

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIMITRI G. ZAVALNITSKIY,

Defendant-Appellant.

UNPUBLISHED
February 10, 2011

No. 296013
Genesee Circuit Court
LC No. 09-025183-FH

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following trial, a jury convicted defendant, Dimitri Zavalnitskiy, of two counts of second-degree fleeing or eluding resulting in serious injury,¹ third-degree fleeing or eluding,² and possession of a firearm during the commission of a felony.³ The trial court sentenced him as a habitual offender, second offense,⁴ to concurrent prison terms of 48 months to 15 years each for the second-degree fleeing or eluding convictions, 36 to 90 months for the third-degree fleeing or eluding conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Flint Police Officer Kyle Brandon testified that he was on road patrol on July 4, 2008, in a fully marked police vehicle on Dupont Street. He observed a gray Jeep Cherokee on Begole Street approaching Dupont. He saw Dimitri Zavalnitskiy, a white male, hold a handgun out of the driver's side window and fire approximately three rounds into the air. Officer Brandon testified that there was nothing obstructing his view of the Jeep, that there was no doubt in his mind that Zavalnitskiy was the driver, and that Zavalnitskiy fired a gun out of the driver's side

¹ MCL 750.479a(4)(a).

² MCL 750.479a(3).

³ MCL 750.227b.

⁴ MCL 769.10.

window. Officer Brandon activated his emergency lights and siren and pursued the vehicle. The pursuit culminated in the Jeep ultimately running a stop sign, driving through an intersection without slowing down, and hitting another car. Officer Brandon stated that he saw a black male, the same individual from the front passenger seat, flee the scene. Officer Brandon then approached the overturned Jeep, pulled Zavalnitskiy out of the vehicle, handcuffed him, and placed him in the police cruiser. He located a black .45 caliber handgun next to the Jeep. He received information that led him to walk one block down to the corner of Begole and Chevrolet, where he observed a bullet hole in a downspout and a .38 caliber slug. Officer Brandon explained that he saw only two occupants in the Jeep.

Contrary to Officer Brandon's testimony, however, two witnesses testified that Zavalnitskiy was not the driver, but was the passenger in the Jeep.

Theodis Hatcher testified that on July 4, 2008, he and his wife were en route to visit his uncle who lived at the corner of Chevrolet and Begole Streets. As they approached the driveway, Hatcher saw a young man and a woman standing in his uncle's driveway. He then observed a four-door gray SUV, driven by a black male, turn onto Begole Street from Chevrolet Street. Hatcher saw Zavalnitskiy lean out the passenger side window and shoot about four times at the couple with a handgun. As the SUV continued down the street, Hatcher heard additional gunshots as it approached an intersection. He saw a police car pursue the SUV, and he watched as the SUV disregarded a stop sign, sped through an intersection, hit another car, and flipped onto its hood. Hatcher testified that he saw the driver, a slim, black man, get out of the truck and run away. Hatcher saw only two people in the SUV.

Benny Bell testified that he was in his car behind a marked police car when he noticed a Jeep "come out of Begole Street." He had heard gunshots before seeing the Jeep. According to Bell, Zavalnitskiy was not the driver, but was on the passenger side. Bell observed the police car activate its lights and sirens and pursue the Jeep. He saw the Jeep "bl[o]w straight through" a stop sign and "t-bone[]" another vehicle. Bell testified that he saw only two people in the Jeep—a black male who ran from the accident and Zavalnitskiy trying to get out of the vehicle until a police officer pulled him out through a window.

Sergeant Jeff Fray was the officer in charge on July 7, 2008, while Zavalnitskiy was in custody. Zavalnitskiy did not make a statement and requested an attorney. He was released on July 7, 2008, pending further investigation. On July 23, 2008, Zavalnitskiy and his attorney came to the police station to make a statement. Zavalnitskiy was not in custody, but Sergeant Fray read him his *Miranda*⁵ rights. Sergeant Fray subsequently resubmitted the case to the prosecutor, and Zavalnitskiy was charged.

In his trial testimony, Zavalnitskiy claimed there were *two* black men in the SUV. He admitted being the driver of the Jeep, but denied firing a weapon or having knowledge that the black individuals in his vehicle were armed when he gave them a ride. Zavalnitskiy presented a

⁵ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

duress defense, claiming that the other individuals in his vehicle forced him to elude the police. He maintained that, while en route to Walgreens to purchase medication for his father, he stopped at the Candy Market to purchase a Mountain Dew. He stated that, as he exited the store, he agreed to give a ride to a black male, “D,” who claimed that his girlfriend was in labor. “D” then motioned to another black male, “P,” to come with them. Zavalnitskiy stated that “D,” seated in the front passenger seat, then began shooting a gray pistol out the window. He stated that when he yelled for “D” to stop, “D” placed the gun in his lap pointed toward Zavalnitskiy⁶ and stated, “Don’t worry about it. Keep driving.” Zavalnitskiy claimed that he rolled up all of the windows except for the driver window, through which “P” fired a large black handgun similar to the weapon recovered at the accident. Zavalnitskiy claimed that, upon seeing the police car, both men yelled for him to continue driving straight. He next recalled striking a vehicle, being pulled out of the Jeep by an officer, and being transported to the hospital. After he was released from the hospital, he was transported to jail. He made no statements about the incident throughout this time.

The vehicle that Zavalnitskiy struck had three occupants in it: a male driver, a female passenger, and the female passenger’s three-year-old son. As a result of the vehicular collision, the female passenger, Karen King, suffered a broken arm, a hemorrhage, a leg injury, and ligament damage. She was unable to stand for an eight-hour work shift. She was in the hospital for a week. She wore a cast on both her leg and knee. She had surgery on her leg two weeks after the accident, for which she was in the hospital for one week afterwards. She had a cast on for three months.

The three-year-old boy was riding in a car seat in the rear of the car at the time of the accident. The boy suffered a laceration to his upper lip, which required stitches, and resulted in a scar. His mother described his lip as “a little puffer.”

The jury convicted Zavalnitskiy as stated. Zavalnitskiy now appeals.

II. PROSECUTOR’S CONDUCT

A. STANDARD OF REVIEW

Zavalnitskiy argues that the prosecutor violated his constitutional right to remain silent by eliciting testimony that Zavalnitskiy did not give a statement and requested counsel when he was initially in police custody after the offense, and by then commenting on that testimony during closing argument. Because Zavalnitskiy did not object to the prosecutor’s challenged remark

⁶ Zavalnitskiy’s did not mention that “D” had placed the handgun in “D’s” lap and pointed it toward Zavalnitskiy in his statement to the police on July 23, 2008. Zavalnitskiy only made that statement in his trial testimony.

and questions at trial, this issue is unpreserved, and our review is limited to plain error affecting Zavalnitskiy's substantial rights.⁷

B. LEGAL STANDARDS

“To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.”⁸ Reversal is warranted only when the error resulted in the conviction of an actually innocent person or when the error “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings”⁹ Also, this Court will not reverse if the alleged prejudicial effect of the prosecutor's remark could have been cured by a timely instruction.¹⁰

During the prosecution's case-in-chief, Sergeant Jeff Fray testified that while Zavalnitskiy was in custody on July 7, 2008, he did not make a statement and requested an attorney. Zavalnitskiy explained on direct examination that he voluntarily told Sergeant Fray his version of the events on July 23, 2008. He accused the police of failing to investigate his account appropriately. On cross-examination, Zavalnitskiy indicated that he did not make a statement on July 7, 2008, and that he did not recall mentioning his “harrowing experience” to the officer who pulled him out of the Jeep, the ambulance driver, or hospital personnel. Zavalnitskiy argues that the prosecutor continued his impermissible conduct during closing argument when he stated that Zavalnitskiy did not initially mention his “fanciful little tale” to Sergeant Fray.

A prosecutor may not imply that a defendant must prove something or present a reasonable explanation.¹¹ Also, testimony concerning a defendant's post-*Miranda* silence is generally inadmissible and cannot be used to impeach a defendant's exculpatory testimony.¹² But testimony regarding a defendant's silence may be properly admitted for a reason other than to contradict a defendant's assertion of innocence.¹³ For example, evidence of a defendant's silence may be used to rebut an inference raised by the defense that the police treated the defendant unfairly.¹⁴ Moreover, “where a defendant has received no *Miranda* warnings, no

⁷ *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

⁸ *Id.* at 763.

⁹ *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 725; 113 S Ct 1770, 1773; 123 L Ed 2d 508 (1993) (internal citations omitted).

¹⁰ *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

¹¹ *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991).

¹² *Doyle v Ohio*, 426 US 610, 611, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996).

¹³ *Crump*, 216 Mich App at 214-215.

¹⁴ *Id.*

constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege."¹⁵

In this case, the prosecution questioned Zavalnitskiy about his silence at the scene, to ambulance and hospital staff, and to Sergeant Fray at the police station on July 7, 2008. Sergeant Fray stated that he gave Zavalnitskiy his *Miranda* rights when he and his attorney went to the police station on July 23, 2008, and there is no indication that police gave them to him any earlier. Because the line of questioning pertains to events that occurred prior to the police reading Zavalnitskiy his *Miranda* rights, they fall outside the scope of Zavalnitskiy's issue.

Also, we do not interpret the prosecutor's remark in closing arguments as a comment on Zavalnitskiy's post-arrest silence. The prosecution was showing why the investigation proceeded as it did as opposed to focusing on Zavalnitskiy's delayed exculpatory statement. In his opening statement, defense counsel asserted that the police failed to give Zavalnitskiy a "fair investigation," stating:

I would like to discuss the word entitlement. Entitlement, as it applies to Dimitri Zavalnitskiy means that he is entitled to a fair investigation. He is entitled to an accurate investigation. He [is] entitled to a full investigation; a complete competent investigation. He's entitled to that. Anyone accused of a crime is entitled to that

Defense counsel discussed Zavalnitskiy's version of the events in detail, and then continued to focus on the inadequacy of the police investigation, stating:

Remember, the incident occurred on July 4th. He's lodged for two or three days, so July 7th or 8th he is released and the police have an acronym that they use when they release somebody. It's released PFI; Pending Further Investigation.

And you're gonna learn something very interesting. You're going to learn during the course of the trial that after he was released, with July 7th, 8th he contacts my office. And he comes to see me. And you're going to learn based upon our discussion I contact Sergeant Fray.

And I say: "Hey, look. I've got a witness. We want to come in and tell you what happened." And on July 23rd, 19 days after the incident he goes down to the police department, with me, and gives a statement to Sergeant Fray about what happened. Told him everything I just told you. He was not under subpoena. He had not been charged with any crimes. He knew people had been injured, seriously. You saw the vehicles. He had been injured. He wanted to help.

¹⁵ *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004).

You know what they [sic] police did with that information? Absolutely nothing. Absolutely nothing except wait ten months and then charge him. Ten months they did absolutely nothing. Oh, yeah. They did run some tests

* * *

Ten months later they disregarded every single thing he said to ‘em and did nothing. And that’s why we’re here.

The prosecutor’s challenged questions and comments were responsive to defense counsel’s implication that Zavalnitskiy was treated unfairly and not afforded a competent and accurate investigation of his version of the events. Under these circumstances, the prosecutor’s questions and comments did not amount to improper presentation of Zavalnitskiy’s post-arrest silence. In light of Zavalnitskiy’s opening statement, the prosecution’s questions to Sergeant Fray are proper to show that Sergeant Fray conducted an adequate investigation. Sergeant Fray stating that Zavalnitskiy requested an attorney when he was in custody was relevant for Sergeant Fray to show the scope of his investigation.

Moreover, any perceived prejudice from the questions and comment could have been cured by a timely instruction upon request.¹⁶ Indeed, the trial court instructed the jury that Zavalnitskiy was not required to offer any evidence or prove his innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and that the lawyers’ questions were not evidence.¹⁷ The instructions were sufficient to dispel any possible prejudice.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Zavalnitskiy argues that defense counsel’s failure to object to the prosecution’s line of questioning concerning Zavalnitskiy’s post-arrest silence constitutes a claim of ineffective assistance of counsel. This Court reviews a trial court’s factual findings for clear error, while this Court reviews constitutional determinations de novo.¹⁸

B. LEGAL STANDARDS

“[C]ounsel is presumed effective, and the defendant has the burden to show both that counsel’s performance fell below objective standards of reasonableness, and that it is reasonably

¹⁶ *Watson*, 245 Mich App at 586.

¹⁷ *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

¹⁸ *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

probable that the results of the proceeding would have been different had it not been for counsel's error."¹⁹

C. APPLYING THE LEGAL STANDARDS

Zavalnitskiy argues that defense counsel was ineffective for failing to object to the prosecutor's questions to Officer Fray and his closing remarks. In light of our conclusion that the questions and comment were not clearly improper, defense counsel's failure to object was not objectively unreasonable. Further, the trial court's jury instructions were sufficient to dispel any possible prejudice. Therefore, Zavalnitskiy cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, Zavalnitskiy cannot establish a claim of ineffective assistance of counsel.

IV. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Zavalnitskiy argues that his convictions for second-degree fleeing or eluding must be vacated because there was insufficient evidence that either victim sustained a "serious impairment of a body function."²⁰

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.²¹ "Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime."²² "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict."²³

¹⁹ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

²⁰ MCL 257.58c.

²¹ *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, *amended* 441 Mich 1201 (1992).

²² *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

²³ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. LEGAL STANDARDS

A person is guilty of second-degree fleeing or eluding if he flees or eludes a police officer and the violation results in “serious impairment of a body function” of an individual.²⁴ The Michigan Vehicle Code defines this term, in relevant part, as:

“Serious impairment of a body function” includes, but is not limited to, 1 or more of the following:

* * *

- (d) Loss or substantial impairment of a bodily function.
- (e) Serious visible disfigurement.

* * *

- (h) A skull fracture or other serious bone fracture.^[25]

C. APPLYING THE LEGAL STANDARDS

Zavalnitskiy argues that his convictions for second-degree fleeing or eluding cannot stand because the prosecution failed to present sufficient evidence that the victims’ injuries met the threshold for a “serious impairment of a body function” under Michigan’s no-fault statute.²⁶ However, the fleeing or eluding statute specifies that “serious impairment of a body function” is to be defined as set forth in MCL 257.58c.²⁷ This Court has held that an injury under MCL 257.58c need not be permanent or long lasting to qualify as a “serious impairment of a body function.”²⁸ This Court further explained that the criminal statute’s definition of “serious impairment of body function” “is significantly different” than the definition in the no-fault act, does not have the same limitations as the no-fault act, and is therefore broader than the category of injuries constituting a serious impairment of body function under the no-fault act.²⁹ Because the criminal statute provides its own definition of a “serious impairment of body function,” Zavalnitskiy’s reliance on the no-fault act is misplaced.

²⁴ MCL 750.479a(4)(a).

²⁵ MCL 257.58c.

²⁶ See MCL 500.3135.

²⁷ MCL 750.479a(9).

²⁸ *People v Thomas*, 263 Mich App 70, 74-75, 77; 687 NW2d 598 (2004).

²⁹ *Id.* at 75.

This Court has previously evaluated the severity of a victim's injuries in determining if there was a "serious impairment of a body function." In *People v Thomas*, this Court held that there was sufficient evidence of "serious impairment of a body function" where a police officer sustained a broken vertebra in his neck and a sprained knee. Due to the knee injury, the officer required crutches for several weeks and was unable to work for 2 1/2 months.³⁰ This Court held that both the police officer's spinal injury and the sprained knee sufficiently established a "serious impairment of a body function."³¹

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that each victim suffered a "serious impairment of body function" within the meaning of the criminal statute. Some of Karen King's injuries were similar to injuries the police officer suffered in *Thomas*. The evidence showed she suffered a broken left arm, a hemorrhage, and an injury to her right knee. She spent a week in the hospital, was released for two days, had surgery, and was hospitalized for an additional week. At the time of trial, she was still under medical care and undergoing physical therapy because of ongoing pain and difficulties with her leg. She has a limp, her leg starts "throbbing" when she walks, she cannot walk for more than 30 minutes before her leg weakens, and her leg "gives out" if she stands too long. Her ability to work was affected because she cannot stand for an eight-hour shift. She wears a brace to help the pain in her knee and has a scar on her leg near her knee, which the jury viewed. Moreover, King's three-year-old son suffered several scars on his face, including one scar on the left side of his face that is 1-1/2 inches in length, which the jury observed. The young child's lip still appears swollen and is puffier in the area where he was injured. Accordingly, viewing the evidence in a light favorable to the prosecution, a rational trier of fact could determine the injuries that one or both of the victims sustained qualified as a "serious impairment of body function."

V. OTHER ACTS EVIDENCE

A. STANDARD OF REVIEW

Zavalnitskiy next argues that evidence of two prior instances, where he was in a vehicle with firearms and accompanied by one or more black males, should not have been admitted. He argues that the prosecution failed to provide reasonable notice of its intent to offer the evidence before trial, the evidence was not relevant for a purpose other than to show his bad character, and any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

A trial court's decision to admit evidence is reviewed for an abuse of discretion.³² However, if the "decision involves a preliminary question of law, which is whether a rule of

³⁰ *Id.* at 72.

³¹ *Id.* at 77.

³² *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

evidence precludes admissibility, the question is reviewed de novo.”³³ “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.”³⁴

B. LEGAL STANDARDS

Michigan Rules of Evidence prohibit “evidence of other crimes, wrongs, or acts” to prove a defendant’s character or propensity to commit the charged crime, but permits such evidence for other purposes, “such as . . . absence of mistake or accident when the same is material.”³⁵ Other acts evidence is admissible if it is (1) offered for a proper purpose, that is, one other than to prove the defendant’s character or propensity to commit the crime; (2) relevant to an issue or fact of consequence at trial; and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403.³⁶ Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.³⁷ When the prosecution intends to introduce other acts evidence, the prosecution is required to provide notice before trial, or during trial if the court dismisses the pre-trial requirement for good cause.³⁸

C. APPLYING THE LEGAL STANDARDS

In this case, a principal issue was whether Zavalnitskiy knowingly possessed a firearm or had knowledge that his occupant(s) possessed a firearm. A witness identified Zavalnitskiy as the person he observed shooting at individuals outside the passenger side window. The arresting officer testified that he saw Zavalnitskiy shooting a gun in the air out of the driver’s side of the Jeep. Zavalnitskiy testified that he was the driver, but denied firing a gun or having knowledge that guns were in his vehicle until they were produced by his two black passengers (whom Zavalnitskiy claimed he barely knew and simply agreed to give a ride to). He further claimed that he was forced to flee from the police because he feared being shot with the firearms possessed by the two passengers, D and P. Zavalnitskiy’s statement did not mention that D had placed the handgun in his lap and pointed it toward Zavalnitskiy, and Sergeant Fray denied that Zavalnitskiy stated that fact. There were no usable fingerprints on a gun recovered near the Jeep, and neither D nor P were apprehended or identified. Under these circumstances, the evidence that Zavalnitskiy previously had loaded firearms in his vehicle and was accompanied by

³³ *Id.*

³⁴ *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

³⁵ MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

³⁶ *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114, amended 445 Mich 1205 (1994).

³⁷ MRE 401; *Yost*, 278 Mich App at 355.

³⁸ MRE 404(b)(2).

particular associates made it more probable that he possessed a firearm or at least had knowledge that his occupants possessed firearms in his vehicle this time as well.

If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance.^[39]

Once Zavalnitskiy claimed mistake as a defense, the evidence became admissible to show the absence of mistake, provided that it was relevant to an issue or fact of consequence and its probative value outweighed the danger of unfair prejudice. The evidence assisted the jury in weighing Zavalnitskiy's intent and knowledge and was also relevant to show an absence of mistake. Also, the evidence of Zavalnitskiy's probationary status stemming from the 2005 incident was relevant to show his motive to elude police to avoid capture.

We disagree with Zavalnitskiy that the evidence should have been excluded because it was unduly prejudicial. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice"⁴⁰ MRE 403 is not intended to exclude "damaging" evidence, as any relevant evidence will be damaging to some extent.⁴¹ Instead, it "is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded."⁴² Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury"⁴³ or "it would be inequitable to allow the proponent of the evidence to use it."⁴⁴ Zavalnitskiy has not demonstrated that the evidence unfairly prejudiced him. The prosecutor focused on the proper purpose for which the evidence was admissible. Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. Under the circumstances, the trial court's decision to admit the evidence of Zavalnitskiy's other acts did not fall outside the range of reasonable and principled outcomes.

We also disagree with Zavalnitskiy's argument that he is entitled to a new trial because the prosecution failed to provide reasonable notice of its intent to introduce the evidence. At trial, defense counsel objected to the trial court admitting the other acts evidence, arguing untimely notice because he received the motion on the first day of trial. The prosecution

³⁹ *People v Mardlin*, 487 Mich 609, 617; 790 NW2d 607 (2010).

⁴⁰ *People v Mills*, 450 Mich 61, 74; 537 NW2d 909, mod 450 Mich 1212 (1995).

⁴¹ *Id.* at 75.

⁴² *Id.* (emphasis in original).

⁴³ *Id.* at 75-76.

⁴⁴ *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

rebutted that he had discussed the motion with defense counsel the week before. Even assuming that the notice was untimely, Zavalnitskiy was not prejudiced by the late notice because the trial court provided him with the file, police reports, and plea agreements related to the prior incidents, and granted a recess to allow defense counsel to review the information.

[T]he harmless error standard requires us to consider the effect plain error has on a proceeding. Because [the defendant] has never suggested how he would have reacted differently to this evidence had the prosecutor given notice, [this Court] has no way to conclude that [the] lack of notice had any effect whatsoever.^[45]

There is no indication that earlier notice would have had any effect on whether the trial court would have admitted the evidence at trial. Also, Zavalnitskiy failed to indicate what he would have done differently had he received notice earlier. Thus, he has not established that the notice that was provided prejudiced him.

VI. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Zavalnitskiy argues that the trial court erred in relying on *Dixon v United States*⁴⁶ to instruct the jury that he had the burden of proving his defense of duress by a preponderance of the evidence. This Court reviews application of jury instructions de novo.⁴⁷ This Court reviews unpreserved constitutional claims for plain error.⁴⁸ The determination of which party has the burden of proof for common-law affirmative defenses is a question of law that this Court also reviews de novo.⁴⁹

B. LEGAL STANDARDS

The defense of duress is successfully raised where a defendant presents evidence from which a jury could conclude: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm, (3) the fear or duress was operating upon the mind of the defendant at the time of the

⁴⁵ *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001).

⁴⁶ *Dixon v United States*, 548 US 1; 126 S Ct 2437; 165 L Ed 2d 299 (2006).

⁴⁷ *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

⁴⁸ *Carines*, 460 Mich at 765.

⁴⁹ *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

alleged act, and (4) the defendant committed the act to avoid the threatened harm.^[50]

“Once a defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress.”⁵¹ Imperfect instructions will not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant’s rights.⁵² “The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice.”⁵³

The standard jury instruction for the defense of duress states that, “[t]he *prosecutor* must prove beyond a reasonable doubt that the defendant was not acting under duress. If [he / she] fails to do so, then you must find the defendant not guilty.”⁵⁴

C. APPLYING THE LEGAL STANDARD

At trial, the prosecution advised the trial court of the United States Supreme Court’s decision in *Dixon*, in which the Court held that placing the burden on a defendant to prove duress by a preponderance of the evidence does not violate due process.⁵⁵ He further noted that the Michigan Supreme Court had granted leave to appeal in *People v Dupree*⁵⁶ to consider, in part, which party has the burden of proof with respect to the defense of duress. Over Zavalnitskiy’s objection, the trial court instructed the jury, consistent with *Dixon*, that “[t]he Defendant has the burden of the proof on the defense of duress by a preponderance of the evidence.”

We agree with Zavalnitskiy that, despite the United States Supreme Court’s decision in *Dixon*, under current Michigan law, the prosecution has the burden of proving beyond a reasonable doubt that Zavalnitskiy was not acting under duress.⁵⁷ Zavalnitskiy raised the defense of duress. It is possible that a jury *could* conclude that P and D’s claimed conduct was sufficient to cause Zavalnitskiy to fear personal injury or death, the conduct did in fact cause him to have such fear, he was reacting to that fear when he was fleeing the officers, and that the motive for his actions was to avoid the threatened harm. Because a jury could choose to believe the circumstances that Zavalnitskiy presented, he has properly raised the defense of duress. “Once a

⁵⁰ *People v Terry*, 224 Mich App 447, 453-454; 569 NW2d 641 (1997).

⁵¹ *Id.* at 453-454.

⁵² *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

⁵³ *Dupree*, 486 Mich at 702.

⁵⁴ CJI2d 7.6 (emphasis added).

⁵⁵ *Dixon*, 548 US at 8.

⁵⁶ *People v Dupree*, 284 Mich App 89; 771 NW 470 (2008).

⁵⁷ See *Terry*, 224 Mich App at 453; *People v Field*, 28 Mich App 476, 478; 184 NW2d 551 (1970).

defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress.”⁵⁸ The trial court’s instruction erroneously advised the jury regarding the extent of the prosecution’s burden of proof with respect to the defense of duress. However, Zavalnitskiy has not carried his burden of establishing that the instructional error resulted in a miscarriage of justice.⁵⁹

Duress excuses a crime but does not negate any element of the offense.⁶⁰ When the lower court required Zavalnitskiy to prove duress by a preponderance of the evidence, it did not decrease the prosecution’s burden. A review of the jury instructions in their entirety shows that the trial court informed the jury several times that the prosecutor had the burden to prove each element of a crime beyond a reasonable doubt and explained the meaning of reasonable doubt. Considering the jury instructions as a whole, it is implausible that a reasonable jury so instructed would fail to understand that it must acquit if it had a reasonable doubt that Zavalnitskiy was coerced into committing the crimes.

Further, it is improbable that the error affected Zavalnitskiy’s substantial rights because his defense of duress was tenuous. Two eyewitnesses testified that he was the shooter, although there was inconsistency concerning his position in the car. The sole evidence supporting his claim that he was forced to flee the police came through his own testimony. This testimony was discredited to the extent that he admitted that his written statement, which he and his attorney reviewed before signing, did not state that D had placed a gun in his lap pointed toward Zavalnitskiy. Even considering that fact, Zavalnitskiy did not testify that D or P directly pointed a gun at him, only that D placed the gun in his lap in his direction. There was no testimony that either D or P made any overtly threatening gestures or engaged in any form of physical contact with him. Rather, Zavalnitskiy testified that D and P were yelling for him to drive as the police pursued them.⁶¹

Zavalnitskiy’s testimony is also less than compelling in that his alleged fear of being shot by D or P did not come into play until he was fleeing the police. In other words, before being pursued by the police, an alleged virtual stranger who he was giving a ride to, started shooting out the window. But Zavalnitskiy’s response was to tell the shooter to stop, roll up the windows, and to continue driving. Common sense suggests that someone who fears severe personal injury or even death would not roll up the window of another person who just fired shots out of his car, at the risk of further inciting the shooter. After examining the nature of the instructional error in light of the weight and strength of the untainted evidence, it affirmatively appears more probable

⁵⁸ *Terry*, 224 Mich App at 453-454.

⁵⁹ MCL 769.26; *Dupree*, 486 Mich at 702.

⁶⁰ *People v Lemons*, 454 Mich 234, 245 n 15; 562 NW2d 447 (1997).

⁶¹ See *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996) (stating that the defendant being slapped in the head and told to drive was not enough to necessitate him fleeing from police).

than not that a properly instructed jury would have rendered the same verdict. Zavalnitskiy has not shown that the instruction error was a miscarriage of justice. Accordingly, the instructional error was harmless.

VII. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Zavalnitskiy further argues that the trial court violated his right to present a defense and to confront his accusers when it precluded defense counsel from eliciting evidence of the local police policy on high-speed chases during his cross-examination of Officer Brandon. “This Court reviews a trial court’s determination of evidentiary issues for an abuse of discretion.”⁶² “However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo.”⁶³

B. LEGAL STANDARDS

Although a defendant has a constitutional right to present a defense and to confront his accusers,⁶⁴ he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict.⁶⁵ Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁶⁶

C. APPLYING THE LEGAL STANDARDS

In this case, the trial court did not preclude Zavalnitskiy from presenting evidence to challenge the officer’s credibility, but rather precluded admission of a police document that was not relevant to the charges against him. Zavalnitskiy did not establish that the police policy on high-speed chases had any tendency to make his culpability in fleeing or eluding the police more probable or less probable than it would have been without the evidence. Because Zavalnitskiy was unable to establish the relevancy of the document, the trial court did not abuse its discretion by excluding it. The trial court did not preclude Zavalnitskiy from otherwise presenting a defense and challenging Officer’s Brandon’s credibility. It permitted Zavalnitskiy to cross-

⁶² *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

⁶³ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

⁶⁴ US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

⁶⁵ See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982).

⁶⁶ MRE 401; *Yost*, 278 Mich App at 355.

examine the officer about his actions surrounding his pursuit. Accordingly, the trial court did not violate Zavalnitskiy's constitutional right to present a defense or to confront his accusers.

VIII. TRIAL COURT CONDUCT

A. STANDARD OF REVIEW

Zavalnitskiy argues that the trial judge was biased against him as demonstrated by the judge's evidentiary ruling allowing the admission of the other acts evidence and by the judge's questioning of witnesses. Because Zavalnitskiy did not move to disqualify the trial judge pursuant to MCR 2.003, we review this unpreserved claim for plain error affecting substantial rights.⁶⁷

B. LEGAL STANDARDS

It is well established that a trial court has a duty to control trial proceedings in the courtroom and has wide discretion and power in fulfilling that duty.⁶⁸ But a court's conduct may not pierce the veil of judicial impartiality.⁶⁹ A court invading the prosecutor's role is a violation of this tenet.⁷⁰ A court may, however, question witnesses in order to clarify testimony or elicit additional relevant information, but must exercise caution to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial.⁷¹ The test to determine whether the trial court pierced the veil of judicial impartiality is whether the trial court's comments and questions "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial."⁷² Defendant must show actual personal bias or prejudice and must overcome the strong presumption that the judge was impartial.⁷³ If a party does not file a timely motion to disqualify, the untimeliness is a factor in deciding the motion.⁷⁴

C. APPLYING THE LEGAL STANDARDS

Although the trial court granted the prosecution's motion to admit evidence under MRE 404(b), "[d]isqualification on the basis of bias or prejudice cannot be established merely by

⁶⁷ *Carines*, 460 Mich at 763-764.

⁶⁸ *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006).

⁶⁹ *Id.* at 308.

⁷⁰ *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989).

⁷¹ MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992).

⁷² *Conley*, 270 Mich App at 308 (citations omitted).

⁷³ *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

⁷⁴ MCR 2.003(D)(1)(d).

repeated rulings against a litigant, even if the rulings are erroneous.”⁷⁵ There is no indication that the judge’s decision was influenced by judicial impartiality or was based on any antipathy toward the defense. The record shows that the judge considered both parties’ arguments, reviewed the relevant information, and made a decision within the range of reasonable and principled outcomes. Because Zavalnitskiy cannot show that the admitted evidence unduly prejudiced him, it is presumed the judge properly admitted it. Even if the judge’s decision to admit the evidence was erroneous, it alone does not show bias or prejudice. But because the decision was not erroneous, it cannot be said that the judge was biased against Zavalnitskiy.

Further, while the trial court asked Karen King additional questions regarding her injuries and directed the victims to show their scars to the jury, the inquiries were material to an issue in the case, limited in scope, and posed in a neutral manner.⁷⁶ The fact that the evidence the trial court elicited may have damaged Zavalnitskiy’s case does not demonstrate that the questioning was improper.⁷⁷ Moreover, the trial court instructed the jury that its rulings and questions were not evidence, that it was not trying to influence the vote or express a personal opinion about the case, and if the jury believed that the court had an opinion, that opinion must be disregarded. Zavalnitskiy has not demonstrated that the trial court’s ruling and questions were improper or prejudicial.

IX. SENTENCING

A. STANDARD OF REVIEW

Zavalnitskiy argues that the trial court erroneously scored offense variables (OV) 1, 3, and 14 of the sentencing guidelines. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.”⁷⁸ A scoring decision “for which there is any evidence in support will be upheld.”⁷⁹

B. LEGAL STANDARDS

A trial court should score 25 points for OV 1 if a “firearm was discharged at or toward a human being[.]”⁸⁰ A trial court should score 25 points for OV 3 if “[l]ife threatening or permanent incapacitating injury occurred to a victim.”⁸¹ A trial court should score 10 points if

⁷⁵ *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009).

⁷⁶ *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996).

⁷⁷ *Id.*

⁷⁸ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

⁷⁹ *Id.* (citation omitted).

⁸⁰ MCL 777.31(1)(a).

⁸¹ MCL 777.33(1)(c).

the victim suffered “a bodily injury requiring medical treatment[.]”⁸² And a trial court should score 10 points for OV 14 if “[t]he offender was a leader in a multiple offender situation.”⁸³ The statute mandates assessment of “the highest number of points possible.”⁸⁴

C. OV 1

At sentencing, Zavalnitskiy challenged the trial court’s score for OV 1 on the basis that he was acquitted of all charges related to discharging a firearm. However, it is well established that a different burden of proof applies at sentencing and, therefore, the scoring of the guidelines need not be consistent with a jury’s verdict. “A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.”⁸⁵ Consequently, the prosecution’s failure to prove the discharge of a firearm from a motor vehicle beyond a reasonable doubt did not prevent the trial court from considering the evidence at sentencing. As the trial court observed, evidence at trial supported Zavalnitskiy’s identification as the person who discharged a firearm at or toward a human being. Witnesses testified that Zavalnitskiy fired rounds from the vehicle. Applying the appropriate burden of proof, the evidence was sufficient to support the trial court’s score of 25 points for OV 1.

D. OV 3

Zavalnitskiy argues that the trial court scored OV 3 incorrectly because the victims’ injuries were not life threatening and they were not permanently incapacitating. Medical evidence is not necessary to prove a life threatening or permanently incapacitating injury.⁸⁶ As previously indicated, the trial court need only find the existence of the sentencing factor by a preponderance of the evidence.⁸⁷

As discussed in section IV, *supra*, the evidence showed that King suffered a broken left arm, a hemorrhage, and an injury to her right knee, which necessitated two week-long stays in the hospital, surgery, and ongoing medical care and physical therapy. She walks with a limp, has continuing pain, continuing difficulties standing and walking, wears a brace, and was unable to work. Although there were no medical records, there was adequate evidence to allow the trial

⁸² MCL 777.33(1)(d).

⁸³ MCL 777.44(1)(a).

⁸⁴ MCL 777.33(1); *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005).

⁸⁵ *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008); See also *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), aff’d in part and vacated in part on other grounds 469 Mich 415 (2003) (stating that “situations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing”).

⁸⁶ *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007).

⁸⁷ *Osantowski*, 481 Mich at 111.

court to find, by a preponderance of the evidence, that King had undergone prolonged medical treatment and suffered a permanent incapacitating injury to her leg. Therefore, the trial court did not abuse its discretion in scoring 25 points for OV 3.

E. OV 14

A trial court should score 10 points for OV 14 if “[t]he offender was a leader in a multiple offender situation.”⁸⁸ The entire criminal transaction should be considered.⁸⁹ There was evidence that Zavalnitskiy picked up his passengers, used his car during the criminal episode, fired a weapon from his vehicle, and led the police on a high-speed chase that ended with him striking the victims’ vehicle and causing their injuries. The evidence was sufficient to allow the trial court to conclude that Zavalnitskiy had a leadership role in this criminal episode. Thus, the trial court did not err in scoring 10 points for OV 14.

We affirm.

/s/ William C. Whitbeck

/s/ Peter D. O’Connell

/s/ Kurtis T. Wilder

⁸⁸ MCL 777.44(1)(a).

⁸⁹ MCL 777.44(2)(a).