

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN PAUL TOVAR,

Defendant-Appellant.

UNPUBLISHED

March 9, 2010

No. 288972

Saginaw Circuit Court

LC No. 07-029831-FC

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of second-degree murder, MCL 750.317; carrying a concealed weapon (CCW), MCL 750.227; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm defendant's convictions, vacate his sentences, and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Decedent, Gerald Gordon, was at a party when he and his friends argued with Cortez Davis and Davis' brothers over a hat. The fight escalated, and, according to the prosecution, defendant pulled out a .40 caliber handgun and fired a shot into the ceiling. The partygoers scattered, and as Gordon ran into the parking lot, he was shot in the back. Gordon later died. The police found a loaded .40 caliber handgun in the pocket of defendant's pants, in the closet of defendant's bedroom.¹ The prosecution's expert witnesses indicated that the spent casings found at the scene were the same type as a number of the cartridges found in defendant's gun,² and the bullet that entered Gordon's back was the same type as some of those found in defendant's gun. An expert witness also testified that the spent shells found at the scene were fired from defendant's gun. Another expert witness testified that defendant's DNA matched swabs taken from the .40 caliber pistol and cartridges.

¹ The police also discovered a .45 caliber handgun in another pocket.

² The gun found in defendant's home contained cartridges with both hollow point and "Hydro-Shok" bullets. The bullet taken from Gordon's body was a Hydro-Shok.

Defendant first argues that defense counsel rendered ineffective assistance by failing to object to the introduction of a videotape of one of Davis' police interviews, in which he told his mother, outside the presence of officers, that defendant was involved in the shooting.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*³ hearing before the trial court; therefore, this claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*, quoting *Solmonson*, 261 Mich App at 663-664.

Davis initially maintained at trial that he did not see Gordon get shot, but then admitted that he told police officers that he saw Gordon "drop and roll" after the shot, and admitted that he saw that occur as Davis ran out of the club. When asked whether he ever told anyone that he knew who shot Gordon, he maintained that he had "told somebody what I heard, yes." However, he maintained that he did not see defendant shoot Gordon. Davis subsequently admitted that he told his mother, while at a videotaped police interview where she was present, outside the presence of the officers, who shot Gordon. When asked the individual's name, he first answered that he would "rather not say", and then answered that he did not remember. He further denied that he told his mother that he was standing right next to the person who shot Gordon, and that he did not want to be a snitch. Subsequently, the videotape of his conversation with his mother was played for the jury. In the discussion with his mother, Davis apparently⁴ told her, "We didn't know that JP was going to shoot him." Davis also acknowledged at trial that, on the video, he told his mother that he did not want to tell the police who shot the victim "because [he] didn't want to be a snitch." He further acknowledged that he told his mother that he was "standing right there when it happened." However, during direct and cross-examination, Davis maintained that he only heard from another individual who shot the victim.

The basis for defendant's ineffective assistance claim is hard to decipher. Defendant appears to argue that this statement was inadmissible hearsay because Davis stated at trial that he had not been near the shooting and the information that defendant shot the victim was a rumor that Davis heard; therefore, the videotape was inadmissible under MRE 602. We disagree.

MRE 602 provides:

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ This Court has not been provided with a copy of the videotape. Only certain of Davis' statements to his mother were discussed in the trial transcripts.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Sufficient evidence showed that Davis was present during the shooting and witnessed it. Apart from the statements given in the videotape, in which Davis told his mother that he was there and saw what occurred, Davis' trial testimony supports a finding that he had personal knowledge of the events. Davis admitted that he engaged in a fight with the victim and others, and that the fight continued until someone started shooting. He further admitted that he saw the victim "drop and roll after the shot" as he ran out of the club. Another witness also testified that Davis was involved in the fight prior to the shooting. One could certainly infer from the fact that Davis was engaged in a physical altercation with the victim, either at the time of the shooting or immediately before, and that he saw the victim "drop and roll" as he was being shot, and that Davis did in fact observe the shooting while it was happening. We thus find defendant's claim that the videotape was inadmissible under MRE 602 without merit.

In addition, to the extent defendant's objection is actually grounded in a claim that the recorded statements were inadmissible hearsay, we find that the recording was properly admissible pursuant to MRE 803(5), which provides:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

To be admissible under MRE 803(5), "(1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant" *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1991), quoting *People v Williams*, 117 Mich App 505, 508-509; 324 NW2d 70, rev'd and remanded on other grounds 412 Mich 711 (1982).⁵

Davis alleged that he could not remember certain events concerning the shooting, but he acknowledged that the conversation with his mother occurred, that he told his mother that he was present during the shooting and knew the identity of the shooter. He also acknowledged that the videotape was of his conversation with his mother. His videotaped conversation was admissible pursuant to MRE 803(5). *Daniels*, 192 Mich App at 667-668.

⁵ Cortez' actual statement that he did not know defendant was going to shoot the victim was not hearsay because the prosecutor was not seeking to use it for the truth of the matter asserted, the extent of Cortez' prior knowledge, but to show that defendant did shoot the victim. MRE 801(c).

Because defendant cannot show that the videotape was improperly admitted, he cannot establish that counsel rendered ineffective assistance by failing to object to its admission. “[C]ounsel does not render ineffective assistance by failing to raise futile objections.” *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues that trial counsel rendered ineffective assistance by failing to object to the following improper statement by the prosecutor during closing arguments:

And you may wonder, ladies and gentlemen, how is it that I would know or think to ask these [defense] witnesses those questions on cross-examination. And you may have noticed that when I was here at the podium cross-examining each witness I had white papers and I would occasionally show one of the witnesses one of the pages with the questions and answers on it.

You should know, of course, or should figure out, that when these detectives talk to people both our witnesses, as you say, and defense witnesses, they record the conversation with a tape recorder. In cases with some people like Cortez, a videotape recorder. And then transcripts are prepared of that, word for word transcripts, and that’s where that stuff came from that I’m showing these witnesses in black and white on the paper. Don’t you remember telling them this? And by and large, you know, when people are confronted with a verbatim recounting of what they said on different occasions, most of them are smart enough to admit, yeah, I said that.

Defendant appears to argue that this statement amounts to a request by the prosecutor that the jury rely on evidence not presented to the jury, i.e., the prior statements, to find defendant guilty. Defendant does not specifically argue that the use of witnesses’ prior inconsistent statements during questioning was improper.⁶ Defendant correctly notes that a prosecutor may not argue facts that are not in evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, this is not the case here, at least to the extent that trial counsel’s failure to object was objectively unreasonable. The prosecutor referenced prior recorded statements that were not admitted, and at least implicitly argued that the prior statements were factually correct. The context of this argument concerns defense witnesses’ direct (favorable) testimony concerning their statements about observing defendant purchase a handgun after the shooting and their admissions on cross-examination to prior inconsistent statements. From this context, we find the challenged statement to be an argument that the witnesses’ favorable trial testimony should not be believed.⁷ A prosecutor is free to argue that a trial witness is not credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Defendant has not shown that counsel’s decision

⁶ Nor would such an argument have been likely to succeed. See MRE 801(d)(1)(a); MRE 612; MRE 613.

⁷ Likewise, the prosecutor’s reference to Davis’ videotaped statement could be viewed as an argument that the jury should not believe his trial testimony. The videotape was admitted at trial, so defendant’s argument is without merit as to this evidence in any event.

not to object was objectively unreasonable. *Ackerman*, 257 Mich App at 455. Defendant has not shown that counsel provided ineffective assistance.

Defendant next argues that the trial court erred during sentencing when it scored offense variable (OV) 9 (number of victims) at 25 points. We review a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supported a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (internal citation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Furthermore, we review "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.*

MCL 777.39 provides that 25 points is to be scored for OV 9 if ten or more "victims" were placed "in danger of physical injury or death". MCL 777.39(1)(b). Each person who was placed in danger of physical injury or loss of life is to be counted as a victim. MCL 777.39(2)(a). Defendant argues that OV 9 should have been scored at zero points because "nothing in the record indicates that any person other than the victim was endangered by the two shots that were fired" where one shot was fired into the ceiling and one directly into the victim's back. We disagree. A person need not be a named victim to be considered a victim for purposes of scoring this variable. *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004). Here, the first shot was fired inside the hall. While this first bullet itself may not have been intended to cause injury, the over 300 panicking people likely had no idea this was the case as they stampeded for the exits. They were all placed in danger of injury due to defendant's actions. Moreover, while defendant's second shot struck the victim, apparently as defendant intended, the trial court could reasonably have found that defendant's decision to shoot at a running target in a dark parking lot with others running nearby placed at least ten individuals in danger of getting shot. This scoring decision was not erroneous.

Defendant next argues that the trial court misscored OV 13 (continuing pattern of criminal behavior) at 25 points. We agree with defendant's assertion of error, vacate defendant's sentences, and remand this matter for resentencing.

MCL 777.43(1)(c) provides that 25 points are to be scored for OV 13 when the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. Here, the scoring was based on the instant shooting, as well as another court file in which defendant was charged with assault with intent to murder, carrying a concealed weapon with intent, and felony firearm.⁸ Defendant correctly notes that notwithstanding whether the trial court could consider the charged assault in the other case, this variable was misscored. Defendant's third offense used to score this variable, carrying a concealed weapon with unlawful intent, MCL 750.226, is a crime against public safety, not a crime against a person. See MCL 777.16m. The trial court's scoring decision was erroneous.

⁸ During sentencing, the prosecutor seemed to indicate that another assault charge was also pending. However, this is unclear, and a third assault is not mentioned in the prosecutor's sentencing memorandum.

If OV 13 is rescored, defendant's OV score drops from 121 to 96 points. This changes his OV level from III to II, and the recommended sentence range from 270 to 450 months or life to 225-375 months or life. MCL 777.61. Defendant is thus entitled to resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

Convictions affirmed; sentences vacated; remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood