

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHIRLEY ANN EWING,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 252558

Genesee Circuit Court

LC No. 03-011696-FC

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions for second-degree murder, MCL 750.317, two counts of 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 to fifty to eighty-three years in prison for the second-degree murder conviction, two terms of five to ten years in prison for the assault convictions, to be served concurrently with the second-degree murder conviction, and a consecutive term of two years in prison for the felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing on the second-degree murder conviction.

Defendant first claims that she was denied a fair trial because of multiple instances of prosecutorial misconduct and is entitled to a new trial on the basis of individual and cumulative error. We disagree. This issue was unpreserved because defendant failed to object at trial to any of the alleged instances of misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Issues of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court must review the pertinent part of the record to evaluate the remarks in context and in light of the defendant's arguments. *Id.* Prosecutors are accorded great latitude in their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors can use "hard language" when it is supported by the evidence and are not required to use the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant first contends that the prosecutor committed misconduct by improperly evoking sympathy for the victims. A prosecutor may not appeal to the jury to sympathize with

the victim. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Defendant argues that during the prosecutor's cross-examination of Tonya Smithers, who was Leon Smithers'¹ estranged wife, he improperly offered condolences, elicited her comment about heartbreak stemming from Smithers' death, and cross-examined her about how she felt about defense counsel "shoving" a personal protection order into her face.² These questions were not improper because they were relevant in light of defendant's evidence attempting to establish that Smithers was abusive toward women, and the prosecutor's offer of condolences to the victim's wife, while perhaps better kept to himself, was not plain error affecting defendant's substantial rights.

Defendant also claims that the prosecution appealed to jury sympathy during closing argument by labeling the victims "three innocent people." The characterization of the victims as innocent was directly responsive to defendant's theory of the case that she acted in self-defense and that Booker Washington, one of the shooting victims, was lying about what had happened. These remarks were not improper.

Defendant next asserts that the prosecutor improperly appealed to juror sympathy by stating in closing argument:

Ladies and Gentlemen, Mr. Smithers will never eat another ice cream cone, he will never spend another Christmas with his family, he is gone, and he is not coming back.

The prosecution immediately attempted to correct this apparent appeal for sympathy by stating:

This trial is not about sympathy for Mr. Smithers. Mr. Smithers has friends and family who have that job. They're the ones who give sympathy.

This statement may have assisted in dispelling any possible prejudice. Regardless, during jury instructions, the court cured any error by reminding the jurors to make their decision "based only on the evidence and only the law that this court gives to you, and not on your sympathies or your prejudices." The prosecutor's alleged attempt to arouse sympathy in the jury was not plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor improperly appealed to the jurors to do their civic duty. A prosecutor should not resort to civic duty arguments that appeal to the fears and prejudices of the jurors or that express personal opinions of guilt. *Bahoda, supra* at 282-283; *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). During closing argument, the prosecutor stated, "You are the only ones who can deliver justice. That is your job." These remarks were not improper because the prosecutor did not assert a personal belief in defendant's

¹ Mr. Smithers was the murder victim.

² Defendant objected to the characterization of the presentation of the personal protection order to Tonya as "shoving," but did not object to the line of questioning as improperly appealing for juror sympathy.

guilt or argue that the jury should convict defendant regardless of the evidence. *Id.* In any case, any potential impropriety was cured by the trial court's instruction that the jury was required to decide the case based only on the evidence. *Thomas, supra* at 456.

Defendant next asserts that the prosecutor improperly denigrated defendant and defense counsel. A prosecutor may not denigrate the defendant or suggest that defense counsel is intentionally attempting to mislead the jury. *Bahoda, supra* at 283; *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). During closing argument, however, a prosecutor is permitted to remark about the credibility of a witness, particularly when conflicting testimony exists. *Thomas, supra* at 455.

Defendant challenges the prosecutor's comments that defense counsel's focus on Smithers' conduct was "trying to pull a rabbit out of the hat." The prosecutor also referred to defendant several times as "the Terminator" and "Ms. Congeniality," and he repeatedly described her defense theory as a "bucket of Whoppers":

[H]ere is a whole bucket of my secretary's [candy] Whoppers, we need them because, ladies and gentlemen, she got up on that stand yesterday and gave us a bucket of whoppers, and I want to talk about them right now. . . . Number one, first whopper, Miss Congeniality.

* * *

So is what she saying true? Was she Ms. Congeniality? Are we going to believe her or are we going to believe the evidence? . . . Ladies and gentlemen, her testimony to characterize herself as Ms. Congeniality is a big whopper.

The prosecutor carried on numbering defendant's version of the facts as buckets of whoppers numbers two through ten. He also called her version of the facts "lies" and characterized her testimony as "preposterous" throughout his closing argument.

The prosecutor's language, while harsh, was in response to the credibility contest that defendant initiated with her defense theory. While the prosecutor's assertion that defendant's theory was not credible may have been presented differently, a prosecutor need not state arguments in the blandest possible way. *Matuszak, supra* at 55-56. Further, a prosecutor may argue from the evidence that a witness, including the defendant, is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Viewed in the context of the record and in light of defendant's theory, the argument was not improper. In the absence of an objection by the defense, prejudice was dispelled by the trial court's instruction that attorney arguments are not evidence. *Matuszak, supra* at 58.

Finally, defendant argues that the prosecutor improperly vouched for the veracity of several witnesses. A prosecutor may not vouch for the credibility of his witnesses by expressing a personal opinion about the witness' truthfulness or by implying that he has some special knowledge of that truthfulness. *Thomas, supra* at 455. However, a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Id.*

During closing argument, the prosecutor stated:

Ladies and gentlemen, nobody else has reason to lie. Booker Washington and Alan Sharp were shot. It is their motive to get the right person held accountable for what they did, that's why Booker's on tape saying, yeah, it was my sister that did it, and that's why he testified it's my sister that did it. Their motive is to tell the truth. The police's motive is to tell the truth. They are doing their jobs; they don't know her. They get into trouble if they get caught lying, the police – the police – the police department doesn't like that. They don't have any reason to lie. Sergeant Hosmer, he doesn't know her, he has not go [sic] reason to lie. Yet all these people are lying. Gee, isn't that interesting.

Everybody is lying, and that should tell you something, ladies and gentlemen.

Considered in context, the prosecutor in this case was not implying that he had special knowledge of the witnesses' truthfulness. He made no comments about his personal knowledge or belief regarding the truthfulness of the witnesses. Additionally, because defendant argued that the police and the witnesses were lying about what had happened, the prosecutor's remarks were properly responsive to defendant's theory of the case. The prosecutor's comments were not improper.

Defendant also argues that the cumulative error of the prosecutorial misconduct warrants reversal. Only actual errors are aggregated to evaluate their cumulative effect. *Bahoda, supra* at 292 n 64. After careful review of the record, we conclude that there was no plain error affecting defendant's substantial rights. Moreover, in light of the overwhelming evidence of defendant's guilt, any prosecutorial misconduct that may have occurred was not outcome determinative and does not require reversal. *Matuszak, supra* at 57.

Finally, defendant contends that defense counsel's failure to object to any of the alleged instances of prosecutorial misconduct constituted ineffective assistance of counsel. This issue is neither stated in the questions presented section of defendant's brief nor suggested by the stated issues, and thus, is not properly before this Court. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Regardless, defendant's assertion lacks merit. This Court neither substitutes its judgment for that of counsel regarding matters of trial strategy nor makes an assessment of counsel's competency in hindsight. *Matuszak, supra* at 58. Here, counsel may have failed to object because he did not want to draw attention to the prosecutor's statements. Further, counsel does not have to make meritless objections. *Id.* Here, the only improper comment by the prosecutor, an appeal for sympathy, was immediately corrected. Thus, defense counsel was not ineffective for failing to object to any of the comments.

Defendant next argues that the trial court abused its discretion when it imposed a sentence that is outside the guidelines range and disproportionate.

Because defendant committed her crimes in October 2002, the legislative sentencing guidelines apply to this case. MCL 769.34(2); *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). Under these guidelines, a trial court may only depart from the minimum sentence range if it has substantial and compelling reasons to do so, and states those reasons on

the record. MCL 796.34(3); *Solmonson, supra* at 668. The substantial and compelling reason justifying a guidelines departure must be objective and verifiable, meaning that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, the defendant, and others involved in making the decision and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). To be substantial and compelling, the reasons for departure must keenly or irresistibly attract this Court's attention and must be of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). The sentencing court may not base a departure on a factor already taken into account in determining the appropriate sentencing range, unless the court finds from the facts in the record that the factor has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock, supra* at 258 n 12.

In reviewing a departure from the guidelines range, whether a particular factor exists is a factual determination subject to review for clear error. *Id.* at 264. Whether a factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* Whether a factor constitutes a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* at 264-265. The amount of the departure is reviewed for an abuse of discretion. *Abramski, supra* at 74.

Here, the minimum guidelines range for defendant's second-degree murder conviction was 225 to 375 months. The court sentenced defendant to a minimum term of six hundred months in prison for the second-degree murder conviction. The trial court articulated four reasons for the upward departure:

- (1) Defendant obviously lied when [she] testified.
- (2) The guideline score of 130 is [thirty percent] higher than the maximum score. This shows the aggravating circumstances of her actions.
- (3) Her deliberation was frightful. She was removed from the scene house before the crime. She cool[ly] waited at the police station, then went home to collect her weapon. She cool[ly] walked to the crime scene, casually shot [three] victims, then deliberately went to her bowling alley to concoct an alibi.
- (4) The trial clearly shows [defendant] to be a woman with a very violent nature. Her violent history has now escalated to weapons [and] death. The court believes she will always be dangerous to society and should not be returned to society until her violent nature[] is reduced by old age.

First, with respect to the court's conclusion that defendant lied, we find it arguable whether this reason for departure is objective and verifiable; however, assuming it to be objective and verifiable, it does not constitute a substantial and compelling reason for departure. If a defendant's lack of truthfulness were a valid reason for departure, then departure would be warranted nearly every time a defendant testified and was found guilty. The trial court's reason does not keenly and irresistibly attract attention and is not of considerable worth.

The second departure factor, that defendant's guideline score was, at 130, thirty percent above the Level III minimum on the second-degree murder (M2) grid, MCL 777.61, is an

objective and verifiable fact. An offense variable (OV) score of over 100 is factored into the sentencing guidelines grid.³ The trial court found, in essence, that the M2 grid inadequately addresses scores that go well beyond 100 points. This premise does have some logic. If, in scoring the variables, the scoring becomes meaningless because 100 points have already been tallied, leaving no higher OV level available, it can certainly be argued that the offense characteristics or aggravating factors have been given inadequate weight. The trial court stated that the 130 total OV score showed the “aggravating circumstances of [defendant’s] action.” However, because Level I is zero to forty-nine and Level II is fifty to ninety-nine, a score of under 149 for Level III is not so high as to keenly and irresistibly attract attention and is not of considerable worth. Defendant’s offense variable score of 130 points was not a substantial and compelling reason to depart from the sentencing guidelines range.

The third reason that the trial court gave for departure was defendant’s deliberation. The prosecution argues that deliberation was objectively verifiable as shown by the testimony. The trial court emphasized that defendant acted coolly and deliberately; however, the jury found her guilty of only second-degree murder, thereby ruling out premeditation and deliberation. We conclude that defendant’s deliberation was not an objective and verifiable reason for departure as it was not external to the mind of the judge.

The fourth reason for departure, the conclusion that defendant was a danger to the public, is not objective and verifiable. See *Solmonson, supra* at 670. Future danger is mere speculation about defendant’s potential future actions. Therefore, this factor could not constitute a substantial and compelling reason for departure from the sentencing guidelines.

The trial court did not articulate any substantial and compelling reasons in this case for departure from the sentencing guidelines range. Therefore, we remand this case for resentencing. MCL 769.34(11); *Babcock, supra* at 265. If the trial court articulates legally sound factors or reasons that would support a departure, the trial court is free to again depart from the guidelines on remand. We do note that the court’s failure to articulate legally-compliant substantial and compelling reasons for departure nullified *any* departure, let alone the extensive upward departure found here. The sentencing guidelines range was 225 to 375 months. The court sentenced defendant to a minimum term of 600 months, almost double the guidelines range. “If a trial court departs from the guidelines range, and its sentence is not based on a substantial and compelling reason to justify the *particular* departure, i.e., the sentence is not proportionate to the seriousness of the defendant’s conduct and his criminal history, the Court of Appeals must remand to the trial court for resentencing.” *Babcock, supra* at 273 (emphasis in original). The trial court must give this case careful attention on remand should it again depart to the same extent, remembering that a substantial and compelling reason that might support a minimal departure may not necessarily support a greater departure. Considering that defendant had no prior criminal history, a departure that nearly doubles the guidelines range will necessarily draw close scrutiny.

³ OV Level III in the M2 grid includes all scores of 100 points or greater. MCL 777.61.

Defendant finally argues that the trial court also improperly departed from the guidelines for her two convictions for assault with intent to do great bodily harm less than murder. In *People v Mack*, __ Mich App __, slip op at 3-4; __ NW2d __ (2005), issued February 8, 2005 (Docket No. 249023), this Court held, citing MCL 777.21 and MCL 771.14, that when offenses are concurrent, the court only has to score the guidelines for the most serious offense. Accordingly, because the guidelines are not implicated with respect to the assault convictions, we reject defendant's argument.

Affirmed, but remanded for resentencing of defendant's second-degree murder conviction. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh