingly, this unpreserved issue does not warrant appellate relief.

Furthermore, we reject defendant's claim that defense counsel's failure to challenge the habitual offender notice deprived defendant of the effective assistance of counsel. Because the prosecutor could have amended the information to accurately reflect defendant's criminal record upon timely objection, and because the record establishes that defendant had at least two other prior felony convictions, defendant cannot establish that he was prejudiced by counsel's failure to object. *Carbin, supra* at 600.

#### B. Sentencing Guidelines Scoring

Defendant challenges the trial court's scoring of offense variables 4 and 6 of the sentencing guidelines.

Because defendant did not object below to the scoring of offense variable (OV) 6, we review that issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). We will uphold the trial court's scoring of a particular variable if there is any evidence in the record to support it. *Hornsby, supra* at 468.

Defendant initially argues that OV 6 is inapplicable to assault with intent to commit murder. We disagree. MCL 777.22(1) expressly provides that the trial court is to "[s]core offense variable . . . 6 for . . . assault with intent to commit murder." Defendant also maintains that, if anything, OV 6 should have been scored at twenty-five points, rather than fifty points. Fifty points should be scored if there is a premeditated intent to kill, MCL 777.36(1)(a), while only twenty-five points should be scored if the offender acted with an unpremeditated intent to kill or intent to do great bodily harm, or the offender created a very high risk of death or great bodily harm knowing that death or great bodily harm would probably result, MCL 777.36(1)(b).

Premeditation requires sufficient time to permit the defendant to take a second look and may be inferred from all the circumstances, including the weapon used and the number and location of the wounds inflicted. *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000). From the record, we have identified several opportunities for defendant to have taken a second look. After defendant rode up to the complainant on a bicycle, pulled out a gun, and announced a robbery, and the complainant attempted to flee, defendant shot at him several times, hitting him once. The complainant then attempted to run again, but defendant chased after him and shot at him several more times, again hitting him in the leg. Defendant then stood over the complainant, shot him repeatedly, and left him lying in the street. This evidence was sufficient to show that defendant acted with a premeditated intent to kill. The trial court did not plainly err in scoring OV 6 at fifty points.

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<sup>2</sup> Because the two 1997 convictions arose from a single criminal transaction, they count as only one conviction for purposes of the habitual offender statute. *People v Preuss*, 436 Mich. 714, 717; 461 NW2d 703 (1990).

Defendant preserved his challenge to the scoring of OV 4 with an objection at sentencing. OV 4 considers psychological injury to the victim. MCL 777.34. The court is to score ten points if the victim “[s]uffered serious psychological injury requiring professional treatment.” MCL 777.34(1)(a). The victim’s failure to seek treatment is not conclusive whether the injury required treatment. MCL 777.34(2). OV 4 should be scored at zero points if there is “[n]o serious psychological injury requiring professional treatment.” MCL 777.34(1)(b). The complainant did not testify at trial that he suffered any type of psychological injury or was in need of professional psychological treatment. Further, he did not respond when contacted for a victim impact statement, so the presentence report does not include any information about his psychological state. We therefore conclude that the record does not support the trial court’s score of ten points for OV 4. But because the scoring error does not affect defendant’s sentencing guidelines range, it was harmless, and resentencing is not required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

### C. *Blakely* Violation

Relying on *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that resentencing is required because the jury did not find beyond a reasonable doubt the facts underlying the trial court’s scoring of OV 4 and OV 6. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant’s maximum sentence on the basis of facts that were not reflected in the jury’s verdict or admitted by the defendant. But in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court stated that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme. Accordingly, defendant is not entitled to resentencing on this basis.

### VI. Cumulative Error

Defendant has not demonstrated that the cumulative effect of several errors denied him a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens