

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIUS TRIPPLETT,

Defendant-Appellant.

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UNPUBLISHED

September 22, 2005

No. 254103

Wayne Circuit Court

LC No. 02-014467-01

Before: Hood, P.J., and White and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two to ten years’ imprisonment for the assault with intent to do great bodily harm conviction, two to four years’ imprisonment for the felonious assault conviction, and two years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied his constitutional right to the effective assistance of counsel. We disagree.

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that his counsel’s performance fell below an objective standard of reasonableness. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first claims that defense counsel should have objected to Nadia Page’s testimony regarding her brother’s hearsay statement that he had been jumped. However, the record establishes that this statement, if challenged, would likely have been admitted as an excited utterance. Defendant also contends that it was ineffective assistance for defense counsel to cross-examine Page concerning the fight. We disagree. The fight was a core part of the context of the case, and defense counsel had a legitimate purpose in exploring it. It was defense counsel’s trial strategy to cross-examine Page concerning the fight rather than attempting to ignore it. Further, defense counsel was attempting to establish that the “bad blood” between the

two families (the Hall family and the Tripplett family) was the motive for the false accusation against defendant. Further, defense counsel elicited from Page the fact that when Amos mentioned the fight, he never claimed that defendant had a weapon. Thus, counsel elicited some information favorable to defendant on cross-examination.

Next, defendant argues that defense counsel ought to have objected to Page testifying because Page was present during the preliminary examination testimony of Sandra Hall. However, the prosecution elicited testimony from Page that she was not present in the courtroom during the preliminary examination testimony by her mother, and defendant has not established otherwise.

Defendant also argues that counsel was ineffective in failing to investigate and present other witnesses to the shooting. “Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the trial’s outcome. *Id.* Because defendant does not identify any witness defense counsel failed to call who could have cast doubt on the identity of the shooter or any other element of the prosecution’s case, defendant was not denied a substantial defense and not denied effective assistance of counsel. *Id.* at 711.

Defendant next asserts that counsel was ineffective in failing to call defendant’s half-brother, Tyrone Kemp, to testify at trial. This argument also lacks merit. There is no evidence that Kemp witnessed the shooting. Kemp would only have provided testimony regarding the bad blood between the Tripplett and Hall families, which was already known. Cumulative evidence need not be submitted. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Therefore, it was not ineffective assistance to fail to call Kemp at trial.

Defendant further argues that his trial counsel should have objected to the prosecution’s alleged “vouching” for Page’s credibility. We disagree. The prosecutor did not lend the prestige of his office in support of the credibility of the witness, but merely argued about believability. Defendant was free to argue to the jury that the prosecution’s witnesses were not believable, as he did in his argument that the Halls’ accusations were motivated by familial animosity and were untrue. The prosecution is permitted to respond to arguments made by the defense, *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002); specifically, to the argument that Sandra Hall’s and Page’s accusations were false because they allegedly arose from family enmity. Further, the trial court’s jury instructions properly notified the jury that statements by the attorneys were not evidence. The prosecution did not commit misconduct, so it was not error for counsel to fail to object.

Finally, defendant claims that his counsel failed to challenge the alleged misscoring of PRV 5. This argument was presented to the trial court in defendant’s post-sentencing motion. The trial court found that the scoring of PRV 5 was not erroneous, and that, even if it was, the court would not change the sentence because substantial and compelling reasons supported the sentence. The court went on to describe the substantial and compelling reasons, namely, the number of bullet holes in the van and a reckless disregard for human life because of the presence of a child in the van. Therefore, it has not been shown that, but for the alleged error, the result of the sentencing would have been different. *Garza, supra* at 255.

Defendant next contends that the prosecution committed misconduct in vouching for Page's credibility. We disagree. Because defendant did not object below, this issue is not preserved. Thus, we review this claim for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). The prosecutor's remarks did not amount to improper vouching. The prosecution had to piece together pieces of direct and circumstantial evidence to prove that defendant was the shooter, including evidence that Page did not actually see the shots. The prosecutor had a legitimate argument that Page was a believable witness, and he based his argument regarding her believability upon the evidence.<sup>1</sup>

Defendant next argues that he was denied his constitutional rights by counsel's failure to object to the scoring of a prior record variable that was improperly scored. We disagree. A trial court generally must impose a minimum sentence within the statutory guidelines range. MCL 769.34(2). A departure may be made from the minimum range only where there is a substantial and compelling reason to do so. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). Any such substantial and compelling reason must be stated on the record. MCL 769.34(3). "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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the scoring to ascertain whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant argues that an error occurred in the scoring of PRV 5. He argues that one prior offense should not have counted because it resulted in a warning and dismissal. Regardless of the merit of defendant's position, the trial court made clear that the sentence would be the same, and gave substantial and compelling reasons for that sentence. MCL 769.34(3); *Babcock, supra* at 255-256. Accordingly, it cannot be said that any misscoring of PRV 5 resulted in a higher sentence than would otherwise have resulted.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Peter D. O'Connell

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<sup>1</sup> We recognize that the prosecutor's statement, "I submit to you that Nadia Page, and *that's the reason why we put her on*, is credible and worth [sic] of belief when she testifies about the identification, and who[m] she saw with the gun," (emphasis added) arguably crosses the line into impermissible territory; however, this single statement did not taint the entire trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).