

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LAWAYNE DEALS,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 266619

Cass Circuit Court

LC Nos. 05-010031-FC;

05-010057-FC

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a(a), MCL 750.529; and assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant to concurrent sentences of 14 to 30 years’ imprisonment for the conspiracy to commit armed robbery conviction and 2 to 4 years’ imprisonment for the assault with a dangerous weapon conviction. Defendant appeals as of right his convictions and his sentences. We affirm.

On Thursday, August 14, 2003, three men, each with their face covered and brandishing a weapon, “burst through the front door” of the Cottage Inn in Dowagiac. The man wearing “a Scream mask” held a gun and went to the corner of the bar, in the direction of the cash register. The man wearing “a Jason mask” hit patron Kenny Kiggins with a bat on the hip and the head. The third man held a knife and remained at the door. Matthew Kiggins struggled with the man in the Jason mask, managing to pull the man’s t-shirt off over the man’s head, and another patron, Jeff Collette, attempted to take the knife from the man at the door. The man in the Scream mask shot Matthew and Jeff, and the three men ran away, leaving behind the t-shirt and the Jason mask. Subsequent testing of the mask, the t-shirt, and an earring found on the floor revealed a major and a minor DNA donor on each; defendant’s DNA matched the major donor. Several patrons testified that defendant’s physique matched that of the man who wore the Jason mask, and both of defendant’s ears are pierced. The Cottage Inn always had “a bit more cash on hand” on Thursdays, and that was the day checks were cashed from various businesses for employees.

Several hours after the incident at the Cottage Inn, Richard Davis received a visit from his nephew, Christopher Brinkley, and two other men, later identified as defendant and Herbert Ford, at his Dowagiac home. Davis described the men as acting “crazy,” “weird, strange, like they had just done something so, got in a fight or something.” Brinkley requested a change of

clothes and a ride to Niles, both of which Davis provided because he wanted the men out of his house. Defendant did not change his clothes, but as soon as he received directions to Chicago, he “hurried up and got out of there,” hitting a few curbs as he left. Davis could not recall whether defendant was wearing a shirt. Davis learned of the attempted Cottage Inn robbery a few days later, and on September 4, 2003, he contacted the police and provided Brinkley’s clothes.

Defendant first claims on appeal that the trial court erred in admitting Brinkley’s statement to Davis that he needed a change of clothes and a ride to Niles. Defendant argues that it was irrelevant under MRE 401, that it was unfairly prejudicial under MRE 403, that it was not a coconspirator’s statement under MRE 801(d)(2)(E), and that it violated his right of confrontation under the Confrontation Clause of the Sixth Amendment, US Const, Am VI. We disagree with all of these arguments.

We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Whether a rule or statute precludes the admission of evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). To the extent defendant’s assertions of error are unpreserved, we review those issues for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Evidence is relevant if it pertains to any fact that matters to the action and if it makes that fact in any way more or less likely to exist. MRE 401; *People v Crawford*, 458 Mich 376, 388-390; 582 NW2d 785 (1998). “Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). When combined with the DNA evidence, the timing of both the attempted robbery and the men’s arrival at Davis’ house, the men’s demeanor, and defendant’s presence with Brinkley, Brinkley’s statement requesting a change of clothes and a ride to Niles has a tendency to make the existence of the fact that defendant was one of the three men who attempted to rob the Cottage Inn more probable. Such relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Aldrich, supra* at 114. However, we are unable to discern any reason why Brinkley’s statement would have induced the jury to base its decision on “considerations extraneous to the merits of the lawsuit,” *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994), and we deem defendant’s argument that he was unable to cross-examine Brinkley pertinent to his Sixth Amendment right to confrontation.

In order to qualify an out-of-court statement as a coconspirator’s statement under MRE 801(d)(2)(E), the proponent of the statement must establish the following: (1) the existence of the conspiracy through independent evidence; (2) the statement was made during the course of the conspiracy; and (3) the statement furthered the conspiracy. *Martin, supra* at 316-317. Defendant asserts that Brinkley’s statement was not made during the course of the conspiracy because a conspiracy is complete once the agreement is formed, and Brinkley’s statement was made long after the agreement. However, a conspiracy “continues ‘until the common enterprise has been fully completed, abandoned, or terminated.’” *Id.* at 317, quoting *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993) (opinion by Boyle, J.). Escaping from the scene of the

crime is a primary objective in any conspiracy. See *United States v Carter*, 760 F2d 1568, 1581 (CA 11, 1985), criticized on other gds *United States v Manganellis*, 864 F2d 528 (CA 7, 1988).

Defendant asserts that Davis' home was a "position of temporary safety" for the three perpetrators, so the crime was completed and Brinkley's statement at that time could no longer constitute a coconspirator's statement under MRE 801(d)(2)(E). The three men did not arrive at Davis' home until several hours after the robbery was abandoned, and they had no apparent arrangements yet to be completed at that time. However, we disagree with defendant's characterization of Davis' home. The evidence shows that the three men were still in a considerable state of agitation and were continuing to take steps to avoid possible pursuit. Rather than a "position of temporary safety," Davis' home was, at most, a brief waystation for the three men while they continued their efforts to make good their escape. Therefore, we find that the trial court did not abuse its discretion in admitting Brinkley's statement as a coconspirator's statement under MRE 801(d)(2)(E).

We finally disagree that the admission of Brinkley's statement violated defendant's right to confrontation. Pursuant to US Const, Am VI, testimonial statements of witnesses absent from trial may only be admitted when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). While the Supreme Court in *Crawford* declined to "spell out a comprehensive definition of testimonial statements," *id.* at 68, it defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," *id.* at 51 (quotations omitted). Brinkley's statement was not a testimonial statement, but rather a simple request to facilitate his flight from the attempted armed robbery of the Cottage Inn. Accordingly, the admission of Brinkley's statement did not violate defendant's right of confrontation.

Defendant next argues that the jury's identification of him as the man who wore the Jason mask was not supported by sufficient evidence. We disagree. When reviewing the sufficiency of the evidence to sustain a conviction, we "must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Identity is an essential element of a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must identify the accused as the person who committed the offense, *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to identify the accused as the perpetrator. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999); *Kern, supra* at 409-410. Three of the patrons at the Cottage Inn, including the one who physically struggled with the man in the Jason mask, testified that defendant's physique matched the physique of the man who wore the Jason mask. Defendant's DNA matched DNA found on the Jason mask, on the white t-shirt pulled off the man wearing the Jason mask, and on an earring found on the floor of the Cottage Inn. Davis stated that all three men arrived at his house together in a similar state of agitation and were not "looking right," and that defendant was in such a significant hurry to depart for Chicago that he ran over curbs when he left. Defendant offers a number of innocent explanations, but the prosecution is not required to negate every possible theory consistent with a defendant's innocence. *People v Hardiman*, 466 Mich 417,

423-424; 646 NW2d 158 (2002). When all the evidence is viewed together, in the light most favorable to the prosecution, *Wolfe, supra* at 515, and making all credibility choices in favor of the prosecution, *People v Meshall*, 265 Mich App 616, 621; 696 NW2d 754 (2005), a rational trier of fact could find that the prosecutor proved beyond a reasonable doubt defendant's identity as the man who wore the Jason mask.

Defendant also argues that it was irrelevant and unfairly prejudicial to admit Davis' testimony that at the request of the police he tape recorded a telephone conversation with Brinkley regarding the robbery. The substance of the conversation, other than the general topic and the fact that the conversation lasted approximately fifteen minutes, was not disclosed to the jury. Davis' cooperation with police was relevant to his credibility and potential bias, given the length of time he waited between learning of the robbery and contacting the police and defendant's suggestion that Davis was trying to protect the three men. "The credibility of [a] witness[] is a material issue and evidence that shows bias or prejudice of a witness is always relevant." See *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). We are unable to perceive any reason the fact of the conversation would induce the jury to base its decision on "considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Pickens, supra* at 336. And we deem it an exercise in pure speculation to consider whether the jury might have assumed that Brinkley actually confessed to Davis during the recorded conversation. Admission of this testimony was not erroneous.

Defendant also argues that there was insufficient evidence of a conspiracy to rob the Cottage Inn. We disagree. Conspiracy is a specific intent crime, requiring the intent to combine with others and the intent to accomplish an illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). A conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement need be proven. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Here, the three men entered the Cottage Inn together, wearing face-concealing masks and brandishing weapons, on the night the Cottage Inn kept extra cash on hand, and one of the men immediately went to the part of the bar where the cash register was kept. Viewing this evidence in the light most favorable to the prosecution, *Wolfe, supra* at 515, a rational trier of fact could find beyond a reasonable doubt that defendant and the two men who entered the Cottage Inn with him conspired to rob the Cottage Inn. There was clearly evidence of concert of action, and such evidence creates an inference of conspiracy. *Cotton, supra* at 393-394. Defendant again sets forth several alternative theories, and again the prosecution was not required to negate every theory consistent with the defendant's innocence. *Hardiman, supra* at 423-424.

Defendant next argues that his convictions are against the great weight of the evidence because there was insufficient evidence to identify him as the man who wore the Jason mask or to find a conspiracy to rob the Cottage Inn. Having concluded that the prosecution presented sufficient evidence of both, we do not find that "the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadowski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant next claims on appeal that the prosecutor's misconduct denied him a fair trial. We review these unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392

(2003). Defendant first argues that the prosecutor denied him a fair trial when the prosecutor elicited Davis' testimony that he tape recorded a conversation he had with Brinkley regarding the attempted robbery of the Cottage Inn. We disagree, having already concluded that this testimony was properly admitted. Defendant next argues that the prosecutor improperly elicited irrelevant testimony from Joel Schultze that defendant's DNA was matched to DNA found on the Jason mask, the white t-shirt, and the earring through the CODIS database and from Officer Kristin Daly that she contacted defendant after receiving a telephone call from Schultze. We again disagree: both officers' testimony was relevant to explain how it was determined that defendant's DNA matched the DNA found on the mask, the t-shirt, and the earring. Defendant argues that this testimony was unfairly prejudicial because of the assumptions the jury would draw, but as we have discussed, we find no basis in the record for this and we will not engage in speculation. We therefore conclude that the prosecutor did not engage in any misconduct by introducing this testimony.

Defendant also argues that the prosecutor improperly appealed to the jury's civic duty and sympathy in his opening statement when he stated that defendant and two other men turned a small corner of Cass County into a combat zone when they attempted to rob an establishment that was trying to make money, that the actions of defendant and the two other men caused terrible impact on the lives of others, and that Matthew and Collette, still fearful, continue to suffer from their injuries and that their bodies are scarred and changed forever. A prosecutor may not appeal to the jury's fears, prejudices, or sympathy through a civic duty argument or an appeal to sympathize with the victim. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, the prosecutor is not limited to the blandest possible presentation of the case and evidence. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Our review of the record reveals nothing beyond the use of passionate terms to outline for the jury what would be established by the evidence. We perceive no appeal to sympathize with the victims, to the jury's fears and prejudices, or to convict defendant irrespective of the evidence. *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998), abrogated on other gds 473 Mich 275 (2005); *Matuszak*, *supra* at 56. Likewise, several witnesses testified regarding the actual injuries sustained by Matthew and Collette, as well as the fear and trauma sustained by the Cottage Inn patrons, all of which was relevant to the elements of defendant's charged counts of assault with intent to commit armed robbery. We see nothing in the record to suggest that the prosecutor elicited this testimony for the purpose of playing on the jury's sympathies.

The prosecutor did not engage in any misconduct, and defendant's argument that the trial court denied him a fair trial when it failed to correct or remedy the prejudice that resulted from the prosecutor's misconduct is without merit. On the basis of all the above, we are unable to perceive how the trial court could have erred in denying defendant's motion for a new trial.

Defendant finally argues that he is entitled to resentencing because the trial court engaged in impermissible judicial factfinding, *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and because the trial court improperly scored a number of offense variables when calculating his sentencing guidelines range. We disagree with the former

because *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). We disagree with the latter because we find no scoring errors.¹ We review a trial court's scoring decision for an abuse of discretion, and we uphold a scoring decision with any evidence to support it. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). We note that in a conspiracy, "each conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators." *People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997). Therefore, in scoring defendant's offense variables, the trial court properly considered the acts of defendant's coconspirators that were done in furtherance of the conspiracy to rob the Cottage Inn.

Defendant first challenges scoring ten points for OV 9, MCL 777.39, under which there were "2 to 9 victims." MCL 777.39(1)(c). "[E]ach person who was placed in danger of injury or loss of life [is] a victim." MCL 777.39(2)(a). Kenny was placed in danger of injury when defendant hit him with a bat on the hip and head. Matthew and Collette were placed in danger of loss of life when defendant's coconspirator shot them. In addition, McCrorey and Jack Daley were placed in danger of injury or loss of life when defendant's coconspirator pointed the gun at them. Accordingly, there is evidence in the record to support the trial court's decision that there were 2 to 9 victims, and we, therefore, affirm the trial court's scoring of ten points for OV 9. *Cox, supra* at 454.

Defendant next challenges scoring ten points for OV 4, MCL 777.34, under which "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Whether a victim sought treatment is not conclusive of whether the victim suffered serious psychological injury. MCL 777.34(2). Collette testified that the attempted armed robbery still affected him psychologically. McCrorey testified that defendant and his coconspirators took her trust and that, because of the attempted armed robbery, she has become a scared and fearful person. Thus, there is evidence in the record to support the trial court's decision that a victim suffered serious psychological injury requiring professional treatment. We affirm the trial court's scoring of ten points for OV 4. *Cox, supra* at 454.

Defendant next challenges scoring 25 points for OV 12, MCL 777.43, under which "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(a). A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act has not and will not result in a separate conviction. MCL 777.43(2). The record shows that at least three assaults with a dangerous

¹ We do note, however, that a sentencing information report (SIR) was prepared for each of defendant's convictions, despite the fact that defendant was given concurrent sentences, so a SIR need only have been prepared for the highest crime class conviction. MCL 771.14(2); *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). The lesser crime class conviction is not scored under the legislative guidelines, and the guidelines do not apply to the lesser crime class conviction. *Id.* at 129-130. We address only the scoring of defendant's conspiracy to commit armed robbery sentence, because the scoring of the variables for his assault with a dangerous weapon sentence are irrelevant.

weapon, not including defendant's assault on Kenny for which defendant was convicted, occurred during the attempted armed robbery of the Cottage Inn. "The elements of assault with a dangerous weapon are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In an attempt to rob the Cottage Inn, the man wearing the soft ski mask pointed the gun toward at least four people, Jack Daley, McCrorey, Collette, and Matthew. He shot Collette and Matthew. Accordingly, there is evidence in the record to support the trial court's scoring of 25 points for OV 12. We affirm the trial court's scoring of OV 12. *Cox, supra*. The trial court properly scored all offense variables, and defendant's minimum sentence falls within the resulting legislative guidelines range; it is therefore presumptively proportional and we are obligated to affirm it. MCL 769.34(10); *Babcock, supra* at 263-264.

Finally, defendant argues that he was denied the effective assistance of counsel. Defendant preserved this issue for appeal when he moved for a new trial on the basis that he received ineffective assistance of counsel. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2003). However, because the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record. *Id.* Defendant has not persuaded us that any arguments raised on appeal that were not raised by counsel below are meritorious. Because counsel is not ineffective for failing to make a futile motion, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), we are unable to conclude that his trial counsel made any errors that would have resulted in a different outcome of the proceedings below. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Defendant has therefore not established that he received ineffective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis