

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMMY ALLEN ROSENBERG,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 251930

Barry Circuit Court

LC No. 02-100200-FH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant's charged offense stemmed from a controlled purchase of cocaine from defendant using a police informant. Following a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced, as an habitual offender, fourth conviction, MCL 769.12, to 180 to 360 months' imprisonment and given 130 days credit for time served. He appeals as of right. We affirm defendant's conviction, but vacate his sentence.

I. Prosecutorial Misconduct

Defendant asserts multiple claims of prosecutorial misconduct. We review de novo a preserved claim of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *Thomas*, *supra* at 453-454.

A.

In defendant's only preserved claim of prosecutorial misconduct, defendant argues that the prosecutor improperly questioned a police officer concerning character evidence in violation of MRE 404(b)(1) because it implicated defendant as the "main source" for cocaine in Barry County. The use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). In this case, the police officer's testimony

about the main sources of cocaine in Barry County does not present a danger of convicting defendant based on a history of other misconduct because the testimony never specifically named defendant as a “main source” of cocaine in Barry County and thus, never referenced a specific prior “bad act” of defendant. The officer was speaking generally about his personal knowledge regarding the sources of cocaine in Barry County—not defendant’s status or actions in Barry County as a drug dealer. Therefore, we find that MRE 404(b) was not violated because evidence regarding defendant being involved in the drug trade was not introduced by the officer’s testimony. Because the evidence was admissible, there was no prosecutorial misconduct relating to the officer’s testimony.

B.

Defendant’s remaining claims of prosecutorial misconduct are unpreserved. Defendant first argues that when the prosecutor asked the police informant on redirect examination if he had purchased cocaine from defendant within the five months preceding the controlled drug purchase from defendant, the prosecutor again delved into prior bad acts of defendant to show action in conformity therewith. We disagree. As the trial court correctly noted, defense counsel had inquired into the informant’s previous drug transactions with defendant during cross-examination. The general rule is that a defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. In other words, defendant “opened the door” to the challenged evidence. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Therefore, the prosecutor did not commit misconduct by posing the question.

Next, defendant contends that the prosecutor impermissibly elicited testimony from two officers that defendant was a source of drugs in the Hastings area. Defendant argues that this information was inadmissible, because it was not based upon personal knowledge. First, defendant does not argue that the trial court erred when it permitted the admission of this testimony, but rather argues that it was misconduct on the part of the prosecutor to even attempt to elicit such testimony. However, a “prosecutor’s good-faith effort to admit evidence does not constitute misconduct.” *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Furthermore, our Supreme Court has stated that it “is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). In the present case, the prosecutor elicited this testimony to provide the jury with an understanding of the general drug-trafficking environment in Barry County and explain the reason that the officers arranged the undercover buy from the informant as part of their investigation. Neither officer directly connected defendant to any specific drug sale, but rather, their testimony indicated that, from their investigations, they believed that there was one main source of drugs and that they could get to that source through the informant. Therefore, there is no basis upon which to conclude that the prosecutor offered this evidence in bad faith.

Defendant also argues that the prosecutor improperly accused a defense witness of lying under oath during questioning. It is well established that cross-examination is an important trial tactic for “‘revealing possible biases, prejudices, or ulterior motives of the witness as they may relate to issues or personalities in the case at hand.’” *People v Layher*, 238 Mich App 573, 579; 607 NW2d 91 (1999), quoting *Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974). In addition, a prosecutor may warn a defense witness about committing perjury during cross-examination. *Id.* at 587.

During the cross-examination of defendant's alibi witness, the prosecutor attempted to elicit testimony from the witness suggesting that defendant recently altered his appearance to look more like the alibi witness and that this was done to establish a possibility that the informant mistook defendant for the alibi witness at the drug sale. To this the witness responded, "where exactly would you be trying to go with this?" The prosecutor then replied that, in addition to perjuring himself, the prosecutor believed that the witness manufactured the alibi with defendant and that the defendant's changed appearance was part of that attempt. As already noted, a prosecutor may properly warn a witness regarding perjury, and, although the prosecutor used strong language, we find that, taken in the context of this particular exchange on cross-examination, the prosecutor's statements were closer to a warning to the witness regarding perjury rather than prosecutorial misconduct. Furthermore, any prejudice defendant may have suffered as a result of this exchange was cured when the trial court informed the jury that the lawyers' questions to witnesses are not evidence. *People v Ortiz*, 249 Mich App 297, 313; 642 NW2d 417 (2001).

Next, defendant argues the prosecutor failed to correct false testimony when the police informant stated that, under his plea agreement, he would be sentenced to a maximum of a year in jail. Defendant insists the prosecutor knew that defendant's plea agreement did not include jail time, but nonetheless failed to correct his testimony on cross-examination. Defendant correctly observes that a prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence when it appears. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). In this case, the prosecutor did not elicit the allegedly inaccurate testimony regarding the informant's plea agreement and, by the time of that testimony, the prosecutor had already admitted the actual plea agreement into evidence. Furthermore, defendant's trial counsel read the agreement into the record during his closing argument. Therefore, defendant suffered no prejudice warranting reversal.

Finally, defendant contends that, throughout his closing and rebuttal arguments, the prosecutor repeatedly and improperly referred to defendant as a big drug dealer and mischaracterized the testimony of various witnesses as direct testimony to that fact. Defendant argues that this repeated conduct was done as an attempt to get the jury to convict defendant based on bad character, rather than the facts. Defendant contends that this conduct prejudiced the jury against him and, therefore, that he is entitled to a new trial. We disagree.

At trial, defendant's theory of the case was that defendant was not at home during the time the drug sale was alleged to have occurred. To support this theory, defendant supplied his roommate at the time as an alibi witness. The alibi witness testified that defendant was not home on the day in question, and that, although the police informant did stop by the house, the informant spoke to him rather than defendant. The alibi witness also stated that he did not sell the informant drugs and that he had no knowledge of any drug activity by defendant. To refute the alibi witness' statements and establish that the witness had a reason to lie, on cross-examination the prosecutor asked the alibi witness to read a statement that he had earlier made to police. The statement was, "... even if I did come out and say that – let's just hypothetically say [that] Tim was, quote, unquote, the biggest drug dealer in Hastings, makin[g] a killing, pushin[g] kilos of cocaine through his house every week, it's gonna come back [to] me that I said this shit and then I'm gonna have to deal with the shit." Defendant argues that this statement was inadmissible hearsay. Yet there is no evidence on the record that the statement was admitted to

prove the truth of the matter asserted. MRE 801. On the contrary, the statement tends to show the alibi witness' state of mind, namely that he was afraid of the consequences that might result if he were to make accusations against defendant, and demonstrate a motive to lie. Furthermore, given the witness' references to kilos of cocaine, the statement also tended to impeach the alibi witness' assertion that he had no knowledge of any drug activity by defendant. Therefore, the evidence was not hearsay and was properly admitted.

Likewise, the prosecutor did not misuse this statement in his closing argument. Prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). For this reason, this Court will "not review the prosecutor's remarks in [] a vacuum; the remarks must be read in context." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). The scope of the review is important, "because an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.*

During his closing argument, the prosecutor initiated a discussion of the alibi witness' statement by questioning the alibi witness' truthfulness. The prosecution then said, "Why would he lie for Timmy? I'll put it in his words." The prosecutor then quoted the alibi witness' statement. The prosecutor followed this quote with an argument that the alibi witness was lying on behalf of defendant because he was afraid of him. The argument centered on the alibi witness' statement and specifically the portion where the alibi witness stated that, hypothetically, defendant was the biggest drug dealer in Hastings and moved kilos of cocaine. The prosecutor then tied this statement to the evidence that the police believed that there was one primary source of cocaine in Hastings. When taken in context, this portion of the prosecutor's closing statement was not an impermissible argument that defendant had bad character, i.e. is a big drug dealer, and therefore, the jury should convict him contrary to MRE 404(b), see *People v VanderVliet*, 444 Mich 52, 63-65; 508 NW2d 114 (1993), but rather that defendant's alibi witness was lying on the stand and that he was motivated to lie by a fear of defendant. Hence, the prosecutor's argument was simply an attempt to place the alibi witness' statement into context and suggest to the jury that they could not trust his testimony.

Similarly, the prosecutor's statements that defendant was the biggest drug dealer in Hastings did not constitute misconduct. The jury heard testimony by the officers that they were investigating cocaine trafficking and that their investigations led them to believe that there was one major source of cocaine for Hastings. The officers further testified that they relied upon informants to move up the ladder of distribution and that they arranged for an undercover officer to make a buy from the witness who later became an informant, in order to gain access to the person who was the primary source of cocaine in Hastings. The jury then heard testimony that the informant did in fact agree to help the police and made a purchase from defendant. Defendant's own trial counsel also elicited testimony from the informant that he had purchased cocaine from defendant on several occasions in the past. It is well-established that the prosecutor "need not confine his argument to the 'blandest of all possible terms,' but has wide latitude and may argue the evidence and all reasonable inferences from it", *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (citation omitted), and the evidence presented at trial supported a reasonable inference that defendant was a major cocaine trafficker. Therefore, the prosecutor did not commit misconduct simply by arguing that the evidence indicated that defendant was the biggest cocaine dealer in Hastings. On the other hand, as already noted, it would be improper for

the prosecutor to present this argument as an attempt to convince the jury that it should convict defendant based upon his bad character. *VanderVliet, supra* at 63. However, we believe that the prosecutor's statements, taken in context, were an attempt to refute defendant's theory that the police were simply targeting defendant because they disliked him and that the police informant falsely accused defendant to please the police and obtain a lenient sentence. The prosecutor's argument was that the police investigation led to defendant all along and was not motivated by any desire other than to curtail cocaine trafficking. Therefore, the prosecutor's statements were properly responsive to defendant's theory of the case.

In addition, to the extent that the prosecutor's conduct may have prejudiced defendant, this prejudice was alleviated by the trial court's instructions. The trial court expressly instructed the jury that the "lawyer's statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Likewise, to the extent that the prosecutor mischaracterized the officer's and alibi witness' testimony as directly, rather than inferentially, stating that defendant was a major drug dealer, this mischaracterization does not warrant a new trial, because it too could easily have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) ("No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.").

Given the context and the responsive nature of the prosecutor's arguments, we do not believe there was misconduct that constituted plain error. Even if these comments by the prosecutor were to be characterized as plain error, we do not believe that they would warrant a new trial. In order to warrant a new trial, an unpreserved plain error must have been outcome determinative. *Carines, supra* at 763. The burden to demonstrate that the error affected the outcome of the trial is on the defendant. *Id.* In the present case, the jury heard compelling evidence from the government informant that he purchased the cocaine at issue from defendant. The informant was very familiar with defendant, indeed was his cousin, and was familiar with defendant's alibi witness. Therefore, identity was not an issue. Furthermore, the presence of defendant's truck and the phone records corroborated the informant's testimony. In addition, compelling evidence was presented that the informant had no contraband or access to contraband in the short time between his detention and the controlled buy. To counteract this evidence, defendant was only able to produce a weak alibi witness, whose testimony was thoroughly discredited at trial. Given these facts, it is highly unlikely that, but for the prosecutor's allegedly improper statements in closing, defendant would have been found not guilty. Finally, even if defendant had demonstrated plain outcome determinative error, we would still decline to reverse because the alleged errors did not result in the conviction of an actually innocent defendant nor did they seriously affect the fairness, integrity or public reputation of the judicial proceeding. See *Id.*

Therefore, there was no prosecutorial misconduct warranting a new trial.

II. Change of Venue

Defendant next argues that the trial court erred by denying defendant's pre-trial motion for a change of venue because of pretrial publicity. In denying the motion without prejudice, the court stated that it would be more appropriate to first impanel a jury and then make a decision on

a change of venue if defendant renewed his motion. The court and both parties engaged in a thorough jury selection process in which potential jurors were questioned regarding any prior knowledge of the case. Following the selection of the jury, defense counsel expressed satisfaction with the jury. As a result of defense counsel's acquiescence and failure to renew his objection to venue, this issue is waived. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000).

III. Recall of a Witness

Defendant next argues that the trial court erred by not allowing defendant to recall a police officer to testify about some previous police reports regarding drug deals between the informant used in the controlled buy and defendant. Defendant insists the trial court's refusal to grant defendant's request violated defendant's fundamental constitutional right to call a witness on one's own behalf. We disagree. A court's denial of a request to recall a witness for further cross-examination may be reviewed to determine if there has been an abuse of discretion. *Potts v Shepard Marine Constr Co*, 151 Mich App 19, 26; 391 NW2d 357 (1986), citing *People v Raetz*, 15 Mich App 404, 406; 166 NW2d 479 (1968). Here, the only reason offered by defendant for recalling the officer was that he wished to question him concerning police reports containing information about drug purchases made by the informant. Defendant presents no reason why he could not have achieved this during his cross-examination of the officer during the prosecutor's case-in-chief. Moreover, defendant has not stated on appeal how the officer's testimony would have helped his case or what relevant information was contained in the police reports. As a result, it is impossible to determine how defendant would have been benefited if his defense counsel was permitted to re-cross-examine the officer. Accordingly, we find no abuse of discretion.

IV. Offense Variable (OV) Scoring

Defendant next argues that the trial court erred in the scoring of offense variables 2, 14 and 19. Because defendant committed the offense in February 2002, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review a trial court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

A. OV 2

Defendant first argues that OV 2 was incorrectly scored at five points because there was no testimony that defendant executed the drug transaction while in possession of a gun or rifle. We agree. MCL 777.32(c) provides that five points be scored if the offender "possessed a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." The statute does not define "possessed." Here, the trial judge concluded that defendant possessed a gun during the drug transaction conducted in his driveway because there was evidence that defendant had a hand gun or long rifle somewhere in his house at that time.

There is little case law surrounding the interpretation of whether a defendant “possessed” a potentially lethal weapon for purposes of scoring OV 2. However, the analogy we find appropriate here is to another “possession” crime, i.e., possessing a firearm when committing a felony, MCL 750.227b. Under that statute, the offender’s gun must be “reasonably accessible” at the time of the crime in order for the offender to have “possession” of the weapon. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). In this case, it cannot be said that defendant had “ready accessibility” to the guns when he was standing outside of his home and the prosecution alleged that the weapons were located inside the home. The trial court should have scored zero points for OV 2.

B. OV 14

Next, defendant argues that the trial court erred in scoring ten points for OV 14. We agree. MCL 777.44(1) states that “[o]ffense variable 14 is the offender’s role” in the crime committed. Ten points is only assessed if the offender was a leader of a multiple offender situation. MCL 777.44(1)(a). The trial court viewed defendant (seller) and the police informant (buyer) as the multiple offenders and defendant as the leader of the two offenders. Thus, the issue is whether an undercover police informant can be considered an “offender” under the plain wording of the statute.

Because the statute does not define “offender,” it is proper to consult dictionary definitions to ascertain the meaning of an undefined word. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). An “offense” is defined as “a breach of the criminal laws” and an “offender” indicates a “person implicated in the commission of a crime.” *Black’s Law Dictionary* (6th ed), p 1081. Here, the informant was acting at the behest of the police in this case, and thus, he cannot be considered to have legally breached the law as the police authorized his actions. Because defendant acted alone in selling the drugs, there was only one offender in this case. Therefore, it cannot be said that there was a “multiple offender situation” in this case. Accordingly, defendant cannot be a “leader” of a “multiple offender transaction.” MCL 777.44(1)(a). Zero points should have been assessed for OV 14.

C. OV 19

Defendant next argues the trial court erred in assessing OV 19 at ten points. This score is appropriate when “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). Our Supreme Court recently stated in *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004), that whether a defendant “interfered with or attempted to interfere with the administration of justice” is a phrase that is broadly interpreted when assessing OV 19. Moreover, this Court will affirm the discretionary ruling of a trial court in matters of guidelines points when the record adequately supports a particular score. *Hornsby*, *supra* at 468.

In this case, the record indicates that the prosecutor and defendant presented conflicting testimony as to whether defendant had a hand in producing or encouraging questionable testimony from a defense witness. Based on this conflicting testimony, the trial court determined that defendant attempted to interfere with the administration of justice. We find that, in light of the high level of deference this Court must give the trial court’s discretionary decision

concerning this offense variable, the trial court did not abuse its discretion in scoring OV 19 at 10 points.

V. Sentencing Departure

Defendant next argues that the trial court erred in departing upward from the sentencing guidelines range. Defendant's guidelines range provided for a minimum sentence of 19 to 76 months, but the trial court imposed a minimum sentence of 180 months.

A. Standards of Review

A trial court may only sentence a defendant outside the guidelines if it finds a substantial and compelling reason to do so, and states its reason(s) on the record which justifies that departure. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Babcock, supra* at 265. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

B. Analysis

Defendant argues that the trial court erred by considering all of defendant's prior misdemeanor offenses. A court may not base a departure on an offense or offender characteristic already taken into account unless the court finds, based on the facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). The presentence investigation report indicates that defendant had thirty-one misdemeanor convictions. Under prior record variable 5, a maximum score of twenty points is assessed for seven or more prior misdemeanor convictions. MCL 777.55(1)(a). And although the trial court only found seventeen of the thirty-one convictions countable under the guidelines, that is still far in excess of the number considered under the variables. Furthermore, the trial court noted that defendant's extensive criminal record included, among others, at least eight previous assaultive crimes, that it felt were not properly considered under the variables. Because these factors were both objective and verifiable, the trial court properly considered them in determining to deviate from the guidelines.

Defendant also argues that the trial court erred when it considered defendant's previous acquittals and pending charges. However, defendant is incorrect. This Court has held that a trial court may consider the acquittals and pending charges. See *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Finally, defendant contends that the trial court erred when it considered defendant's continuous criminal behavior, because the trial court's opinion as to the likelihood of defendant committing another crime is subjective and unverifiable. We disagree. We believe that the trial court properly considered the threat posed by defendant to his community. The defendant's

record reveals a consistent disregard for the law, which is objective and verifiable, and not adequately accounted for by the variables.

Therefore, we find that all of the above factors were properly considered and were both objective and verifiable reasons to depart from the sentencing guidelines. However, this does not end our review, for we must also determine whether the reasons stated by the court were substantial and compelling reasons to depart from the guidelines range. *Babcock, supra* at 270. Our Supreme Court has said that in “determining whether a sufficient basis exists to justify a departure, the principle of proportionality – that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record – defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Id.* at 262. We agree that the guidelines did not adequately reflect this particular defendant’s history and that a more properly proportionate sentence may be had by deviating upwards beyond the recommended minimum sentence range. However, we do not believe that the factors considered were sufficiently substantial and compelling to justify the extent of the trial court’s departure. We hold that, under the circumstances presented in this case, a departure of more than double the recommended 76 month maximum, and almost four times the corrected range, falls outside the principled range of outcomes and, therefore, constituted an abuse of discretion by the trial court. See *id.* at 269. Consequently, we vacate defendant’s sentence and remand to the trial court for sentencing in accord with this opinion.

VI. Ineffective Assistance of Counsel

Defendant also asserts several claims of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, defendant must show that (1) the attorney’s performance was objectively unreasonable in light of prevailing professional norms and that, (2) but for the attorney’s error or errors, a reasonable probability exists that a different outcome would have resulted, i.e., defendant must show prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant argues on appeal that he was deprived of effective assistance of counsel by his lawyer’s failure to object to the various instances of prosecutorial misconduct discussed above. Because we have determined that defendant’s prosecutorial misconduct claims are without merit, defendant was not deprived of effective assistance of counsel. An attorney is not required to make futile objections. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant also briefly argues that defense counsel should have questioned an investigating officer during cross-examination about police reports concerning the informant. Defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* And decisions regarding what evidence to present and how to question witnesses are presumed to be matters of trial strategy which a court will not review with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant fails to articulate how further cross-examination of the officer would have benefited defendant and affected the outcome of his case and thus, fails to overcome this presumption.

Defendant further argues that defense counsel was ineffective for failing to question all the potential jurors concerning their prior knowledge of the pending trial and the publicity surrounding it. We disagree. The record indicates that both defense counsel and the prosecutor

engaged in extensive juror voir dire and only one juror indicated she had knowledge about the case. This witness was then sequestered, questioned and determined to be a proper juror by the judge, prosecutor and defense counsel. We find no basis for defendant's ineffective assistance of counsel claim.

VII. Resentencing

Finally, in his supplemental brief, defendant argues that he must be resentenced in light of the United States Supreme Court's recent decision in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court noted that *Blakely* is inapplicable to Michigan's sentencing system stating, "Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." Defendant contends that this language in *Claypool* is mere dicta and not binding on this Court. But in *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), the defendant raised the exact same issue in his supplemental brief regarding the applicability of *Blakely*, and this Court rejected the assertion that the statement from *Claypool* pertaining to *Blakely* is not binding precedent.

We affirm defendant's conviction, but vacate his sentence and remand to the trial court for sentencing in accord with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Richard A. Bandstra