

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALGENARD DION COWART,

Defendant-Appellant.

UNPUBLISHED

January 5, 2010

No. 287186

Oakland Circuit Court

LC No. 2008-219559-FC

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 40 to 80 years each for the assault and felon in possession convictions, to be served consecutive to concurrent five-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. Basic Facts

Defendant's convictions arise from a shooting in the parking lot of a Pontiac nightclub in the early morning of August 13, 2007, in which the victim was shot in the abdomen and arm and a bullet grazed his forehead. At trial, the victim and three independent eyewitnesses testified about the shooting. Testimony revealed that the victim, a white male, and an African-American woman were involved in an altercation outside the nightclub. One eyewitness testified that the victim yelled obscenities and racial slurs, although the victim denied making such derogatory remarks. The witnesses testified that the woman struck the victim. Witnesses then heard the shooter repeatedly say, "Pop my trunk, pop my trunk" or "Open the trunk, open the trunk." Each witness observed the shooter either inside or standing next to a white Dodge Charger. The shooter reached into the trunk of the Charger and was subsequently observed holding a handgun. The victim testified that he struck defendant in the face, and defendant stumbled backward and started shooting at him. The three independent eyewitnesses testified that the shooter struck the

victim, backed up a few feet, and then fired multiple shots at him.¹ Witnesses testified that the shooter fled in the white Dodge Charger, breaking through a gate and hitting a barrier.

The victim and one independent eyewitness identified defendant as the shooter from a lineup, and both testified that they were certain that defendant was the perpetrator. Another eyewitness recognized the shooter as a person who had introduced himself to her as “Red” earlier that night, and testimony revealed that defendant’s nickname was “Red.” The other eyewitness provided a description of the shooter to an acquaintance of defendant’s while standing outside the nightclub. The acquaintance testified that she did not witness the shooting, but had talked to defendant outside the nightclub five minutes before the shooting, saw defendant walk toward the parking lot, and heard gunshots coming from the parking lot. The acquaintance told the eyewitness that “Red” might be the shooter. The acquaintance subsequently identified defendant as “Red” in a lineup.

The police recovered a damaged white Dodge Charger from a ditch behind a house across the street from defendant’s mother’s residence. The vehicle was leased to defendant’s mother. During a police interview, defendant’s mother stated that she had allowed defendant to borrow the car and that when he returned at about 2:30 a.m., he came inside the house briefly and then left. Two months later, defendant was arrested in Toledo, Ohio. In a recorded telephone conversation from jail, defendant threatened his girlfriend and told her that he needed her help with his case. An inmate testified that defendant attempted to convince two other inmates to stop his acquaintance from coming to court because she was the only person who knew his identity.

The defense argued that defendant was not at the nightclub at the time of the shooting. Defendant’s girlfriend testified that she visited defendant in Toledo on August 10, 2007, because he had broken his foot, and that they remained there together until his arrest in October 2007. Defendant’s mother denied making the incriminating statements about defendant to the police and claimed that defendant did not use her car or come to her house on the day of the shooting. She claimed that she gave her neighbor a ride home that day and damaged the car as she parked it in the neighbor’s backyard. The neighbor denied that defendant’s mother had given her a ride or that she allowed defendant’s mother to park in her backyard.

II. Photographic Evidence

Defendant argues that the trial court abused its discretion in admitting a photograph of the victim asleep in the hospital with a bandage on his forehead and a breathing tube in his nose, and three crime scene photographs.² We disagree. The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). A trial court abuses

¹ The police found seven shell casings on the pavement, all of which were fired from the same handgun.

² The crime scene photographs depict apparent blood on the pavement, evidence markers, and a shoe.

its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Photographs that are calculated solely “to arouse the sympathies or prejudices of the jury” may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether the photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills, supra* at 67-68, 76. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401.

The photographs were relevant to the disputed issue of defendant’s intent and witness credibility. The photograph of the victim illustrated the victim’s head injury and abdomen wound that necessitated a breathing tube, which supported the prosecution’s theory that defendant shot the victim with an intent to kill. An intent to kill is an essential element of assault with intent to commit murder, *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), and that intent may be inferred from the nature and extent of the injuries inflicted. See *Mills, supra* at 71. In addition, the photographs of the crime scene assisted the jury in understanding the scene and weighing the credibility of the witness testimony regarding the events of the shooting. See *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). Contrary to defendant’s suggestion, the fact that witnesses could have testified regarding the victim’s injuries and the crime scene does not render the photographs inadmissible. *Mills, supra* at 76.

Moreover, a relevant photograph is not inadmissible merely because of its gruesome or shocking nature. *Id.* Here, the photographs depicted little blood or other graphic detail and are not overtly gruesome. It is apparent from the record that the trial court weighed the probative value of the photographs against their potentially prejudicial nature. See *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001). We conclude that the trial court did not abuse its discretion in admitting the photographic evidence.

III. Prosecutor’s Conduct

Defendant also argues that he is entitled to a new trial because the prosecutor engaged in impermissible conduct. Because defendant failed to object to the prosecutor’s conduct below, we review his unpreserved claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). We will not reverse if the alleged prejudicial effect of the prosecutor’s conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. Vouching for the Eyewitnesses

Defendant argues that the prosecutor improperly vouched for the eyewitnesses during closing argument when she made the following emphasized statements during closing argument:

And what he testified to in court that was most important is, he testified that the defendant is the person who did that to him. I asked how certain he was of that said he was absolutely certain that was him.

This is a person who he was - - the testimony was that he was standing, I think maybe 5 to 10 feet away from him, so a close area, a parking lot that's lit, and he having some time to look at him. Obviously, he's face to face with him. He remembers his face.

He's then asked to - - later he's asked to look at a lineup. He looks at the lineup and he picks defendant out of the lineup

[The victim] has *no motivation to lie* about this. He doesn't know the defendant You want to get the person who did the shooting and that just is common sense. You're not going to go after somebody who you don't think did it. And he said that with certainty.

* * *

And then you heard from Brittany Paris and Robin Loveday. Again, *no reason to lie*. They didn't know [the victim] before this night, they didn't know the defendant before this night, they just happened to be at the wrong place at the wrong time.

* * *

The next person I want you to think about is Ericka English. Ericka English goes to the bar that night with her friends, doesn't drink at the bar, walks out and she was very, very certain about the details that she gave

But Ericka English, the most important thing about her testimony was that she was absolutely, and I believe her words were, 100 percent certain, that that was the man, that [defendant] was the man who shot [the victim] in Pontiac on August 13th of 2007.

* * *

Again, *no reason to lie, no reason to fabricate*. She doesn't know anybody involved. [Emphases added.]

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that the witnesses were credible. The prosecutor's argument was focused on refuting defense counsel's assertions during trial that the eyewitnesses' testimony was not credible. In making the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the reliability of the witnesses' testimony, and argued that there were reasons from the evidence to conclude that each witness was credible. A prosecutor is free to argue from the facts that a witness is credible. *Howard, supra* at 548. In addition, in its final instructions, the trial court instructed the jurors that they were the sole judges of witness credibility, and that the lawyers' statements and arguments are not evidence. The instructions

were sufficient to dispel any possible prejudice.³ *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

B. Shifting the Burden of Proof

Defendant argues that the prosecutor shifted the burden of proof during closing argument when she made the following remarks concerning the testimony of defendant's acquaintance at the nightclub:

And then you have Pauletta Carson who kind of seals the deal really. She comes in here and she has less motive than anybody else. I mean, she used to date [defendant's] cousin. She obviously is still friendly with [defendant], or Red as she calls him, because the bar closes, she's standing outside the bar and she's talking with him

She says at one point in time he walks away from her, he walks towards the parking lot across the . . . street and within less than five minutes she hears the gunshots. *Defense did not bring out anything that would show you that she had it out for [defendant], that they - - no reason to be biased against him.* If anything she was biased for him and probably didn't even want to be here, didn't want to come to court. [Emphasis added.]

Although a prosecutor may not imply that a defendant must prove something or present a reasonable explanation, *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), the prosecutor's argument here, viewed in context, did not shift the burden of proof. Rather, the challenged remark was a small part of a proper argument regarding credibility that was focused on countering the defense argument that the witness was not believable and providing reasons why the witness should be believed. *Howard, supra* at 548. To the extent that the challenged remark could be viewed as improper, the trial court's jury instructions, that defendant did not have to offer any evidence or prove his innocence and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, were sufficient to dispel any possible prejudice. *Long, supra*.

C. Vouching for a Police Officer

Defendant further argues that the prosecutor impermissibly vouched for a police officer's credibility when making the following emphasized remark:

I want to talk about [defendant's mother] also and I want you to think about seriously what her motive and how she's biased. It's her son. She's looking out for her son. She comes in and she tells the detective, Detective Buchmann who's been a police officer for, I think he said nine years, with the

³ We note that defense counsel commented similarly during closing, including that defendant's girlfriend was "here to tell the truth."

Pontiac Police Department. *He is not going to fabricate a report. He's not going to put his job on the line because he has it out for somebody.*

And there was no evidence that came out whatsoever that oh, you know [defendant], you don't like [defendant], you and [defendant] have got[ten] into it before, you got it out for him? [Emphasis added.]

Considered in context, the prosecutor did not suggest to the jury that she had special knowledge that the police officer was testifying truthfully. *Knapp, supra*. Rather, the challenged remarks were plainly focused on addressing the conflicting testimony of the officer and defendant's mother, and refuting the defense suggestion that defendant's mother was credible whereas the officer was not. *Howard, supra* at 548. Also, the propriety of the police conduct was challenged in this case, and Detective Jeffrey Buchmann was the officer in charge. For example, during defendant's closing argument, defense counsel argued that the police did not conduct a "fair investigation" or a "good investigation." Moreover, the trial court's instructions, that the jurors must judge the credibility of the police witnesses by the same standards they use to evaluate the credibility of the other witnesses and that the jurors were the sole judges of witness credibility, were sufficient to dispel any possible prejudice. *Long, supra*.

D. Improper Comment on Alibi Witness

Defendant further argues that the prosecutor impermissibly commented on his alibi witness's credibility when she made the following emphasized remarks during closing argument:

[Defendant's girlfriend] testified from the stand that the last time she talked to him was in the conversation that she had that was played here in court.

But then when she talked to me she said she had visited him I think twice after that, upon his request. *I mean, isn't it funny that she just happens to have all this information that basically, if that's true, if he was down in Ohio and it could be verified, this case would probably have gone away a long time ago.*

But yet she has that information since - - I think she said he was arrested in October, and she sits on it. *Because she didn't have that information. She didn't sit on it, she made it up. She probably made it up yesterday to help him out.*

In her conversation with him she keeps saying to him, saying, "Don't threaten me, don't threaten me" after he says, "Oh I see, is that the way you want to go?" "Don't threaten me. I'm tired of you threatening me."

He also says that we need to sit down and have a talk, about four hours. I need you to help me with my case. So think about that when you're deciding because you are the people who decide what witnesses are telling the truth and what witnesses are lying, and it's up to you. [Emphases added.]

The prosecutor's remarks conveyed her contention that, based on the evidence, any defense based on defendant's girlfriend's testimony was suspect and not credible. When making

the challenged remarks, the prosecutor asked the jury to evaluate the witness's testimony and to consider her lengthy delay in reporting the alibi, as well as her motives for lying. A prosecutor may properly challenge the truthfulness of a defendant's alibi defense based on an alibi witness's failure "to come forward earlier," *People v Gray*, 466 Mich 44, 47; 642 NW2d 660 (2002), and may argue that a witness is not credible without having to "state inferences and conclusions in the blandest possible terms." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d (1996). Thus, the prosecutor's remarks were not improper.

E. Effective Assistance of Counsel

We reject defendant's alternative argument that defense counsel was ineffective for failing to object to the prosecutor's remarks. In light of our conclusion that the prosecutor's remarks were not improper and that the trial court's instructions were sufficient to dispel any possibility of prejudice, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

IV. Scoring of Offense Variable 6

Defendant lastly argues that resentencing is required because the trial court should have scored 25 points for offense variable (OV) 6, instead of 50 points. We disagree. When scoring the guidelines, "[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 Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.*

MCL 777.36(1) provides that 50 points should be scored for OV 6 for a premeditated intent to kill and 25 points for an unpremeditated intent to kill. MCL 777.36(1)(a) and (b). "To premeditate is to think about beforehand," and "characterize[s] a thought process undisturbed by hot blood." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a 'second look' at his contemplated actions." *Id.* Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the defendant's conduct before and after the crime, and the circumstances surrounding the killing itself, including the type of weapon used and the location of the wounds inflicted. *Coddington, supra* at 600.

At trial, there was evidence that during an altercation between the victim and a woman, defendant repeatedly yelled, "pop the trunk, pop the trunk." He walked to the back of his car, reached into the trunk, and retrieved an automatic handgun. There was testimony that defendant walked over to the victim, hit him in the face, backed up a few steps, pointed the gun at the victim from a close range, and fired seven shots. The victim was struck in the abdomen and arm, and a bullet also grazed his forehead. Immediately after shooting, defendant fled the scene, abandoned his car, and was later arrested in Toledo. This evidence was sufficient to support a finding that defendant acted with a premeditated intent to kill, permitting the trial court to score 50 points for OV 6.

Furthermore, even assuming only 25 points should have been scored, defendant would not be entitled to resentencing. Although the change in scoring would have altered the guidelines range, and generally a defendant is entitled to resentencing when an error in scoring affects the sentencing guidelines range, *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006), resentencing is “not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate scoring guidelines.” *Id.* at 89 n 8, citing *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). Here, the trial court was clear in this regard:

I will state for the Record now, because the Court of Appeals likes to hear these things, that if the guidelines range for OV-6 was reduced to 25[,] I would still sentence the defendant to the 40 to 80 years in the Michigan Department of Corrections. I think that is an appropriate sentence under the circumstances. And if that sentence guidelines range was reduced to 171 to 570, which is what we calculated at the bench, I’d give him the same sentence.

We agree with the trial court’s calculations. If OV 6 were scored at 25 points, it would lower defendant’s guidelines range from 225 to 750 months to 171 to 570 months. Because defendant’s 480-month minimum sentence would fall within the lower guidelines range, and the trial court was explicit that it would have given defendant that sentence even if OV 6 were scored at 25 points, defendant is not entitled to resentencing regardless of whether OV 6 was improperly scored. *Francisco, supra* at 89 n 8.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro