

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 16, 2014

v

LEONARD LEEYOUNG KEYS,  
Defendant-Appellant.

No. 312801  
Oakland Circuit Court  
LC No. 2012-241280-FC

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Before: STEPHENS P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 15 to 50 years' imprisonment for the assault with intent to murder conviction and two years for the felony-firearm conviction, to be served consecutively. We affirm.

First, defendant argues that the trial court erred in denying his motion for a directed verdict. We disagree.

This Court reviews a trial court's decision on a motion for a directed verdict de novo. *People v Martin*, 271 Mich App 280, 319; 721 NW2d 815 (2006). "In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to 'determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'" *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011), quoting *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2005).

To sustain a conviction of assault with intent to murder, the prosecution must provide "proof of an assault, committed with an actual intent to kill, which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 155; 703 NW2d 230 (2005). An assault is "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Assault with intent to commit murder is a specific intent crime. *Brown*, 267 Mich App at 147. In addition, "identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

A rational trier of fact could conclude beyond a reasonable doubt that defendant was the individual who fired shots at Scott Kneeshaw. Devin Body testified that defendant was the shooter. On the contrary, defendant introduced the testimony of several witnesses who said that he was at Gallery Tattoo for the entire evening on March 3, 2011. In deciding a motion for a directed verdict, the trial court views the evidence, including issues of credibility, in the light most favorable to the prosecution. *Hartuniewicz*, 294 Mich App at 242; *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Thus, the conflicting testimony regarding defendant's whereabouts on the night of March 3, 2011, must be decided in favor of the prosecution and Body's version of events. See *id.* In addition, issues of witness credibility are the purview of the jury. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619.

It was not error for a rational fact finder to conclude beyond a reasonable doubt that defendant had a specific intent to commit murder. "Circumstantial evidence and reasonable inferences that arise from [the] evidence can constitute satisfactory proof of the elements of the crime." *Kanaan*, 278 Mich App at 619. Scott Kraemer testified that there were nine bullet casings from a .9 millimeter firearm found at the scene. Kneeshaw testified that the shooter was 10 to 15 feet away when he was pointing a gun at him, and that at least one of the bullets hit his passenger door. If the bullet had not hit the crash bar on the door, it would have entered the passenger compartment and likely hit Kneeshaw. Body testified that defendant asked him to block the victim's car and then shot at the car several times, in rapid succession.

Next, defendant asserts that the jury's verdict was against the great weight of the evidence. We disagree.

Defendant did not preserve this issue by moving for a new trial in the trial court. See *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Therefore, this issue is reviewed for plain error affecting substantial rights. *Cameron*, 291 Mich App at 618. The defendant must "show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings." *Id.*

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). However, questions of credibility are "within the exclusive province of the jury." *Id.* at 470. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 469-470, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Conflicting testimony does not warrant a reversal unless the testimony contradicted undisputed physical facts or the witness was so far impeached that the testimony lost all probative value. *People v Roper*, 286 Mich App 77, 89; 777 NW2d 483 (2009).

As discussed above, the evidence supported defendant's conviction of assault with intent to murder. Body identified defendant as the shooter. This testimony conflicted with the testimony of Dennis Reed, Keith Floyd, King Twitty, and Virgil Smith, who all testified that defendant was at Gallery Tattoo when the shooting occurred. However, conflicting testimony

does not warrant a reversal or indicate that a verdict was against the great weight of the evidence. *Lacalamita*, 286 Mich App at 470. In addition, as discussed above, the circumstantial evidence supported a finding that the shooter had the specific intent to kill Kneeshaw. The shooter fired nine shots, in rapid succession, at Kneeshaw as he sat in the driver's seat of his car. For these same reasons, defendant's conviction of felony-firearm was not against the great weight of the evidence.

Defendant also contends that his trial counsel was ineffective. We disagree.

To preserve a claim of ineffective assistance of counsel, defendant must make a motion for a new trial or a *Ginther* hearing with the trial court. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant did not move for a new trial or a *Ginther* hearing. Therefore, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *Rodriguez*, 251 Mich App at 38. The circuit court's factual findings are reviewed under a clearly erroneous standard. MCR 2.613(C). Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20. In order to establish ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness," and, "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010), quoting *Strickland v Wash*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, a defense lawyer has discretion over his method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Counsel's failure to introduce certain evidence constitutes ineffective assistance of counsel only when the defendant is deprived of a substantial defense. *Id.*

First, defendant argues that his trial counsel was ineffective for stipulating to the admission of cell phone numbers, cell phone records, and a PowerPoint presentation prepared by Detective Gerald Wakefield. However, defendant has offered no legal grounds on which his trial attorney could have objected to this evidence. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008) (quotation omitted). Rather, defendant argues that the cell tower evidence was damaging to his case. Although this may be true, it is not a legal ground for objecting to the evidence. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Payne*, 285 Mich App at 195 (quotation omitted).

Defendant also bases his ineffective claim on his trial counsel's failure to cross-examine Detective Wakefield. Again, defendant does not support this claim with questions his attorney should have asked to impeach Detective Wakefield. Generally, "[t]he questioning of witnesses is presumed to be a matter of trial strategy." *Petri*, 279 Mich App at 413. Defendant argues that

cell phone tower evidence is “junk science.” None of the quoted documents are part of the lower court record, and therefore cannot be considered by this Court. See MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379 n 4; 677 NW2d 76 (2004). Second, it appears that the information is inapplicable to the instant case. In this case, Detective Wakefield used cell phone records to determine, within a general area, where defendant was located when he made or received specific calls. This evidence was then used to determine that defendant was *not* in a specific location – Gallery Tattoo. The information provided in defendant’s brief relates to placing an individual at a specific location – for purposes of a 911 call or to determine if that individual was at or near the crime scene. There is an important distinction between concluding that an individual was not in a specific place at a specific time, as opposed to affirmatively stating that an individual was at a particular location at a particular time.

Finally, defendant argues that his trial counsel was ineffective for failing to admit a receipt into evidence which Reed referenced during his testimony. Defendant claims that the receipt would have confirmed that Reed was at Gallery Tattoo on March 3, 2011, and saw defendant there. However, defendant has not produced this receipt on appeal. This Court’s review of an ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Jordan*, 275 Mich App at 667. We cannot speculate that such a receipt existed and that it was dated March 3, 2011.

Defendant next argues that he was denied a fair trial by the trial judge’s misconduct and bias. We disagree.

Because defendant did not raise this issue in the trial court, it is unpreserved. See *Cameron*, 291 Mich App at 617. This Court reviews unpreserved issues for plain error. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Both the United States and Michigan Constitutions give a defendant the right to a fair and impartial trial. US Const, Am VI; Const 1963, art 1, § 20; *Conley*, 270 Mich App at 307. Thus, although a trial judge “has wide discretion and power in matters of trial conduct,” this power is limited by the requirement of judicial impartiality. *Conley*, 270 Mich App at 307-308, citing *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

If the trial court’s conduct pierces the veil of judicial impartiality, a defendant’s conviction must be reversed. The appropriate test to determine whether the trial court’s comments or conduct pierced the veil of judicial impartiality is whether the trial court’s conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Conley*, 270 Mich App at 308 (internal citations and quotation marks omitted).]

There is a heavy presumption that a judge is impartial. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). “Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality.” *Id.*, citing *People v Cain*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

It is important to note that the trial judge gave the jury a thorough instruction regarding rulings, questions, and statements made during the trial:

My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts and you should decide this case from the evidence.

“Generally, [j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Snyder*, 301 Mich App 99, 112; 835 NW2d 608 (2013), quoting *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (internal quotation marks omitted).

Second, defendant has not demonstrated that the trial judge was biased or partial. Defendant argues that the trial judge demonstrated partiality by allowing the prosecutor to engage in certain conduct that the judge precluded defense counsel from doing. The record does not support this assertion. Defendant also claims that the trial judge was biased for repeatedly criticizing defense counsel for asking compound questions. We have found no evidence of judicial partiality in the judge’s evidentiary admonitions. Furthermore, it is a trial judge’s duty to maintain order in her courtroom and rule on evidentiary objections. See *Conley*, 270 Mich App at 307-308.

Finally, defendant argues that the trial judge’s questioning of defense witnesses called into question their credibility. A trial court’s discretion and power in matters of trial conduct includes the authority to interrogate witnesses. MRE 614(b); *People v Davis*, 216 Mich App 47, 49-52; 549 NW2d 1 (1996). “[T]he fact that testimony elicited by a court’s questions damaged a defendant’s case [does] not demonstrate that the court had improperly assumed the role of surrogate prosecutor.” *Davis*, 216 Mich App at 51. The record does not demonstrate an abuse of discretion in judicial questioning.

Defendant also claims that he was denied a fair trial by the prosecutor’s misconduct. We disagree.

“Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object to any of the instances of alleged misconduct. Therefore, his claim is reviewed for plain error. See *Unger*, 278 Mich App at 235.

When reviewing a claim of prosecutorial misconduct, the prosecutor’s statements are reviewed as a whole and in context with the evidence presented and the defendant’s arguments. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Prosecutors are generally “accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich

261, 282; 531 NW2d 659 (1995). “A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence.” *Unger*, 278 Mich App at 241. Under a plain error analysis, reversal for prosecutorial misconduct is not required “where a curative instruction could have alleviated any prejudicial effect.” *Id.* at 235. Proper jury instructions cure most errors because jurors are presumed to follow the trial judge’s instructions. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

The prosecutor did not commit misconduct with respect to his argument about the cell phone tower evidence. The prosecutor was discussing the credibility of defendant’s alibi witnesses, as opposed to the cell phone tower data. The prosecutor argued that people can be mistaken, but scientific evidence, like cell phone records, cannot be changed or mistaken. The prosecutor’s argument was reasonable and based on the evidence. Detective Wakefield testified that based on his evaluations of the cell tower records, defendant was not at Gallery Tattoo on the night of March 3, 2011. Detective Wakefield was qualified as a witness in interpreting cell phone tower records. Furthermore, the jurors were instructed that they can believe or disbelieve an expert’s opinion, and it is their job to determine how important the opinion is. In addition, the court instructed the jury that the attorneys’ arguments were not evidence.

The prosecutor also did not mischaracterize the intent requirement for assault with intent to murder. Rather, the prosecutor told the jurors to use common sense when determining if the shooter had the intent to kill. He explained that intent can be inferred from the circumstances of the crime, like the fact that the shooter in this case did not shoot at the tires or front of Kneeshaw’s car. Rather, four shots were fired into the side of the car, directly at Kneeshaw’s body. None of these statements are inaccurate.

Finally, the prosecutor did not use the video recording of Smith’s police interview as evidence that defendant was not at Gallery Tattoo when the incident occurred. Rather, the prosecutor specifically told the jurors that the only reason they could consider the recording was for determining Smith’s credibility. The prosecutor then gave examples of Smith’s trial testimony and the statements he made to Detective Andrew Snarey, arguing that Smith was inconsistent, and therefore, incredible. The prosecutor did not argue that the interview was substantive evidence that defendant was not at the tattoo shop when the shooting occurred.

Defendant argues that the cumulative effect of his trial counsel’s ineffective assistance, the prosecutor’s misconduct, and the trial judge’s partiality denied him a fair trial. We disagree.

“We review this issue to determine if the combination of alleged errors denied defendant a fair trial.” *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). “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 the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted.” *Dobek*, 274 Mich App at 106. If the defendant has not established any errors, then reversal is not warranted. *Id.*

For the reasons discussed above, defendant has not shown that his trial counsel was ineffective, the trial judge was partial, or the prosecutor engaged in misconduct. Because

defendant has not established any errors, reversal is not warranted. See *Dobek*, 274 Mich App at 106.

Defendant also argues that the trial court erred in allowing the prosecution to play a video recording of Smith's interview with Detective Snarey for the jury. We agree that the video should not have been played, but conclude that reversal is not required because the error did not affect the outcome of the trial.

We review the trial court's decision on a preserved evidentiary issue for an abuse of discretion. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* This Court reviews an unpreserved claim of evidentiary error for plain error affecting substantial rights. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011).

A party may impeach a witness with extrinsic evidence of a prior inconsistent statement on a noncollateral matter. MRE 613(b); *LeBlanc*, 465 Mich at 590. MRE 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

When a trial court has abused its discretion on an evidentiary issue, reversal is not required "unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence." *Benton*, 294 Mich App at 199 citing MCL 769.26.

In arguing for the recording's admission, the prosecution argued that Smith denied making certain statements to Detective Snarey, and the recording would show that Smith did, in fact, make these statements. However, Smith's denials were accurate. He did not make the statements that the prosecutor claimed he did. For example, Smith testified during cross-examination that he never told Detective Snarey that the only person he took home on March 3, 2011, was Jerome. In his interview with Detective Snarey, Smith said:

*Q.* Okay. What time did you drop Leonard off last night?

*A.* Let me see, I dropped Rome off, I don't know what time it was, but it was earlier part of the day. But I don't know if I'm allowed to ask questions.

The subject then changed and Smith never actually answered what time it was when he took defendant home. Smith never told Detective Snarey that the only person he took home was Jerome.

During cross-examination, Smith also denied telling Detective Snarey that defendant called him after 10:00 p.m. and said he was in trouble for something serious. During his interview with Detective Snarey, Smith said:

Q. Okay. And they [defendant and Jerome] said they got in a little bit of trouble? What'd they say?

A. Actually, Rome called me, he got into a little trouble. (Inaudible) – he didn't get into any serious details but he did say that – that it's something serious, you know?

Again, Smith's testimony did not conflict with the statements he made during his police interview. Smith never told Detective Snarey that defendant called him and said he was in trouble. Rather, Smith specified that Jerome called him.

Even though the video recording was improperly shown to the jury, reversal is not required. It does not appear “more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence.” See MCL 769.26; *Benton*, 294 Mich App at 199. With respect to Smith's credibility, no harm was done. Because Smith's statements during the interview were consistent with his testimony, the video recording actually bolstered his trial testimony and made him more credible. Even if Smith's credibility was affected, defendant had three less interested witnesses testify that he was at Gallery Tattoo on the night of March 3, 2011. Therefore, the error did not affect the outcome of the trial.

Defendant also argues that the video recording was substantially more prejudicial than probative, and thus inadmissible under MRE 403. He did not raise this argument below so it is reviewed for plain error. See *Cameron*, 291 Mich App at 618.

MRE 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Defendant contends that the recording was unfairly prejudicial because “[t]he jury saw Mr. Smith being treated as [a] criminal and heard numerous statements made by the police that cast Mr. Keys in a bad light.” However, as discussed above, the recording actually bolstered Smith's credibility because his statements during the interview were consistent with his trial testimony. In addition, the court instructed the jury before the recording was shown:

I need to indicate to you that during this exchange that one of the police officers indicates that the defendant, Mr. Keys, had confessed. There has never been a confession in this case. That is merely a police tactic that is used in order to obtain information.

Secondly, the purpose of showing you this tape is that you can – it's for impeachment purposes with respect to the testimony of Mr. Smith and Mr. Smith only. You are not to consider this or use it against the defendant, Mr. Keys.

The court instructed the jury again, in a similar fashion, during its final instructions. “[J]urors are presumed to follow their instructions, and instructions are presumed to cure most errors.”

*Snyder*, 301 Mich App at 112. Thus, defendant has not demonstrated that showing the recording was plain error affecting his substantial rights.

Finally, defendant contends that the trial court erred in the scoring of several offense variables (OVs), specifically, OV-4, OV-6, OV-10, and OV-19. We disagree.

To preserve an issue challenging the scoring of the sentencing guidelines or the accuracy of the information used in sentencing, a defendant must raise the issue “at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” MCL 769.34(10); see also *People v Jackson*, 487 Mich 783, 795; 790 NW2d 340 (2010). At sentencing, defendant objected to the scoring of OV-6 and OV-10. Therefore, defendant’s arguments related to these variables are preserved. Defendant’s arguments related to the scoring of OV-4 or OV-9 are not preserved because he did not object to their scoring at sentencing.

Generally, this Court reviews the trial court’s factual determinations under the sentencing guidelines for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.* When the defendant has failed to preserve the scoring error by raising it at sentencing, in a motion for resentencing, or a motion to remand, he is still entitled to resentencing when the error resulted in the use of a different sentencing guidelines range. *Jackson*, 487 Mich at 793-794; 790.

The trial court’s findings of fact on the sentencing factors must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. In scoring the sentencing factors, the trial court may rely on the contents of the presentence investigation report (PSIR). *People v Nix*, 301 Mich App 195, 205 n 3; 836 NW2d 224 (2013). The information in the PSIR may be considered even if it contained hearsay because the rules of evidence do not apply in sentencing proceedings. MRE 1101(b)(3); *Nix*, 301 Mich App at 205 n 3.

First, the evidence supported scoring OV-4 at 10 points. OV-4 provides that 10 points should be scored if “[s]erious psychological injury requiring professional treatment occurred to the victim.” MCL 777.34(1)(a). “[T]he fact that treatment has not been sought is not conclusive.” MCL 777.34(2). In *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), this Court concluded that 10 points was properly scored for OV-4 because the victim “testified that she was fearful during the encounter with defendant.” According to the victim impact statement of the PSIR, Kneeshaw said that the shooting had affected him greatly. “He has missed work and is very nervous when he leaves work.” This evidence supports scoring OV-4 at 10 points.

Second, OV-6 was properly scored at 50 points. OV-6 provides that 50 points should be scored if the offender had a premeditated intent to kill. MCL 777.36(1)(a). The evidence showed that defendant’s actions were premeditated; he had a plan in place for the night of March 3, 2011. At some point earlier in the day, the Jaguar was stolen and brought to Gallery Tattoo; Body testified that the Jaguar was there when he and defendant left at about 9:00 p.m. After defendant and Body left the tattoo shop, they stopped and stole a license plate from another vehicle. They then switched the stolen plate with the plate on the Jaguar. Body testified that

once they reached Northland Mall, they sat in the parking lot and waited for Kneeshaw to exit. Once Kneeshaw exited the mall, they waited for him to part from the individuals he was talking to and enter his car alone. Finally, defendant instructed Body to position the Jaguar behind Kneeshaw's car in order to block him in. All of these actions indicate that defendant planned and prepared for the shooting. In addition, as discussed above, there was evidence that defendant had the intent to kill Kneeshaw. He fired nine shots in rapid succession at Kneeshaw's car, while standing somewhere between 3 and 15 feet away.

Third, defendant claims that the trial court erred in scoring OV-10 at 15 points. This argument lacks merit. OV-10 provides that 15 points should be scored if "predatory conduct was involved." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Under MCL 777.40, predatory conduct is "behavior that is predatory in nature, precedes the offense, and is directed at a person for the primary purpose of causing that person to suffer from an injurious action." *People v Kosik*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (November 12, 2013, Docket No. 312518) (slip op at 7). A victim's vulnerability need not be inherent; it can arise from external circumstances. *Id.*, citing *People v Huston*, 489 Mich 451, 466; 802 NW2d 261 (2011). In this case, defendant and Body waited for Kneeshaw to leave the individuals he was speaking with in the parking lot and get into his car alone. "The timing of an offense and waiting until a victim is alone can denote predatory conduct." *Id.*; *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003).

Finally, the evidence supported the trial court's decision to score OV-19 at 10 points. OV-19 provides that 10 points should be scored when the offender "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Fleeing from police can constitute interference with the administration of justice. *People v Cook*, 254 Mich App 635, 638-640; 658 NW2d 184 (2003), overruled on other grounds *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). The evidence showed that Body and defendant fled the police in the Jaguar. They were followed by Officer Thomas Literacki in a police car, along with Northland Mall security officer Brian Rothell and a police helicopter. Nonetheless, they did not stop. According to Rothell's statement, the Jaguar "made many evasive maneuvers and disregarded traffic control signs and devices." Eventually, defendant and Body exited the Jaguar and fled on foot. Thus, the evidence supported scoring OV-19 at 10 points.

Affirmed.

/s/ Cynthia Diane Stephens  
/s/ Michael J. Kelly  
/s/ Michael J. Riordan