

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY TRAMORE BURCHARD,

Defendant-Appellant.

UNPUBLISHED

April 23, 2009

No. 283052

Kent Circuit Court

LC No. 06-010414-FH

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob while unarmed, MCL 750.88, aggravated assault, MCL 750.81a(1), assault and battery, MCL 750.81(1), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 10 to 50 years in prison for assault with intent to rob while unarmed, 12 months in jail for aggravated assault, 93 days in jail for assault and battery, and 12 months in jail for possession of marijuana. For the reasons set forth below, we affirm.

I. Sufficiency and Weight of the Evidence

Defendant argues that the prosecutor presented insufficient evidence to support the jury's verdict, and alternatively, that the verdict was against the great weight of the evidence.¹ To

¹ We review sufficiency of the evidence claims de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), and “must view the evidence in a 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Reasonable inferences drawn from circumstantial evidence can be sufficient evidence to sustain a criminal conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). To determine whether a verdict is against the great weight of the evidence, we must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The trial court's grant or denial of a new trial is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). “A trial court may be said to have abused its discretion only when its decision falls

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secure a conviction of assault with intent to rob while unarmed, the prosecutor must prove the following three elements: “1) an assault with force and violence, 2) an intent to rob and steal, and 3) defendant being unarmed.” *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993); MCL 750.88. Thus, the assault must be “with force and violence, *and* with the intent to rob and steal.” *Id.* at 615 (emphasis added). In addition, the force used to accomplish the taking must occur in the course of committing the larceny. MCL 750.530(1); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). “[I]n the course of committing a larceny’ includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.” MCL 750.530(2); *Passage, supra*, 277 Mich App at 177. In addition, robbery requires the intent to permanently deprive the owner of his property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). “Because of the difficulty in proving a defendant’s state of mind, circumstantial evidence is often necessary and is wholly satisfactory in sustaining a conclusion that the defendant possessed the requisite intent.” *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant’s conviction for assault with intent to rob while unarmed. The assault occurred in the course of committing the attempted larceny because defendant assaulted the victim, Margaret VanSoest, before, during, and after the attempted taking. *Passage, supra* at 177. Defendant approached Margaret demanding information about the location of his wife and children, and he punched Margaret in the face when she said she did not know them. As Margaret’s hand went to her face, defendant noticed the ring on her finger and demanded it three times. When Margaret refused to give the ring to defendant, he grabbed Margaret’s legs and tried to pull her out of her vehicle, but he was interrupted by the next victim, John VanSoest. This constituted sufficient evidence to establish that the assault was contemporaneous with the attempted taking.

Sufficient evidence also established that defendant intended to permanently deprive Margaret of her ring. Defendant demanded Margaret’s ring three times, and he forcibly tried to remove Margaret from her vehicle when she refused to give the ring to him. When Margaret’s husband arrived and began to call the police, defendant attacked him as well. Moreover, defendant confessed that he tried to take “the rings.” Clearly, this evidence was sufficient for the jury to conclude that defendant intended to permanently deprive Margaret of her ring. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant has failed to show that the verdict was contrary the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The jury found the prosecution’s version of events credible, and witnesses gave similar accounts of the crime, thus undermining defendant’s argument that the prosecution witnesses gave incredible testimony. Nothing in the record shows that the evidence preponderated against the verdict, and the trial court did not abuse its discretion when it denied defendant’s motion for a new trial.

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outside the principled range of outcomes.” *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

II. Police Officer's Testimony

Defendant contends that the trial court denied him a fair trial when it admitted “expert” testimony through Officer Robert Zabriskie, who testified about defendant’s mental state. We review unpreserved issues for plain error affecting substantial rights, *Carines, supra* at 763-764, and find no plain error related to defendant’s allegations. A lay witness may opine about the mental condition of the accused at the time of the charged offense, although he must base his opinion on “the facts and circumstances within [his] own knowledge.” *People v Cole*, 382 Mich 695, 707; 172 NW2d 354 (1969). Police testimony is considered lay testimony if it is “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue,” MRE 701, while expert testimony is testimony based on a person’s knowledge, experience, and training. *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007).

Here, Officer Zabriskie testified as a lay witness, not an expert, about his own perception of defendant’s mental state and he did not rely on specialized knowledge. Defendant’s mental condition was relevant to determine whether he knowingly understood and waived his *Miranda*² rights. Officer Zabriskie testified that he does not give *Miranda* warnings to people if he believes they have mental problems because their statements would be inadmissible in court. Defendant, however, seemed to understand his *Miranda* rights and he agreed to talk to the police. Officer Zabriskie based his assessment on his own perceptions and not on his “scientific, technical, or other specialized knowledge.” Therefore, the trial court properly admitted the evidence.

III. Prosecutorial Misconduct

Defendant maintains that several incidents of prosecutorial misconduct occurred. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). “The test for prosecutorial misconduct is whether, after examining the prosecutor’s statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor must be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutors are afforded great latitude regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues that the prosecutor introduced irrelevant and prejudicial testimony that suggested that defendant was not suffering from a mental illness. The prosecutor’s remarks must be examined in light of all the facts of the case, defense arguments, and the relationship the comments bear to the evidence admitted at trial. *Dobek, supra* at 63-64. “A prosecutor’s good-faith effort to admit evidence does not constitute misconduct.” *Id.* at 70. Defendant’s argument is without merit. Both police witnesses testified regarding defendant’s ability to understand his

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

Miranda rights. Defendant's mental condition was relevant to the issue of his susceptibility to police coercion. *People v Cheatham*, 453 Mich 1, 17; 551 NW2d 355 (1996). The prosecution's use of the police officer's testimony related to defendant's ability to understand his *Miranda* rights and demonstrated that defendant's admissions were knowing and voluntary despite his bizarre behavior. The prosecutor properly introduced the police officers' perception of defendant's mental condition, which was helpful to the jury's understanding of the issue. MRE 701.

Defendant claims the prosecutor argued facts not in evidence when he argued that defendant tried to take the "rings" off Margaret's finger instead of the "ring," singular, when the evidence showed there was only one ring. A prosecutor may not make a factual statement to the jury that is not supported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Officer Zabriskie originally used the term "rings" when testifying, but during cross-examination, he clarified that Margaret only wore one ring. The prosecutor's use of the word "rings" during closing arguments was, therefore, a misstatement. However, defendant has failed to establish that the prosecutor's use of the plural word "rings" instead of "ring" prejudiced the outcome of the trial. The fact that the prosecutor's comment might imply that there was another ring on Margaret's finger did not affect the outcome of the proceedings, and relief is not warranted.

Defendant avers that various comments made by the prosecutor during closing arguments impermissibly interjected his personal belief in defendant's guilt. A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge. *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004). Nevertheless, a prosecutor may comment that evidence against the defendant is "uncontroverted" or "undisputed." *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). When a prosecutor remarks that evidence is undisputed, he is properly arguing the weight of the evidence. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991).

The prosecutor's reference to the evidence as "straightforward" and "uncontroverted" was not improper. *Fields, supra* at 115-116. Nothing in the prosecutor's statement can be viewed as asking the jury to convict defendant based on the prosecutor's personal knowledge. The prosecutor was merely arguing the weight of the evidence and not using the prestige of the prosecutor's office to inject his personal opinion. Moreover, the trial court instructed the jury not to consider "[t]he lawyer's statements and arguments" as evidence because they "are only meant to help [the jury] understand the evidence as well as each side's legal theories." No misconduct occurred.³

IV. Sentence

³ Defendant also argues that the cumulative effect of the prosecution's alleged misconduct denied him a fair trial. We reject defendant's argument because, as noted, we found no instances of prosecutorial misconduct.

Defendant contends that his sentence is invalid because the trial court enhanced it based on facts not proven by the jury. Because defendant's minimum sentence was within the guidelines, we must affirm defendant's sentence unless the trial court erred in scoring the sentencing guidelines or the sentence was based on inaccurate information. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003); MCL 769.34(10). Contrary to defendant's assertion, *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), are inapplicable to Michigan's indeterminate sentencing scheme in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Defendant complains that the trial court improperly scored several offense variables. Contrary to defendant's argument, when a defendant is convicted of multiple offenses and "the crimes involved constitute one continuum of conduct, . . . it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense." *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003). A sentencing court has discretion in determining the number of points to be scored for each offense, if record evidence adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial court scored offense variable (OV) 3, MCL 777.33(1)(d), at ten points. MCL 777.31(1)(d) provides that OV 3 should be scored ten points if "[b]odily injury requiring medical treatment occurred to a victim." Evidence established that both John and Margaret sustained various injuries and were treated at the hospital following the attack. Therefore, the trial court correctly scored OV 3.

The trial court also scored OV 4, MCL 777.34, at ten points. Ten points is appropriate if there is serious psychological injury to the victim that requires professional treatment. MCL 777.34(1)(a). "There is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004); MCL 777.34(2). Margaret indicated that, at random times since the assault, she must fight against overwhelming feelings of fear and anxiety. Therefore, though Margaret did not seek psychological treatment, there was sufficient evidence to uphold the trial court's score of ten points. *Id.*; *Hornsby*, *supra* at 468.

The trial court also scored OV 9, MCL 777.39, at ten points. MCL 777.39 provides that this variable should be scored at ten points if two to nine victims were placed at risk of physical injury or loss of life. MCL 777.39. Bystanders and persons who intervene may be counted as victims if they are placed in danger of injury. *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004). When Margaret was assaulted, Olamae Sanders was nearby on the passenger side of the vehicle, and John intervened to stop defendant's assault on Margaret and was then assaulted. Each individual was in close proximity to the assault and could be counted as a victim. Therefore, sufficient evidence supported the trial court's scoring of OV 9.

The trial court also scored OV 10, MCL 777.40, at ten points. OV 10 addresses the "exploitation of a vulnerable victim," MCL 777.40(1), and ten points is scored if the "offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). Five points

is scored if a defendant exploits a size difference. MCL 777.40(1)(c). If more than one characteristic of vulnerability applies under MCL 777.40, the court must use the highest point value. MCL 777.40(1). The trial court found that defendant clearly exploited Margaret because of her age, sex, and size. Defendant was 34 years old, and Margaret was 56 years old at the time of the incident and had a small build. Moreover, Sanders was with Margaret at the time of the attack and is described as “elderly” in the record. Because there was a significant age difference between Margaret and defendant, an obvious size difference, and because Margaret was with an elderly woman and was attempting to enter a vehicle when defendant attacked her, we find that the trial court correctly scored OV 10 at ten points.

V. Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel. Because defendant did not move for a new trial on this basis, our review of defendant’s claim is limited to mistakes apparent on the record. *Rodriguez, supra* at 38. To prevail on his claim, defendant must show that defense counsel’s performance fell below an objective standard of reasonableness and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel’s actions constituted sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defendant complains that defense counsel failed to investigate his mental situation and delayed moving for an independent evaluation until the day of the trial. “The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial’s outcome.” *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). In addition, the failure to present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* There is no record evidence before this Court to establish that defendant was denied a substantial defense through his failure to obtain an independent evaluation. Defense counsel chose not to present an insanity defense. Instead, he aggressively argued that defendant lacked the specific intent to rob Margaret. Defense counsel argued that the evidence supported a conclusion that defendant was frantically seeking his wife and children and attacking anyone in his way. Moreover, defense counsel argued that defendant did not attempt to grab the ring off Margaret’s finger. The fact that, in hindsight, the jury rejected defense counsel’s argument that he only intended to find his wife and children does not support a finding that counsel was ineffective. *Matuszak, supra* at 61. Defendant has failed to rebut the presumption that he received effective assistance of counsel. *Unger, supra* at 242.⁴

⁴ After reviewing defendant’s Standard 4 brief and the trial court record, we decline to remand for a hearing with regard to an insanity defense and we decline to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). We also reject the other arguments in defendant’s Standard 4 brief because the record does not support his claims of error.

Defendant also argues that he received ineffective assistance of counsel because his attorney failed to ensure that defendant was dressed in civilian clothing at trial and left him in a jail uniform. A defendant has a due process right to attend trial dressed in civilian clothing. *People v Harris*, 201 Mich App 147, 151-152; 505 NW2d 889 (1993). However, due process is satisfied if a defendant is wearing jail clothing that resembles civilian clothing. *Id.* It is not apparent from the record what reason, if any, defense counsel had for allowing defendant to sit through trial dressed in jail clothing or clothing that looked like jail clothing. Defense counsel did not request that defendant be allowed to wear civilian clothing during trial. However, defendant has failed to show that any decision regarding his clothing constituted an error on the part of his counsel. Indeed, the record contains no evidence regarding defendant's clothing decision or why it was made. Moreover, defendant has not established that there is a reasonable probability that, but for any alleged error, the result of his trial would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra