

**Court of Appeals, State of Michigan**

**ORDER**

People v MI v Nicholas Butler

Docket No. 305756

LC No. 11-002924-FC

Amy Ronayne Krause  
Presiding Judge

Mark J. Cavanagh

Mark T. Boonstra  
Judges

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The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued January 29, 2013, is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

**APR 02 2013**

Date

  
Chief Clerk

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS BUTLER,

Defendant-Appellant.

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UNPUBLISHED

April 2, 2013

No. 305756

Wayne Circuit Court

LC No. 11-002924-FC

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**ON RECONSIDERATION**

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, and possession of a dangerous weapon, MCL 750.224(1)(a). Defendant was sentenced to 20 to 40 years' imprisonment for the assault with intent to commit murder conviction and three to five years' imprisonment for the possession of a dangerous weapon conviction. We affirm defendant's conviction for assault with intent to commit murder, but we vacate his conviction for possession of a dangerous weapon and remand for a new trial on that charge.

In the early morning hours of January 30, 2011, Carlos Diaz was stabbed at a house party in Detroit. Melissa Bulyk, her husband Eliseo Galvan, her niece, Amanda Medina, and her children lived in the residence. Others present at the time of the incident include Gina Durban, a woman named Jennifer, an individual alternately referred to as "High Risk" or "BJ," Carlos Diaz, and defendant. A witness testified that, during the course of the evening, Durbin and Diaz had twice argued when Diaz took Durbin's cell phone and that during the second altercation, Durbin attempted to strike Diaz. Conflicting testimony held that Galvan either tried to escort Diaz out of the house when Diaz was attacked, or Galvan was upstairs and came down when he heard the noise of the fight. Diaz and another witness testified that defendant repeatedly stabbed Diaz in the head, back, and arms. In addition, Diaz stated that the defendant hit him in the forehead with a pair of metallic knuckles. Diaz was able to escape and make his way to the nearby home of his mother-in-law, from which he was taken by ambulance to the hospital.

Defendant first argues that the jury was improperly instructed on the possession of a dangerous weapon charge and that defense counsel was ineffective for failing to object to the instructions. We agree.

Because defendant's trial counsel expressed satisfaction with the jury instructions as they were given, review of this issue is waived. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). We nevertheless review the issue to the extent necessary to resolve defendant's claim of ineffective assistance of counsel. *People v Eisen*, 296 Mich App 326, 329-330; 820 NW2d 229 (2012). "When no *Ginther*<sup>1</sup> hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Instructions are reviewed in their entirety to determine whether they "they fairly present the issues to be tried, and sufficiently protect the defendant's rights," irrespective of whether they were completely technically correct. *Chapo*, 283 Mich App at 373. Reversal is not necessarily warranted unless the instructions, when read as a whole, entirely misinform the jury as to the elements of an offense. *People v Kowalski*, 489 Mich 488, 501-503; 803 NW2d 200 (2011). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Defendant was charged with and convicted of both felonious assault<sup>2</sup> and possession of a dangerous weapon. Each charge requires proof of a dangerous weapon, but, importantly, the *meaning* of a "dangerous weapon" differs between the charges. A felonious assault occurs when a defendant assaults another person with, among other possible items, a knife, brass knuckles, "or other dangerous weapon[s]." MCL 750.82(1); *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). In contrast, "possession of a dangerous weapon" pursuant to MCL 750.224(1) is limited to a more specific list of enumerated items, including "A blackjack, slungshot, billy, metallic knuckles, sand club, sand bag, or bludgeon," MCL 750.224(1)(d), but not including any kind of knife.

The possession of a dangerous weapon charge was—properly—based on defendant's alleged possession of metallic knuckles, and the felonious assault charge was—equally properly—based on his alleged use of either a knife or the metallic knuckles. When instructing the jury on felonious assault, the trial court thoroughly discussed the meaning of a "dangerous weapon" in the context of that charge. However, we find the trial court's transition to the discussion of the possession of a dangerous weapon charge confusing. Although the trial court did properly attempt to clarify that the possession of a dangerous weapon charge was predicated *solely* on the alleged possession of metallic knuckles, we find in context that the trial court's attempt was insufficient.

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> The trial court determined that the felonious assault conviction, as well as a conviction for assault with intent to commit great bodily harm, were charged as an alternative to assault with intent to commit murder. The trial court therefore dismissed the felonious assault and assault with intent to commit great bodily harm convictions.

Critically, the verdict form given to the jury erroneously provided the jury with the option of finding defendant guilty of possession of a dangerous weapon on the basis of possession of brass knuckles *or* a knife. This is clearly and unequivocally incorrect, and because the jury would have had it available as a direct reference during deliberations, the error is highly unlikely to have been harmless. “The verdict form is treated as, essentially, part of the package of jury instructions,” and therefore, is considered in reviewing the jury instructions in their entirety to determine if the trial court committed error requiring reversal. *Eisen*, 296 Mich App at 330. When the instructions are viewed in their entirety, the confusing instructions stated to the jury combined with the erroneous verdict form, we conclude that the jury instructions failed to properly instruct the jury on the possession of a dangerous weapon charge.

“If the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant’s substantial rights or otherwise undermined the outcome of the proceedings.” *Kowalski*, 489 Mich at 506. Here, the evidence was neither overwhelming nor uncontested. There was strong evidence that defendant possessed a knife. However, it was far from clear, and the numerous witnesses provided significantly conflicting testimony, whether defendant actually possessed metallic knuckles. “Generally, where both correct and incorrect instructions are given, this Court will presume that the jury followed the incorrect charge.” *People v Foster*, 138 Mich App 734, 737-738; 367 NW2d 349 (1984). Ultimately, we find that the instructional error undermines our confidence in the outcome of the proceedings and therefore constitutes plain error affecting defendant’s substantial rights.<sup>3</sup> See *Kowalski*, 489 Mich at 505-506.

Both the United States and Michigan Constitutions guarantee the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish an ineffective assistance of counsel claim:

a defendant must show that counsel’s performance was so objectively deficient that counsel was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302–303, 521 NW2d 797 (1994). Defendant must also show that he was prejudiced thereby. *Id.* at 312, 521 NW2d 797. To establish prejudice, defendant must show that there is a reasonable probability that the alleged error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216, 528 NW2d 721 (1995); *Pickens*, 446 Mich at 312, 521 NW2d 797. [*People v Orlewicz*, 293 Mich App 96, 107-108; 809 NW2d 194 (2011).]

Where jury instructions are plainly erroneous, defense counsel should object, and the failure to do so constitutes conduct that falls below an objective standard of reasonableness. See *Eisen*, 296 Mich App at 330. The record suggests, and we can conceive of, no apparent strategic reason for defense counsel’s decision to ignore the erroneous instructions. Because we have already determined that the erroneous instructions constituted plain error affecting defendant’s

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<sup>3</sup> However, as noted, our reversal is, strictly speaking, based on ineffective assistance of counsel. Our assessment of the jury instructions is only a prerequisite to finding trial counsel ineffective.

substantial rights, we conclude that defendant received ineffective assistance of counsel as to his charge of possession of a dangerous weapon. Accordingly, his conviction for that offense is vacated and the matter remanded for a new trial.

Defendant otherwise asserts that he was deprived of a fair trial because of misconduct by the prosecutor. We conclude that the prosecutor did commit one impropriety in the form of referencing facts not in the record, but we conclude that the remainder of defendant's assertions of misconduct are meritless, and defendant was not ultimately deprived of a fair trial.<sup>4</sup>

Prosecutors have a great deal of latitude and freedom to conduct themselves at trial and make arguments and inferences from the evidence. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). However, prosecutors have a concomitant obligation "to seek justice and not merely to convict." *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011). The conduct of the prosecutor is reviewed on a case-by-case basis, in the unique context of the particular case at issue, to determine whether the defendant was ultimately denied a fair and impartial trial. *People v Brown*, 294 Mich App 377, 382-383; 811 NW2d 531 (2011). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Id.* at 382.

Defendant first asserts that the prosecutor improperly introduced evidence of witness intimidation without establishing that defendant was connected to the threats. Initially, the motivation of witnesses is always relevant, as is anything else that might influence testimony. *People v Minor*, 213 Mich App 682, 685 (1995). Evidence of threats is not only relevant to witnesses' motivations, *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989), but a threat from a defendant is relevant to the defendant's possible consciousness of guilt. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). It is proper for the prosecution to inquire into threats to witnesses, and inquire into defendant's role in any such threats even if there is no evidence yet that defendant was connected to those threats, but any such questioning must stop if it is established that there were no threats or defendant was not connected to them. *Johnson*, 174 Mich App at 112; *Kelly*, 231 Mich App at 640; *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985).

Here, the prosecutor's inquiries into the possibility of threats to the witnesses was proper in light of the witnesses' inconsistent cooperation, inconsistent statements, and gang affiliation. The prosecution also properly limited its questioning. The prosecution's inquiry into the issue of gang affiliation was also proper. "A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias." *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465, 83 L Ed 2d 450 (1984). The prosecution established that the gang had certain rules of conduct for its members, including prohibitions against harming or "snitching on" each other. This is an issue with relevance to the

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<sup>4</sup> We do not consider any assertions of misconduct that would only affect the dismissed charges or the charge for which we are vacating and remanding. Even if any impropriety had been committed, any effect it might have had on those charges would be moot.

accuracy or truthfulness of the witnesses' testimony. The prosecutor's references to gang affiliation was not a "guilt by association" argument, but rather a proper argument that the witnesses may have had certain motivations or biases underlying their testimony.

Defendant argues that the prosecution improperly offered unsupported facts into the record that undermined defendant's theory at trial. Defendant's theory was that he had been attacked at the party because he had not followed the gang's procedures for properly terminating his membership in the gang. Defendant testified that he received facial bruises and someone stabbed his finger during the altercation. Defendant also testified that he did not see nor does he know who stabbed Diaz. During closing argument, the prosecutor attacked defendant's theory by asserting that there was no evidence that the same people who had "jumped him in[to]" the gang, pursuant to the gang's rules, were the same as those to "jump him out." In fact, defendant correctly points out that no evidence in the record suggested the existence of any such rule requiring his gang membership termination to be by the same people who had initiated him. Consequently, we agree with defendant that the prosecutor improperly injected unsupported facts into the record and improperly used those facts.

However, the error did not result in the "conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The evidence overwhelmingly supported the jury's verdict on the assault with intent to commit murder charge. Two witnesses, including the victim, testified that defendant repeatedly stabbed the victim. The victim testified that defendant stabbed him 12 to 13 times during the incident and the other witnesses detailed the victim's loss of blood and physical condition after the attack. A third witness, although testifying at trial that he did not see the stabbing, made two prior statements that he had witnessed the stabbing and identified defendant as the assailant in one of those statements. It was undisputed that defendant was present and that no one else had been identified as the assailant. The evidence other than his own testimony simply did not support his theory that he was the one who was attacked. In any event, the trial court instructed the jury to consider only properly-admitted evidence and that the attorneys' statements are not evidence, alleviating any prejudice resulting from the comments. *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010). Therefore, while the prosecutor committed an error, it does not require reversal.

Defendant next argues that the prosecution improperly admitted other-acts evidence under MRE 404(b). We disagree. The complained-of evidence was that defendant had engaged in a verbal altercation with another person at the same house the previous day. However, the evidence was unsolicited and somewhat confusing; when the prosecutor determined that the witness was referring to a different day, he moved on.<sup>5</sup> "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). The evidence certainly was not improperly obtained. Furthermore, MRE 404(b) is a broad rule that includes any evidence that does not otherwise violate the Rules of Evidence unless the evidence was introduced solely to show criminal propensity or to prove

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<sup>5</sup> On cross-examination, defendant inquired further into the issue, albeit almost as briefly.

something about defendant's character. See *People v Mardlin*, 487 Mich 609, 614-616; 790 NW2d 607 (2010). Defendant contends that the prosecutor used the evidence in closing argument to prove he was a violent man. We disagree. The evidence was only used by the prosecutor to emphasize the witness's opinion that defendant wanted a fight, and because the evidence was of a verbal, rather than physical, altercation, we do not believe it was in danger of causing unfair prejudice. See *id.* Consequently, the prosecutor committed no misconduct by using this evidence.

Defendant further complains that two other statements made by the prosecutor were unsupported by the record. Specifically, "[Bulyk] said that [Galvan] told her when he ran up there that he had been cut trying to protect Carlos Diaz's throat from being cut," and "[Galvan] admitted he saw Carlos Diaz stabbed. He admitted that his hand had [sic] cut protecting Carlos Diaz's throat." The record does not contain any evidence from which the prosecutor's reference to Diaz's throat could be directly derived, but the remainder of these statements are entirely supported by the record. A statement Galvan gave to the police, which was admitted into the record, did contain a reference to Galvan's belief that he put his hand over Diaz's throat to prevent it from being cut; Galvan denied portions of the statement on the stand, but not specifically that he saw Diaz stabbed and that he was injured protecting Diaz's throat. We do not believe that the prosecutor's statements were improper. In any event, as noted previously, the trial court properly instructed the jury only to consider evidence that was admitted and that the lawyers' arguments were not evidence.

Defendant argues that the prosecution deprived him of a fair trial when it failed to endorse two *res gestae* witnesses. We disagree. Under MCL 767.40a, "the prosecution must notify a defendant of all *known res gestae* witnesses and all witnesses that the prosecution *intends to produce.*" *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005) (emphasis in original). Further, "[t]he prosecutor's duty to produce witnesses has been replaced with an obligation to provide notice of *known witnesses* and *reasonable assistance* to locate witnesses *on defendant's request.*" *Id.* at 295, quoting *People v Burwick*, 450 Mich 281, 287-290; 537 NW2d 813 (1995). It appears from statements in the record and in defendant's Standard 4 brief that defendant was notified of the existence of these *known res gestae* witnesses and of the witnesses that the prosecution intended to produce at trial. Therefore, there is no error.

Defendant has also failed to establish defense counsel was ineffective for failing to either request assistance to produce these witnesses at trial or to call these witnesses to testify at trial. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). A defense is substantial if it is one that might have made a difference at trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). In the lower court, defendant did not introduce evidence or request an evidentiary hearing on this issue. Thus, there is no evidence on to the record to suggest that the witnesses would have testified at trial, let alone that their testimony would have been helpful to the defense. Accordingly, defendant has failed to establish that he was deprived

of a substantial defense and therefore that counsel was ineffective. *Carbin*, 463 Mich at 600; *Dixon*, 263 Mich App at 398.

Defendant next argues that the prosecution suppressed material evidence consisting of photographs taken of defendant's face after the incident, which allegedly demonstrated that he had injuries consistent with and supportive of his theory at trial. Defendant also asserts that trial counsel was ineffective for failing to request this evidence. We disagree.

“Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure.” *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To establish a *Brady*<sup>6</sup> violation, a defendant must prove that the state possessed and suppressed favorable evidence and “that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998). “A reasonable probability of a different result exists where suppression of the evidence undermines confidence in the outcome of the trial.” *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). A defendant must also prove that he did not possess the evidence or could not have obtained the evidence by exercising reasonable diligence. *Fox*, 232 Mich App at 549.

Defendant admits that he knew of the photographs from the outset, and he alleges that trial counsel was also aware of them. We are therefore unpersuaded that the evidence was “suppressed” or that the defense could not have obtained it by exercising reasonable diligence. More importantly, the photographs allegedly demonstrate that defendant had facial bruising and scratches, but this evidence is supportive of nothing more than that defendant may have been involved in a physical altercation, which was not a fact in dispute. Consequently, defendant has entirely failed to demonstrate that the photographs had any possibility of affecting the outcome of the trial, let alone undermining confidence in that outcome. Therefore, defendant has failed to establish a *Brady* violation. For the same reason, we cannot find trial counsel ineffective for failing to undertake an endeavor with no established likelihood of changing the outcome. Indeed, defendant admitted that he had previously made a prior inconsistent statement about the source of his finger injury, which the prosecution used to challenge his credibility. Defense counsel may have reasonably decided that, as a matter of trial strategy, emphasizing defendant's facial injuries might have further undermined his credibility. Defendant did not receive ineffective assistance of counsel.

Defendant argues that the cumulative effect of the alleged errors above requires reversal. We disagree. “The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal,” but this Court will not grant a new trial unless the cumulative effect of such errors “undermine[s] the confidence in the reliability of the verdict.” *Dobek*, 274 Mich App at 106. The few individual errors did not undermine the reliability of the verdict, because they were either cured or prejudice was not established. The evidence presented overwhelmingly supported the jury's verdict on the

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<sup>6</sup> *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

assault with intent to murder conviction. Given the weight of the evidence against defendant, the cumulative effect of the errors did not undermine the reliability of the verdict or establish plain error that affected defendant's substantial rights.

Defendant finally argues that he was deprived of his right to the effective assistance of counsel on the basis of a conflict of interest. We disagree. Defendant alleges that counsel represented an individual with familial ties to the prosecution's witnesses four months before defendant's trial and that defendant learned about this conflict because that individual is currently incarcerated at the same facility as defendant. Defendant is required to establish that counsel had an actual conflict of interest that actually affected counsel's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998); *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708, 1719; 64 L Ed 2d 333 (1980). Beyond mere conjecture, defendant has not provided any evidence, nor does the record support a finding, that defense counsel represented a relative of the prosecution's witnesses. We therefore cannot find ineffective assistance of counsel on this basis.

We affirm the assault with intent to commit murder conviction, but we vacate the possession of a dangerous weapon conviction and remand for a new trial. If defendant is ultimately not convicted of possession of a dangerous weapon, whether through acquittal or the prosecutor's decision not to pursue a retrial, defendant is entitled to have his prior record variable score reduced accordingly and to be resentenced for his assault with intent to commit murder conviction on the basis of a corrected sentencing guidelines score. *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010); *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). We do not retain jurisdiction.

/s/ Amy Ronayne Krause  
/s/ Mark J. Cavanagh  
/s/ Mark T. Boonstra