STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2007
v	No. 271511 Oakland Circuit Court
BRANDON ALLEN ARNOLD, Defendant-Appellant.	LC No. 2005-204581-FC

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 40 to 60 years for the second-degree murder conviction, 25 to 50 years for each of the assault convictions, and 1 to 7-1/2 years for the felon-in-possession conviction, to be served consecutive to two years' imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise out of a shooting that occurred near the Lancaster Apartments in Pontiac. Donte Robertson drove with Julius Standifer to the apartment complex in a van to pick up Kentrell Louris. Louris got into the van, and Robertson attempted to park the vehicle at another location within the complex. While Robertson was doing so, defendant and his codefendant, Christopher McCray, began firing shots at the van. Standifer, who was in the backseat, laid on the floor of the van until the gunshots ceased. He was unharmed. Robertson, however, was struck twice in the knee and fatally struck in the head, and Louris suffered gunshot wounds to the right thigh and neck, rendering him a quadriplegic. Defendant's theory of defense at trial was misidentification, and he presented witnesses who testified that the shooters wore masks.

Defendant first argues that the repeated references to polygraph examinations during trial denied him his due process right to a fair trial. We disagree. Defendant arguably waived appellate review of this issue by successfully moving for the admission of the videotape of the police interview of Nacita Gilder, which frequently referenced polygraph examinations. See *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001) ("[a] defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the

evidence was prejudicial and denied him a fair trial"). At a minimum, defendant failed to preserve this issue for appellate review, by failing to object to the references to polygraph examinations in the trial court.[1] Therefore, even if review of this issue was not waived, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Knapp*, *supra* at 375. Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Generally, a reference to a polygraph examination is not admissible at trial. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Not every reference to a polygraph test, however, constitutes error requiring reversal. *Id*. at 98. To determine if reversal is required, this Court has examined the following factors:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id*. (citations omitted).]

Here, defendant did not object to the polygraph references during trial and, as previously stated, successfully sought to admit videotape evidence repeatedly referencing a polygraph examination with respect to witness Nacita Gilder. Gilder indicated in her first statement to the police that she was having sexual intercourse with defendant at the time that the shooting occurred. Shortly before Gilder was to undergo a polygraph examination, however, she recanted her first statement and made a second statement to Sergeant David Veasley indicating that her previous statement was untrue and that defendant had asked her to be his alibi. Defendant's theory at trial was that the actions of the police officers and prospect of taking a polygraph examination coerced Gilder into recanting her first statement and fabricating her second statement. Therefore, defendant used the references to a polygraph examination to his advantage during trial.

Although the first reference to a polygraph examination occurred during the prosecutor's examination of Gilder, the record clearly shows that the prosecutor's questioning was designed to elicit testimony regarding whether Gilder told Sergeant Veasley that her first statement to the police was untrue. Gilder's reference to a polygraph examination in response to that questioning was not solicited and clearly inadvertent. The inadvertent and unsolicited mention of a polygraph examination is not grounds for reversal. See *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

Further, following the initial reference to a polygraph examination during the prosecutor's direct examination, defense counsel cross-examined Gilder regarding her intent to

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[1] Although counsel for codefendant McCray objected to the references to polygraph examinations, defense counsel did not similarly object or join McCray's objection. Thus, this issue is not preserved for this defendant. *People v Poindexter*, 138 Mich App 322, 331; 361 NW2d 346 (1984).

take a polygraph examination and played the videotape of Gilder's police interview, which repeatedly referenced a polygraph examination. Thereafter, the trial court permitted the prosecutor to question Gilder regarding her refusal to take a polygraph examination because "[t]he defense opened the door." Further, because Gilder did not take the examination, the results of the test obviously were not admitted. Accordingly, under the circumstances of this case, defendant has not demonstrated that the references to a polygraph examination constituted plain error.

Defendant next contends that the trial court's admission of rebuttal testimony, including permitting the jury to view a video that the court had previously suppressed, denied him a fair trial. We disagree. We review for an abuse of discretion a trial court's decision admitting rebuttal evidence. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado*, *supra*; *Babcock, supra*.

"Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *Figgures*, *supra* at 399 (citation and quotations omitted). "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id*. "As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id*.

Here, the trial court did not abuse its discretion by admitting the rebuttal testimony of Detective Maurice Martin and allowing the jury to view a videotape of the crime scene.[2] Defense witness Lashawnda Garrett testified that she witnessed the shooting from a courtyard near her residence, that both shooters were wearing masks, and that nothing obstructed her vision. She initially testified that she was approximately 35 feet away from the shooting when it occurred, but thereafter testified that she was approximately 70 feet from the shooting. The trial court permitted the prosecutor to present Detective Martin's testimony in rebuttal and to play the videotape to contradict Garrett's estimate of her distance from the shooting and to show her vantage point. The tape was played before the jury, and Detective Martin testified that Garrett was approximately 30 to 40 yards, or 90 to 120 feet, from the shooting. Because the testimony and video were responsive to Garrett's testimony, the trial court's ruling did not constitute an abuse of discretion.

Defendant next contends that he is entitled to resentencing because offense variables (OVs) 13 and 19 were erroneously scored. A sentencing court has discretion in determining the

[2] The trial court did not admit the videotape into evidence, but rather, allowed the tape to be played during Detective Martin's testimony while he explained what the tape portrayed.

number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*.

Defendant argues that the trial court erred by scoring 25 points under OV 13, MCL 777.43, involving a continuing pattern of criminal behavior. MCL 777.43(1)(b) directs that 25 points be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Further, MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted . . . ."

Defendant contends that because his convictions in the instant case arose out of a single incident, they cannot form the basis for scoring points under OV 13. Defendant's argument lacks merit. In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court stated that concurrent convictions could support a score of 25 points under OV 13. Moreover, the Legislature specifically addressed those situations in which convictions should not be counted because they arose out of a single incident in MCL 777.43(2). The Legislature did not include the instant circumstances as an exception to the general rule that "all crimes within a 5-year period, including the sentencing offense, shall be counted . . . ." MCL 777.43(2)(a). We thus find no merit to defendant's claim that the instant circumstances are exempt from the application of the general rule.

Defendant also argues that the trial court erroneously scored ten points under OV 19, MCL 777.49, based on its determination that defendant "interfered with or attempted to interfere with the administration of justice . . . ." MCL 777.49(c). The trial court scored ten points under this variable based on defendant's request of Gilder that she provide an alibi for him. Because the evidence at trial supported the scoring decision, we will uphold the trial court's scoring of OV 19. *Endres*, *supra* at 417.

Defendant next contends that his sentence was based on facts neither admitted nor proven beyond a reasonable doubt contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Because defendant did not preserve this issue by raising it in the trial court, our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 763; *Knapp*, *supra* at 375.

In *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006), cert den ___ US ___; 127 S Ct 592; 166 L Ed 2d 440 (2006), our Supreme Court held that judicial fact-finding to determine only the minimum sentence of an indeterminate sentence does not violate *Blakely*, which pertains only to sentences imposed beyond the statutory maximum. Defendant argues that he is entitled to resentencing because the trial court's scoring of the OVs reflects judicial findings that defendant did not admit and which were not proven beyond a reasonable doubt. Because the assessment of points under the OVs, however, affected only the minimum term of defendant's indeterminate sentence, the trial court's scoring of the OVs did not violate *Blakely*. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter