

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LEVON TARELE PATE,

Defendant-Appellant.

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UNPUBLISHED

December 12, 2006

No. 262696

Eaton Circuit Court

LC No. 04-020483-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of assault with intent to commit murder, MCL 750.83, two counts of felonious assault, MCL 750.82, kidnapping, MCL 750.349, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), felon in possession of a firearm, MCL 750.224f, intentional discharge of a firearm in a dwelling, MCL 750.234b, and eight counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 400 to 600 months for the kidnapping conviction and each assault with intent to commit murder conviction, 30 to 48 months for the drug conviction and each felonious assault conviction, 5 to 10 years for the felon in possession conviction, and five to eight years for the intentional discharge of a firearm conviction, to be served consecutively to eight concurrent two-year prison terms for the felony-firearm convictions. Defendant appeals as of right. We affirm.

I. Underlying Facts

In 2004, a bench warrant was issued for defendant. On the evening of October 17, 2004, the police observed defendant and other individuals in a red Neon. According to police testimony, the car slowed, defendant jumped out, and ran into a Red Robin restaurant's parking lot. Police Officer Kenneth Hatfield testified that he pursued defendant in his vehicle, and defendant "reached back and fired [a] weapon at [him]." Officer Hatfield and other officers then pursued defendant on foot, while identifying themselves, and ordering him to stop. Officer Hatfield explained that, as defendant ran into the restaurant, defendant fired two shots toward him. Officer Scott Brooks testified that defendant was "shooting right back in the direction that [he] was coming from . . . [and he] went down . . . attempting to avoid the bullets." Officer Casey Tietsort indicated that defendant also shot at him as he was entering the restaurant.

Several restaurant patrons testified that defendant ran into the restaurant, turned, and started shooting toward the front of the restaurant where the officers were entering. The patrons and workers sought cover, and some were able to leave. The officers repeatedly instructed defendant to “give up,” but he did not stop. Officer Hatfield indicated that “defendant had [his] weapon out, and pointed directly toward [him], and fired it.” Officer Hatfield explained that he fired three shots at defendant, and defendant returned fire in between each shot. Trooper Robert Wolf, who was behind a wall, testified that he “couldn’t move.” “Every time [he] stuck [his] head around that corner it seemed like a shot would go off.”

At one point, defendant ducked down, and emerged holding a waitress, Renee Ostrander. Defendant had his arm around her neck, and his gun against her head. Ostrander testified that defendant removed the gun from her head, fired at the officers, and put the gun back to her head, while stating “drop your weapons, or [he’d] blow her . . . brains out.” Eventually, with the gun pressed against Ostrander’s head, defendant walked through a side door into the parking lot, where several officers were located. Officer Sherry Workman had parked her police van, which was still running, near the exit. Officer Jeff Lutz testified that defendant pointed his gun at him, and fired a shot. According to police testimony, defendant moved toward the van, holding Ostrander, in an attempt to escape. Officer Jeffrey Lutz fired one shot at defendant, which hit Ostrander in the hip, and a shot fired by Officer Workman hit defendant. Defendant was arrested, and the police seized his firearm and 5.32 grams of cocaine.

## II. Change of Venue

Defendant first argues that the trial court erred in denying his motion for a change of venue based on pretrial publicity and community prejudice. Defendant, a black male, argues that there were “numerous” newspaper articles discussing the crimes in this case, and also media coverage linking this case to his being a suspect in a murder case involving two white females in a neighboring county.

This Court reviews the denial of a motion for change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530, reh den 456 Mich 1202 (1997), cert den 522 US 1097; 118 S Ct 895; 139 L Ed 2d 880 (1998). “An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.” *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524, lv den 465 Mich 920 (2001).

As a general rule, a defendant must be tried in the county where the crime is committed. MCL 600.8312; *Jendrzejewski*, *supra* at 499. However, the court may change venue to another county in special circumstances where justice demands or a statute provides. MCL 762.7; *Jendrzejewski*, *supra* at 499-500. The existence of pretrial publicity alone does not necessitate a change of venue. *Id.* at 502. Rather, two approaches have been used to determine whether the failure to grant a change of venue is an abuse of discretion. *Id.* at 501. “Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice.” *Id.* at 500-501. To determine if a defendant’s trial was fundamentally fair, the court must look at the totality of the circumstances. *Id.* at 502.

The record supports defendant's assertion that several articles were published concerning this case. However, this Court must determine whether the pretrial publicity involved such "unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it." *Id.* at 501 (citation omitted). This Court must also distinguish between largely factual publicity and that which was invidious or inflammatory. *Id.* at 504.

The media reports involving this case did not amount to "a barrage of inflammatory publicity" that resulted in prejudice against defendant. *Id.* at 506-507; see also *People v DeLisle*, 202 Mich App 658, 668; 509 NW2d 885 (1993), lv den 447 Mich 987 (1994), cert den 526 US 1075; 119 S Ct 1476; 143 L Ed 2d 559 (1999). Furthermore, the news reports were largely based on the facts of the crimes, the investigation, defendant's arrest, and the status of the case. The trial court excused the 11 jurors who recalled reports that defendant's arrest in this case was tied to his being a suspect in two murders to avoid possible tainting of the jury pool. Moreover, the record does not reflect extensive egregious media reporting, see, e.g., *Rideau v Louisiana*, 373 US 723, 725-726; 83 S Ct 1417; 10 L Ed 2d 663 (1963) (due process required change of venue after repeated television broadcast of a "confession" made by the defendant in a small parish). Defendant has not established that pretrial publicity so saturated the community that the entire jury pool was tainted.

The record also supports defendant's assertion that several prospective jurors were at least somewhat familiar with the facts of the case. However, "[c]onsideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue. The reviewing court must also closely examine the entire voir dire to determine if an impartial jury was impaneled." *Jendrzejewski, supra* at 517. Here, the trial court questioned in chambers each of the prospective jurors who had heard about the case. As noted, the trial court excused those prospective jurors who had heard about defendant's alleged involvement in the murders in a neighboring county. Additionally, there was not a high percentage of jurors who indicated a disqualifying prejudice. Only four of 34 jurors who were questioned expressed an inability to be fair and impartial.

Moreover, each of the jurors who were ultimately selected to sit on defendant's jury asserted that they would be able to judge defendant's case fairly and impartially, notwithstanding any exposure to media reports about the case. "[W]here potential jurors can swear that they will put aside preexisting knowledge and opinions about the case, neither will be a ground for reversing a denial of a motion for a change of venue." *DeLisle, supra* at 662. Indeed, "[t]he value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." *Jendrzejewski, supra* at 519. Under the totality of the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a change of venue.

### III. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his convictions of assault with intent to commit murder. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were

proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), lv den 455 Mich 870 (1997).

To sustain a conviction for assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), lv den 459 Mich 857 (1998); see also MCL 750.83.

Defendant challenges only the intent element. The intent to kill may be inferred from facts in evidence, including the use of a dangerous weapon; because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), lv den 461 Mich 949 (2000), and *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Evidence was presented that, during his attempt to escape the police, defendant, armed with a loaded weapon, ran into an occupied restaurant, and fired shots directly toward the officers pursuing him. Defendant then took a hostage, held his loaded weapon to her head, threatened to kill her, and essentially used her as a shield as he walked out of the restaurant. Once outside, defendant continued to use the hostage as a shield, as he fired his weapon toward an officer. The hostage was shot during officers' attempts to stop defendant from leaving the premises. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to infer that defendant committed the assaults with an actual intent to kill. The evidence was sufficient to sustain defendant's convictions of assault with intent to commit murder.

#### IV. Prosecutorial Misconduct

Defendant also argues that he is entitled to a new trial because the prosecutor misstated the law. We disagree. Because defendant failed to object to the prosecutor's conduct, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130, reh den 461 Mich 1205 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370, lv den 463 Mich 927 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant claims that in the following comments made during closing argument, the prosecutor misstated the law in defining felonious assault, and in explaining the difference between assault with intent to commit murder and assault with intent to do great bodily harm:

The only other option for you to consider is felonious assault. What's the difference? Felonious assault is made out as simply pointing a gun at somebody and putting them in fear by doing that. Well, the evidence on this record is way beyond that. He shot the gun. So, it comes down to a difference between assault with intent to do great bodily harm and assault with intent to murder.

\* \* \*

Now, in terms of this distinction between - - at this time, when he's doing all those shots at the police officers did he intend to injure them, did he intend to kill them? What's the difference? Well, we have an example in this case. When Sergeant Lutz testified outside that he drew down on the Defendant, he said, I was concerned about the possibility that my shot might miss and hit the hostage, so I moved my aim down to the hip so that it would be a nonlethal, nonfatal wound. That's the definition of an assault with intent to do great bodily harm, or at least shooting with the intent to do great bodily harm. But, keep in mind that Sergeant Lutz had years of military training and practice, years of police training and practice, he had good position, and he was using a laser site. *For you to conclude that the Defendant had this reduced intent, you'd have to conclude that he had the training, the practice, the skill, the position to make those shots simply injure rather than kill.* (emphasis added).]

A defendant may be deprived of a fair trial if a prosecutor makes a "clear misstatement of the law that remains uncorrected." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002), lv den 468 Mich 856 (2003). But if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured. *Id.*

Defendant has not shown that the prosecutor's comments affected his substantial rights. The prosecutor was arguing why defendant should not be convicted of any lesser offenses. To the extent that the prosecutor's discussion of felonious assault and assault could be considered inaccurate,<sup>1</sup> the jury was correctly instructed on the law. Before the presentation of any evidence, the trial court instructed the jury that the court was responsible for instructing on the law, and that the jurors must accept the law as it gave it to them. Following closing arguments, in its final instructions, the trial court instructed the jury that the lawyers' comments are not evidence, and reminded the jurors of their oath to return "a true and just verdict based only on the evidence and [the court's] instructions on the law." The court also instructed:

It is my duty to instruct you on the law. You must take the law as I give it to you. *If a lawyer says something different about the law, follow what I say.* At various times, I have already given you some instructions about the law. You must take all my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others. To sum up, it is your job to decide what the facts of this case are, to apply the law as I give it to you, and in that way to decide the case. (emphasis added).]

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<sup>1</sup> The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, (3) committed with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997), lv den 459 Mich 971 (1999).

The court thereafter correctly instructed the jury on the lesser offenses of felonious assault and assault with intent to commit great bodily harm less than murder. The instructions were sufficient to dispel any possible prejudice.<sup>2</sup> *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), lv den 465 Mich 952 (2002). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's comments. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), lv den 463 Mich 1010 (2001).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* Here, because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Id.*

## V. Sentence

### A. Offense Variables 3 and 13

Defendant argues that he is entitled to resentencing because the trial court improperly scored offense variables ("OV") 3 and 13. We disagree. Defendant did not object to the scoring of these variables at sentencing, in a motion for resentencing, or in a motion to remand filed in this Court. MCL 769.34(10). But because defendant argues that the error resulted in a sentence outside the appropriate guidelines range, we may review the issue for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant must show that a clear or obvious error affected his substantial rights. *Id.*

"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). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

MCL 777.33(1)(c) states that 25 points should be scored for OV 3 when "[i]f threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c); *People v Houston*, 473 Mich 399, 404; 702 NW2d 530 (2005). There was evidence that, during the incident, Ostrander was shot, necessitating surgery and a 13-day stay in a hospital. Thereafter,

<sup>2</sup> In fact, the jury returned verdicts for the lesser offense of felonious assault on the counts of assault with intent to commit murder involving Deputy Josh Ivey and Trooper Robert Wolf.

Ostrander was unable to walk for two months and underwent 12 weeks of physical therapy. According to the presentence investigation report, her leg “required surgical repairs including titanium rods for support, is now reasonably functional and though it gets tired after a full day and is uncomfortable, the pain from it is now tolerable.” This evidence is sufficient to support the trial court’s score of 25 points for OV 3.

MCL 777.43 instructs a court to score 25 points for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). The evidence showed that, on October 17, 2004, defendant committed four acts of assault with intent to commit murder, two acts of felonious assault, and kidnapping, all of which are crimes against a person. See MCL 777.16d and MCL 777.16q. Although defendant asserts that a continuing pattern of criminal behavior cannot be established using concurrent offenses, this Court has held that concurrent convictions, and offenses occurring concurrently, may form the basis of a pattern of criminal behavior for purposes of scoring OV 13. *People v Harmon*, 248 Mich App 522, 526, 532; 640 NW2d 314 (2001), lv den 467 Mich 900 (2002). Consequently, the trial court did not abuse its discretion by scoring 25 points for OV 13.

#### B. “Improper Allocution”

Defendant also argues that the trial court erred by permitting persons who did not qualify as “victims” under the Crime Victim’s Rights Act, MCL 780.751 *et seq.*, to address the court at sentencing. We disagree.

At sentencing, the prosecutor played a videotape containing statements of the victims connected to the charges, as well as several people who were inside the Red Robin restaurant at the time of the incident, and Ostrander’s mother.<sup>3</sup> Defendant objected, arguing that several individuals on the tape were not “victims” under the Crime Victims Rights Act, and therefore should not be allowed to address the court. The trial court ruled:

Well, certainly, the Victim’s Rights Act would encompass individuals who were at risk due to the activity of the defendant. I’m assuming that’s who these individuals would be. Certainly somebody who has no involvement would not be allowed to come in and make statements to the Court, and if that turns out to be the case the Court will disregard that. But to the extent that these people were there in the restaurant and experienced the activity that went on there that evening they certainly have a right to say what they like and I’ll allow it.

At sentencing, the court must give the defendant, the defendant’s lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence. MCR 6.425(E)(2)(c).<sup>4</sup> However, the trial court has broad discretion in determining who else may speak at sentencing. *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994), lv den 448 Mich 943 (1995) (“a sentencing court is afforded

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<sup>3</sup> The prosecutor made the video to “condense[]” the presentation.

<sup>4</sup> Formerly MCR 6.425(D)(2)(c).

broad discretion in the sources and types of information to be considered when imposing a sentence”).

In *Albert*, this Court noted that although an attorney of a victim was not himself a victim as defined in the Crime Victim’s Rights Act, the trial court did not abuse its discretion in permitting him to speak because the Court did not perceive any “bias or prejudice on the part of the sentencing court as a result of [the attorney’s] statements.” *Id.* at 74-75.

Here, the trial court did not abuse its discretion. The status of the individuals who addressed the court would be relevant only if the court were denying certain persons their legal right under MCL 6.425(E). Here, the trial court could properly consider, for purposes of sentencing, the statements of persons who did not meet the definition of a victim under MCL 780.752. Therefore, resentencing is not required.

### C. Two-Thirds Rule

Because the trial court has issued an amended judgment of sentence reducing defendant’s minimum sentences for assault with intent to commit murder and kidnapping to 400 months, it is unnecessary to address defendant’s claim that his original sentences of 420 to 600 months for these offenses violated the two-thirds rule in MCL 769.34(2)(b).

Affirmed.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder