

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE AL-TREAVES WILLIAMS, also known
as ANDRA LAMAR WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 17, 2003

No. 238437

Lenawee Circuit Court

LC No. 01-009222-FC

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 562 months' to 960 months' imprisonment for the kidnapping conviction, 114 months' to 240 months' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the prosecutor presented insufficient evidence to support his conviction on the kidnapping charge. We disagree. In reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987). A person can be convicted of kidnapping if it is proven beyond a reasonable doubt that he or she willfully, maliciously and without lawful authority, forcibly or secretly confined or imprisoned any other person within this state against his will or forcibly seized or confined, or inveigled or kidnapped any other person with the intent to cause such person to be imprisoned in this state against his will. MCL 750.349; *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984).

To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime, unless the underlying crime involves murder, extortion, or

taking a hostage. *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998).¹ While not determinative, one factor relevant to asportation is whether the movement added a greater danger or threat of danger. *People v Adams*, 389 Mich 222, 238; 205 NW2d 415 (1973). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The prosecutor provided sufficient evidence to support defendant’s conviction for kidnapping. A witness testified it was defendant who said to take the victim to the basement. If defendant had intended to only assault the victim, he could have continued to do so in the kitchen. The victim’s forcible confinement to the basement provided sufficient evidence from which a jury could have found asportation incidental exclusively to kidnapping. Moreover, moving the victim to the basement added greater dangers, increased the risk of harm, and made escape less likely. *Adams, supra*. Thus, the prosecutor presented sufficient evidence from which a rational trier of fact could have found the essential elements of kidnapping were met. *Patterson, supra*.

Defendant’s second issue on appeal is that his due process rights were violated when the prosecutor did not disclose to the jury that a witness (Elmore) had a reasonable expectation of lenient treatment in exchange for his testimony. We disagree. Because defendant claims his due process rights were violated, we review this issue de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

When an accomplice or co-conspirator has been granted leniency to secure his testimony, the prosecutor must disclose this fact to the jury on the defendant’s request. *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). “The same requirement of disclosure should also be applicable if reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulted from contact with the prosecutor.” *Id.* It is also inconsistent with due process for the prosecutor not to correct the testimony of such a witness against the defendant, where the witness testifies that he has been promised no consideration for his testimony and the prosecutor knows this statement to be false. *Id.* at 173-174.

However, it is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness’s credibility. It is quite another to require “disclosure” of future possibilities for the jury’s speculation. . . . *The focus of required disclosure is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony.* [*Id.* at 174 (emphasis added).]

Thus, while a prosecutor has a duty to disclose promises made to obtain an accomplice’s testimony, the prosecutor is not required to disclose future possibilities of leniency for the jury’s speculation. *Id.* “The disclosure requirement may be considered satisfied where the ‘jury [is] made well aware’ of such facts ‘by means of . . . thorough and probing cross-examination by

¹ Although not mentioned in the statute, asportation of the victim is a required element of the crime of kidnapping by forcible confinement or imprisonment. *Green, supra*.

defense counsel.”” *People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990), quoting *Atkins, supra* at 174 (emphasis in original).

Here, there is no record support that a plea agreement existed. During the preliminary exam and trial, Elmore and his counsel repeatedly denied the existence of any plea agreement, as did the prosecutor. Moreover, when at the conclusion of the preliminary exam defense counsel specifically inquired of the prosecutor and counsel for Elmore whether a plea agreement existed, the trial court indicated on the record that there was no such agreement. At the same time, counsel for Elmore repeatedly indicated that he “anticipated” and “hoped” to get Elmore’s charge reduced or beaten, but indicated (as did the prosecutor) that no agreement or deal had been made. Likewise, even the post-trial letter from Elmore’s counsel to the prosecutor only made an inquiry about the charge Elmore would have liked to have pleaded to, and whether that was acceptable to the prosecutor.

Of greater difficulty is whether there was a duty to disclose because Elmore otherwise received a reasonable expectation of leniency in exchange for his testimony. We conclude, after a thorough review of the record, that there is no record evidence to establish that defendant falsely testified regarding his expectations or lack thereof, nor did the prosecutor have any duty to disclose. As noted previously, the issue of the prosecution entering into plea negotiations with Elmore repeatedly arose, and each time all parties (and the court) denied the existence or knowledge of the existence of any such negotiations. Rather, counsel for Elmore repeatedly indicated what he “hoped” would occur for his client in the future, whether through his artful lawyering or otherwise. Even the court and prosecutor separately noted that Elmore’s counsel was only expressing *his own* “hope” or “anticipation,” not the prosecution’s. Hence, close scrutiny of the record only reveals Elmore’s hope for a future plea, which according to *Atkins* would only allow the jury to speculate. *Atkins, supra*.

The strongest evidence for defendant is that prior to trial the prosecution alerted the court of its belief that a “deal” would be reached with Elmore before trial. Additionally, the post-trial letter from Elmore’s counsel indicates his “understanding that Jason *complied with the agreement* and testified truthfully at the Trial” (Emphasis added.) As to the reference to a “deal,” there is nothing in the record to suggest that any purported “deal” had to do with Elmore’s testimony, rather than, for example, the facts of the case as developed prior to trial. Additionally, while both Elmore and his counsel may have expected to obtain some kind of consideration for Elmore’s truthful testimony, there was no evidence to reveal that the prosecution and Elmore’s counsel discussed any such offer. Indeed, the letter only illustrates defense counsel’s *own expectation* of consideration in exchange for the witness’ truthful testimony and his hope that Elmore be able to plead guilty to a misdemeanor charge of assault and battery. The fact that the witness later pleaded to a lesser offense does not demonstrate that he had a reasonable expectation of leniency. Moreover, it was not improper for the prosecutor to recommend lenient consideration for the witness after the fact.

Further, the jury was aware of the charge pending against Elmore and defendant extensively cross-examined Elmore concerning his motivation and credibility, including the possibility of future plea bargains. *Mumford, supra; People v Mata*, 80 Mich App 204, 208; 263 NW2d 332 (1977). In light of the thorough questioning of Elmore, and the closing argument by defense counsel, it was clearly brought to the jury’s attention that Elmore may have had a motive

to testify as he did. Accordingly, there was nothing to disclose, no false testimony stood uncorrected, and no false representations were made.

Further, even if we concluded that the prosecution had a duty to disclose, or that Elmore provided false testimony, we would conclude that defendant's conviction did not result in a miscarriage of justice. MCL 769.26; *People v Minor*, 213 Mich App 682, 685-688; 541 NW2d 576 (1995). We reach this conclusion based on the fact that, unlike in *People v Wiese*, 425 Mich 448, 451; 389 NW2d 866 (1986) and *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972), Elmore's testimony was not the sole basis for defendant's convictions. Rather, defendant himself admitted to striking the victim in the face with a gun, causing the victim to fall to the ground and curl up in pain. Defendant admittedly then shot a round into the floor near where the victim lay. Additionally, Sara Beltran testified that defendant "pistol whipped" the victim, shot the round into the floor, and then proceeded to kick and hit the victim while he was on the floor. Beltran also testified that defendant with others took the victim to the basement, where she heard the beating continue. It was also Beltran who saw the victim lying naked and shaking on the basement floor in a pool of blood. Thus, defendant and Beltran's testimony alone was enough to convict defendant of the crimes for which he was actually convicted.² Therefore, following *Atkins*, we find no error and no violation of defendant's due process rights.

Defendant's third issue on appeal is that his trial counsel was ineffective in failing to request a cautionary accomplice instruction regarding Elmore's testimony and that the failure of the trial court to give such an instruction was reversible error. In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* At the same time, because defendant failed to object to the absence of an instruction regarding accomplice testimony, defendant's argument regarding the propriety of the trial court's instructions will be reviewed for plain error, which generally requires a showing of prejudice. *Carines, supra* at 763-764.

It has been "deemed reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). A case is "closely drawn" when the case is a credibility contest between the defendant and the testifying accomplice. *People v Wilson*, 119 Mich App 606, 620; 326 NW2d 576 (1982).

² Interestingly, it was only Elmore who testified that defendant had engaged in the sexual brutalization of the victim, yet defendant was not convicted of criminal sexual conduct. Beltran could not testify that defendant participated in the use of the broom handle or bottle on the victim. These facts give credence to the fact that the jury may well have placed less weight on the testimony of Elmore given the cross-examination and closing argument.

We hold that defendant was not prejudiced by his trial counsel's failure to request or the trial court's failure to give the jury instruction regarding accomplice testimony, and therefore, find no error requiring reversal. The jury heard testimony that Elmore was facing an assault with intent to murder charge, so it was aware that the prosecutor was charging him as an accomplice. Additionally, the witness' credibility was vigorously challenged. The jury was also instructed that it was free to believe all, none, or part of his testimony, and the general witness instructions received by the jury instructed that the jury should consider a witness' reasons for testifying, as well as any bias or personal interest of the witness. Because the essential character of the accomplice jury instruction was given to the jury, defendant was not prejudiced by the alleged error, nor was defense counsel ineffective in failing to request that specific instruction. See *Noble, supra*. Further, this case did not involve a credibility contest between the accomplice witness and defendant. Rather, several other witnesses implicated defendant in the crime. Accordingly, defendant's argument is without merit.

Defendant's fourth issue on appeal is that his trial counsel was ineffective in failing to object to an erroneously scored sentencing variable, which resulted in a disproportionate sentence. We disagree. Sentencing decisions, including determining the number of points to be scored, are within the trial court's discretion and reviewed for an abuse of that discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant's sentence is controlled by the legislative sentencing guidelines. MCL 769.34(1). Defendant's prior record variable (PRV) 7 score was improperly calculated because it included defendant's felony-firearm conviction; however, the trial court stated on the record numerous reasons why it departed from the sentencing guidelines. If a trial court would have found substantial and compelling reasons to depart from the sentencing guidelines, resentencing is not required if a variable is improperly scored. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002), *aff'd* 468 Mich 50 (2003). While the trial court scored PRV 7 improperly, the trial court articulated numerous substantial and compelling reasons for departure from the sentencing guidelines.

A trial court's substantial and compelling reasons for departing from the sentencing guidelines must be articulated on the record. MCL 769.34(3). A trial court cannot base a departure from the guidelines on factors already considered in determining the appropriate guidelines range, unless those factors were given inadequate or disproportionate weight. *Id.* In this case, the trial court noted the exceptional cruelty and brutality inflicted on the unsuspecting victim, and defendant's role in this viciousness. As our Supreme Court stated in *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994), particularly egregious and aggravating circumstances can justify departures from the guidelines. The brutality of the crimes and defendant's involvement in initiating the assault and preventing others from leaving the scene, thereby preventing anyone from getting help to the victim, justified the departure from the guidelines. The trial court considered defendant's role in initiating the assault, as well as defendant's conduct up until the point the victim was found wandering in the snow, dazed and severely injured. The trial court's reasoning reflected a wide range of factors not considered under the sentencing guidelines. Consequently, defense counsel was not ineffective in failing to object to the scoring error, as defendant has failed to establish that, absent counsel's error, the result of the proceedings would have been different. See *Noble, supra*.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Talbot