

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO VELEZ,

Defendant-Appellant.

UNPUBLISHED

April 12, 2005

No. 255581

Monroe Circuit Court

LC No. 03-033079-FH

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant Roberto Velez appeals as of right his conviction and sentence following his March 9, 2004 jury conviction in Monroe County Circuit Court of one count of felonious assault, for which he was sentenced to serve a minimum of 5 to a maximum of 15 years in prison. We affirm both the conviction and sentence.

I. Basic Facts And Procedural History

Greg Barker and his daughter, Stacey, were walking against traffic on Temperance Road in Monroe County when a car driven by Velez came within a few feet of hitting Mr. Barker. Mr. Barker turned and yelled at the car. Velez turned the car around and drove on the wrong side of the street back toward the Barkers. After stopping his car, Velez got out and began ranting and raving at Mr. Barker with profanities. Following the verbal argument, Velez returned to his car, drove the wrong way up the road one or two driveways, then turned around and came back toward the Barkers. After passing the Barkers for the second time, Velez again turned his car around, drove the wrong way up the road, and stopped his car behind them. This time, a physical altercation began between the two men. Immediately following the physical altercation, Mr. Barker realized that he had puncture wounds to his arm and back.

Testifying on his own behalf, Velez, who is eleven inches shorter than Mr. Barker, stated that he never intended to fight Mr. Barker and when the fight became physical he grabbed an awl that was in his pocket. Velez testified that Mr. Barker had him in a hold that he could not escape from and that he was in fear of his life, so he “poked” Mr. Barker in the back with the awl and then started swinging it around to protect himself. The testimony of three independent eyewitnesses tended to discredit Velez’s account, although the testimony of his niece and daughter, who were riding in his car at the time, contradicted some parts and supported others.

During his closing argument, the prosecutor said that Velez's claim of self-defense was "flimsy." To support this statement, the prosecutor pointed out that Velez described his stabbing Mr. Barker as a "poke," then argued that if Velez were actually in fear of his life, he would have been "stabbing like crazy to protect" himself. Furthermore, in rebuttal closing argument, the prosecutor argued that if the jury were to believe that Velez was really acting in self-defense, it would "pretty much have to find that when he got out of that car, when he stopped his car in the middle of Temperance Road, when he comes running out at Greg Barker, all he wants to do is hold hands and sing Cumbya [sic] with the Barkers." Finally, the prosecutor called Velez's credibility into question by stating, "when we think about his credibility . . . we start to remember this man was convicted of aggravated robbery in 2001."

In its closing instructions to the jury, the trial court described two charges. First, it instructed the jury on the offense of assault with intent to do great bodily harm. Then, it instructed the jury on the cognate offense of assault with a dangerous weapon, or "felonious assault." The jury found Velez guilty of the cognate offense of felonious assault.

At Velez's sentencing hearing, the trial court assessed ten points for Offense Variable 9 ("OV-9"), which allows for an assignment of ten points when "[t]here were 2 to 9 victims" of a crime.¹ In response to Velez's argument that the only person placed in danger was Mr. Barker, the trial court stated that "[t]he assaultive behavior and the . . . words that were exchanged were also directed at [Stacey Barker], and she could have been hurt as well . . ." Consequently, the trial court scored OV-9 at ten points.

II. Prosecutorial Misconduct

A. Standard of Review

Velez made no objection to any of the closing arguments made by the prosecutor; however, he claims that the prosecutor's statements violated his constitutional due process rights. As Velez presents an unpreserved issue of alleged constitutional error, we therefore review the record for plain error.² To avoid forfeiture under the plain error rule, "three requirements must be met: 1) an error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."³

B. The Prosecutor Did Not Violate Velez's Due Process Rights

Velez first argues that the prosecutor committed prosecutorial misconduct by improperly denigrated his defense during closing arguments. Specifically, Velez points to the comments made by the prosecutor during closing arguments in support of his contention that the prosecutor

¹ MCL 777.39(1)(c).

² See *People v Grant (On Rehearing)*, 445 Mich 535, 546; 520 NW2d 123 (1994).

³ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993)).

committed misconduct that constitutes plain error. Velez cites *People v Dealessandro*,⁴ where we granted relief to the defendant when the prosecutor repeatedly told the jury that the defense was nothing but “damnable lies” and that it was a “sham meant to mislead you.”⁵ In holding that these comments were denigrating to the defense, we referred to *People v Wise*,⁶ which stated:

The prosecutor may not question defense counsel's veracity. . . . When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. . . . Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality.⁷

We reiterated our focus on the prosecutor’s questioning of the defense counsel’s veracity when we found that “the prosecutor's argument attacked defense counsel and suggested to the jury that defense counsel was intentionally trying to mislead the jury.”⁸ Thus, *Dealessandro* held that, when determining if a prosecutor’s statements are denigrating to a defendant, the focus should be on the issue of whether the prosecutor “question[ed] defense counsel’s veracity” by “argu[ing] that the defense counsel himself is intentionally trying to mislead the jury.”⁹

Despite Velez’s assertion that the prosecutor here improperly denigrated his defense with his comments just as the prosecutor in *Dealessandro* did, the case here is distinguishable from *Dealessandro*. Unlike the prosecutor in *Dealessandro*, who repeatedly argued that defense counsel was intentionally perpetrating a fraud upon the jury by presenting nothing but “damnable lies,” the prosecutor in Velez’s case did not argue that defense counsel was intentionally trying to mislead the jury. Rather, the prosecutor here was responding to defense counsel’s comments made during defense counsel’s closing argument. Under *People v Watson*,¹⁰ “the prosecutor’s comments must be considered in light of defense counsel’s comments.”¹¹ Indeed, “an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.”¹² Accordingly, it is necessary to view the prosecutor’s statements in the context of defense counsel’s closing arguments.

⁴ *People v Dealessandro*, 165 Mich App 569; 419 NW2d 609 (1988).

⁵ *Id.* at 579.

⁶ *People v Wise*, 134 Mich App 82; 351 NW2d 255 (1984).

⁷ *Id.* at 101-02.

⁸ *Dealessandro*, *supra* at 580.

⁹ *Wise*, *supra* at 101.

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

¹¹ *Id.* at 592-93 (citing *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997)); *see also People v Abraham*, 256 Mich App 265, 275; 662 NW2d 836 (2003).

¹² *Id.* (quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996)).

In his closing remarks, defense counsel stated that when Velez returned to confront Mr. Barker for the second time, “it was only to exchange words, you know, run his little mouth, nothing more.” Defense counsel went on to say that Velez “had no intention to create a fight,” that “[h]e didn’t expect a fight,” and that “[h]e was just running his mouth” like “small dogs” would “bark.” Under *Watson*, when evaluating the prosecutor’s argument that the jury would have to believe that Velez meant to “hold hands and sing Cumbya [sic] with the Barkers” in order to believe his defense, the most potentially denigrating argument referred to by this appeal, we must view the prosecutor’s argument in light of its responsive nature. With this argument, the prosecutor questioned the *logic* surrounding defense counsel’s theory that Velez did not intend or expect a fight when he returned to confront the Barkers a second time. It is clear that the prosecutor’s argument was not designed to question defense counsel’s personality, but was a response to the self-defense theory presented by defense counsel during his closing argument. Moreover, the prosecutor’s comment that the defense was “flimsy” and his argument that Velez would have been “stabbing like crazy” had he actually been in fear for his life, were not meant to shift “the jury’s focus from the evidence to defense counsel’s personality” but were again simply arguments designed to point out flaws in the defense theory that Velez had no expectation that a fight might occur because of his actions.¹³ Without doubt, it is one thing to characterize a defense as “flimsy,” but another thing entirely to repeatedly characterize it as nothing but “damnable lies” and a “sham meant to mislead”¹⁴ Therefore, Velez’s due process rights were not violated by the prosecutor’s statements during his closing arguments because the statements, due at least in part to their responsive nature, were not so denigrating to his defense that they rose to the level of prosecutorial misconduct.

III. Jury Instruction On A Cognate Offense

A. Standard Of Review

As before, Velez made no objection to any of the jury instructions given by the trial court; however, he claims that certain erroneous instructions violated his constitutional jury trial and due process rights. Accordingly, as Velez presents another unpreserved issue of alleged constitutional error, we again review the record for plain error.¹⁵

B. Velez Waived Appellate Review Of Erroneous Jury Instruction

In *People v Vinson*,¹⁶ we determined that the offense of which Velez was convicted, felonious assault, is a cognate offense of the crime he was charged with at trial, assault with intent to do great bodily harm.¹⁷ Indeed, we recently upheld the ruling in an unpublished

¹³ See, e.g., *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

¹⁴ *Dealessandro*, *supra* at 579.

¹⁵ See *Grant*, *supra* at 546.

¹⁶ *People v Vinson*, 93 Mich App 483; 287 NW2d 274 (1979).

¹⁷ *Id.* at 485.

opinion.¹⁸ Velez correctly contends, and the people agree, that the trial court erred by instructing the jury on the felonious assault charge. Under *People v Cornell*,¹⁹ juries should not receive instruction on cognate offenses, but only on necessarily lesser included offenses, or, those “offenses in which the elements of the lesser offense are completely subsumed in the greater offense.”²⁰

While it is clear that the jury should not have been instructed on the felonious assault charge, the record is unclear as to whether defense counsel affirmatively requested the instructions. As the Michigan Supreme Court held in *People v Carter*,²¹ appellate review is waived by a party when, by his own conduct, he invites the error of which he complains.²² Contrary to the people’s assertion, the totality of the transcripts does not *clearly* indicate that defense counsel affirmatively requested the instructions during a meeting with the trial court in chambers. Thus, it must be determined from a careful reading of the transcripts whether Velez actually waived the right to appeal the error of which he now complains.

In *Carter*, the Michigan Supreme Court followed *United States v Griffin*,²³ a case that effectively demonstrated the difference between the mere forfeiture of the right to appeal and the full waiver of such a right.²⁴ As in this case, *Griffin* involved an erroneous instruction given to a jury; however, there were two defendants with separate counsel.²⁵ One defendant’s counsel affirmatively approved by saying “yes” when asked whether the defendants preferred the erroneous instruction, while the other defendant’s counsel simply failed to object.²⁶ The Michigan Supreme Court summarized the *Griffin* opinion as follows:

In *Griffin*, the court concluded that the defendant waived any objection to a jury instruction because his counsel *affirmatively approved the instruction*. . . . This approval extinguished any error. . . . However, counsel's approval of the instruction did not preclude the court from the reviewing a codefendant's challenge to the instruction. Codefendant's counsel, rather than affirmatively approving the instruction, *failed to object to the instruction*. The failure to object qualified as a forfeiture, and the court reviewed the instruction for plain error.²⁷

¹⁸ See *People v Paletis*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 14, 2004, docket no. 253494; 2004 Mich App LEXIS 2388 (2004).

¹⁹ *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002)

²⁰ *Id.* at 356.

²¹ *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000).

²² *Id.* at 214-15; see also *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003).

²³ *United States v Griffin*, 84 F3d 912 (C.A. 7 1996).

²⁴ See *Carter*, *supra* at 215-16 (citing *Griffin*, 84 F3d at 923-26).

²⁵ *Griffin*, *supra* at 923-26.

²⁶ *Id.* at 923-24.

²⁷ *Carter*, *supra* at 215-16 (citing *Griffin*, 84 F3d at 923-26) (emphasis added).

Here, while it is not clear from the transcripts whether defense counsel affirmatively *requested* the felonious assault instructions, it is clear that defense counsel affirmatively *approved* a verdict form containing “the lesser offense of assault with a dangerous weapon (felonious assault)” To put the exchange between the trial court and Velez’s counsel in a broader context, the trial transcript reads:

THE COURT: Okay. Also I have prepared a verdict form. I showed that to Counsel. And it simply has three options. They are to return one verdict. That would be not guilty; guilty of assault with intent to do great bodily harm less than murder; or guilty of the lesser offense of assault with a dangerous weapon (felonious assault), which is also the same charge. And everybody agrees that that’s – given my rulings that that [sic] an appropriate verdict form.

[PROSECUTOR]: I do.

[DEFENSE COUNSEL]: Yes.

This exchange makes it clear that, regardless of whether he requested the felonious assault instructions, Velez’s counsel affirmatively approved of the verdict form containing the felonious assault charge by saying “yes” in response to the trial court’s question regarding the form’s propriety. Consequently, similar to the approvals in *Carter* and *Griffin*, defense counsel’s affirmative approval of the verdict form constitutes a waiver that extinguishes any error and renders our appellate review of the erroneous jury instructions inappropriate.

IV. Offense Variable Scoring And *Blakely* Issue

A. Standard Of Review

During the sentencing hearing, Velez’s counsel objected to the trial court’s scoring of OV-9 at ten points due to its finding that Velez victimized two people. As seen in *People v Kennie*,²⁸ a sentencing issue may be raised on appeal when an objection is made at the trial court level.²⁹ However, we will not reverse the trial court’s factual findings leading to the OV-9 score unless we determine that the trial court abused its discretion.³⁰ Indeed, whenever there is any evidence present in the record to support a trial court’s scoring of an offense variable, we will uphold that scoring.³¹ As for Velez’s unpreserved argument that the United States Supreme

²⁸ *People v Kennie*, 147 Mich App 222; 383 NW2d 169 (1985).

²⁹ *Id.* at 226.

³⁰ *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), *rev on other grounds*, 469 Mich 247; 666 NW2d 231 (2003).

³¹ *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Court's holding from *Blakely v Washington*³² should apply in his case, we review unpreserved issues of alleged constitutional error for plain error.³³

B. The Scoring Of OV-9 Was Not An Abuse Of Discretion

Velez asserts that the trial court should not have scored OV-9 at ten points because there was only one victim of the felonious assault he committed, and that victim was Mr. Barker. In support of this contention, Velez argues that Stacey Barker was merely a bystander and that she was never identified as a victim for purposes of trial. In *People v Scott*,³⁴ the trial court assessed a defendant ten points under OV-9 for two victims of an attempted robbery when one of the victims was not actually robbed.³⁵ In *Scott*, the defendant and a group of his friends threw “ice packs” at the principal victim and his friend, surrounded them, threatened both of them, and then proceeded to fight with the principal victim in an effort to rob him.³⁶ We reasoned that the ice-throwing, coupled with evidence establishing “that the group surrounded the victim and the attempted robbery occurred when the victim’s companion was approximately three or four feet away from the victim” supported the trial court’s decision to assess the defendant ten points for OV-9.³⁷ Accordingly, we concluded that the “facts support[ed] the trial court’s score of ten points because the victim’s friend, who was standing nearby when the crime occurred, was also ‘placed in danger of injury.’”³⁸

Although the case is unpublished, we may consider the reasoning from *Scott* persuasive in reaching a decision in Velez’s case.³⁹ Like Velez, the defendant in *Scott* never actually injured the second victim, Stacey Barker, during the crime. Yet this fact is not enough to prevent the trial court from exercising its discretion to assess a defendant ten points under OV-9, as close proximity to the principal victim of a crime may be sufficient to support a trial court’s determination that there was more than one victim under OV-9.⁴⁰ Our holding in *Scott* illustrates the “danger of injury” aspect of OV-9, as one who is in close proximity to a crime such as felonious assault may well be in danger of receiving a poorly-aimed punch or stab to her body. Thus, because Stacey Barker could easily have been punched or stabbed due to her close proximity to Velez during his assault on Mr. Barker, the trial court did not abuse its discretion by assessing him ten points under OV-9.

³² *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

³³ See *Grant*, *supra* at 546.

³⁴ *People v Scott*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2004, docket no. 243418; 2004 Mich App LEXIS 660, (2004).

³⁵ *Id.* at *8.

³⁶ *Id.* at *3, *8.

³⁷ *Id.* at *8.

³⁸ *Id.*

³⁹ See *People v Green*, 260 Mich App 710, 721 n5; 680 NW2d 477 (2004).

⁴⁰ See *Scott*, *supra* at *8.

C. *Blakely* Does Not Apply To The Michigan Sentencing Guidelines

Velez also raises an argument based on the United States Supreme Court's holding in *Blakely v Washington*.⁴¹ Specifically, Velez argues that the facts surrounding the ten-point assessment under OV-9 were not found by a jury using the reasonable doubt standard, and that the resulting increase in his maximum sentence therefore violates his Sixth Amendment right to a jury trial. While Velez is correct that *Blakely* requires that juries determine the facts used to support upward departures from *determinate* sentencing guidelines,⁴² the Michigan Supreme Court has explicitly stated that *Blakely* does not apply to Michigan's sentencing guidelines because they are *indeterminate*, i.e., they do not allow trial judges to exceed the maximum sentence.⁴³ Thus, Velez is precluded from successfully arguing a *Blakely* issue before this Court.

Velez's conviction and sentence are affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens

⁴¹ *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁴² *See id.* at 2540.

⁴³ *People v Claypool*, 470 Mich 715, 730 n14; 684 NW2d 278 (2004).