STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2012
v	No. 304645 Wayne Circuit Court
ANTHONY LAMAR ALLEN, Defendant-Appellant.	LC No. 11-001801-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v	No. 305081 Wayne Circuit Court
ANTHONY LAMAR ALLEN, Defendant-Appellee.	LC No. 11-001801-FC

Before: MURRAY, P.J, and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Following a bench trial in the Wayne Circuit Court, defendant, Anthony Lamar Allen, was convicted of carjacking, MCL 750.529a, armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was subsequently sentenced to 9 to 18 years' imprisonment for the carjacking conviction, 9 to 18 years' imprisonment for the armed robbery conviction, one to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. The first three sentences were to run concurrently and consecutive to the sentence for the felony-firearm conviction. Defendant appeals as of right each of his convictions, while the prosecution appeals as of right each of defendant's sentences except that for felony-firearm. We affirm defendant's convictions, vacate his sentences (except that for his felony-firearm conviction), and remand for resentencing.

I. SUMMARY OF FACTS AND PROCEEDINGS

Defendant was charged with committing numerous crimes on November 17, 2010, each of which were based upon his actions in threatening, and ultimately shooting at, the victim, Aaron Patrick, while stealing the victim's car. The facts brought forth at this one-day bench trial revealed that on November 17, 2010, the victim was at Ashley Collin's apartment, who was his girlfriend. Also present were the girlfriend's god brother, T. J. Ziglar, as well as her one-year-old son. The victim was in the back bedroom looking for his girlfriend's shoes when defendant knocked on the door and was let into the apartment. Defendant was accompanied by another man.

While the victim was in the back bedroom looking for the shoes, his girlfriend, along with her son, walked into the bedroom. When the victim looked up he saw defendant standing about four or five feet away, with the other man standing behind defendant. Defendant pointed a gray and black automatic pistol at the victim's chest and repeatedly stated, "[G]ive me your money and your keys," but the victim repeatedly refused. At defendant's suggestion, the girlfriend took her son and left the room, while defendant told the victim one more time to turn over the keys. Then, according to the victim, "he lowered the gun towards my leg and fired a shot." The bullet pierced the left leg of his pants, a large pair of blue jeans. There was a bullet hole in the front left crotch area and another hole in the back left side of the jeans. The victim was also wearing basketball shorts under his pants, and there was a bullet hole on the bottom left front leg of the shorts. Both the pants and the shorts were admitted into evidence.

After the shot was fired, the victim threw the car keys on the television stand next to where defendant was standing. Defendant grabbed the keys and exited the room, all the while pointing the gun at the victim. Looking out a window, the victim saw defendant and the other man drive away in his car. The police arrived about five minutes after the victim called for help.

This was not the victim's first encounter with defendant, as he had seen defendant once or twice before at the girlfriend's apartment. Additionally, that night, before he went to the apartment, the victim saw defendant at a nearby store. He knew defendant as "Ant," and subsequently identified defendant in a photo lineup that was admitted into evidence. The victim's girlfriend was even more familiar with defendant, as she had met defendant at the same nearby store shortly after she moved to her apartment on September 25, 2010, and had become friends. Indeed, and unbeknownst to the victim, she saw defendant every day at the store and had been intimate with him prior to the crime. Reflecting their closeness, the day after the crime defendant told the victim's girlfriend where the car was located. She then obtained the keys from defendant's cousin and found the car behind a vacant house.

Following the testimony of two more prosecution witnesses, the parties' rested, closing arguments were made, and the court made the following brief findings:

> The prosecution has proven each and every element of the charges of carjacking, armed robbery, felonious assault and felony firearm. And the Court finds the defendant guilty of those charges.
>
> The prosecution has not proven beyond a reasonable doubt that the defendant had the intent to commit great bodily harm or the intent to commit

murder. And I find the defendant not guilty of assault with intent to do great bodily harm and assault with intent to murder.

Defendant was sentenced as described at the commencement of this opinion. We now turn to the substantive issues raised by the parties in both appeals.

II. ANALYSIS

I. PUTTING ON THE PANTS AND SHORTS

During trial the pants and shorts the victim was wearing when defendant shot at him were admitted into evidence. However, defendant also wanted the victim to put on the pants and shorts during trial, purportedly to determine whether the bullet holes in each piece of clothing matched up with each other when being worn. The trial court declined the request, finding that whether the holes lined up at the time of trial would, given the passage of time, only allow speculation about whether the holes lined up when the shot was fired or whether they could have even been made while the clothes were worn. Defendant argues that this decision denied him his constitutional right to present a defense, which we note is embodied in the due process clause of the Fourteenth Amendment and the compulsory process or confrontation clauses of the Sixth Amendment to the United States Constitution. *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008).

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007); *In re Hill*, 221 Mich App 683, 696; 562 NW2d 254 (1997). This Court reviews de novo whether the defendant suffered a deprivation of his constitutional right to present a defense. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). However, "[t]he right to present a defense is not absolute or unfettered." *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011) lv held in abeyance __ Mich __ ; 812 NW2d 734 (2012). Evidentiary rules excluding evidence from trial "do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Unger*, 278 Mich App at 250 (quotations and citation omitted). This Court must accord deference to the trial court's assessment of the credibility of the witnesses that testify before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004).

We agree with the trial court that the nature of the material, and the human elements that could have impacted trying on the clothing months after it was worn during the crime, could have caused the fact-finder to speculate about whether the clothing ever actually fit or was worn on the day of the crime. And, we have previously held that evidence that could cause speculation about what actually occurred is not relevant and therefore not an abuse of discretion to excludable from the fact-finder's consideration. *People v Diaz*, 98 Mich App 675, 684; 296 NW2d 337 (1980), citing MRE 401. The trial court did not abuse its discretion in precluding the victim from trying on these clothes during trial.

Furthermore, another ground would have supported the trial court's ruling. "Trial courts . . . have discretion to place limits on cross-examination where questions are intended merely to

harass, annoy, or humiliate the witness, or where inquiries would tend to endanger the personal safety of the witness." *People v Sammons*, 191 Mich App 351, 367; 478 NW2d 901 (1991). As stated in MRE 611(a):

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Defendant's motion to have the victim try on the undershorts and pants in front of the court, and then have the attorneys pushing and poking at his clothes in his groin area, certainly falls under MRE 611(a)(3). The court's denial of this motion protected the victim from undue embarrassment and, therefore, was not an abuse of the court's discretion. *Farquharson*, 274 Mich App at 271.

In light of our conclusion that the trial court did not abuse its discretion when precluding the victim from trying on these clothes during trial, and because of other factors outlined below, we hold that the trial court's denial of this motion did not abridge defendant's right to present a defense. *Steele*, 283 Mich App at 480; *Unger*, 278 Mich App at 250. We must keep in mind that defendant's defense was that he did not commit the crime, and that defendant wanted the victim to try on the garments in an attempt to show that his testimony was not credible. However, the court, sitting as the trier of fact, was able to judge the credibility of the witnesses' testimony, *Miller*, 433 Mich at 337, and the court allowed the pants and shorts to be placed on top of each other to help determine whether the holes were aligned. Also assisting the court in determining the credibility of what transpired was an officer's testimony about the possible angle of the handgun when the bullet was shot at the victim. Hence, there was sufficient evidence before the trial court to address the validity of defendant's defense, and the victim's credibility about the shooting.

Additionally, there were two other eyewitnesses to the offense and both supported the victim's testimony. The victim's girlfriend, who was very familiar with defendant, testified that she saw defendant fire the gun, while her god brother testified that he saw defendant come into the bedroom, pull out a gun, and demand the keys to the victim's car. The god brother then left the room and heard the gun shot. Hence, there was ample evidence from which the trial court could determine the credibility of the victim's testimony and whether he was actually shot at by defendant. We also note that defendant has supplied no more than bare unsupported assertions that, had the victim tried on the clothes in front of the court, defendant would have been found not guilty of the crimes. Upon de novo review, we hold that defendant was not denied his constitutional right to present a defense.

II. THE DUTY TO INVESTIGATE

Defendant next argues that he was denied his constitutional right to due process of law because the police failed to properly investigate the crime and the prosecutor did not introduce any evidence that verified the alleged victim's and his cohorts' allegations. This argument was not raised in front of the trial court, so it is not preserved. We review unpreserved issues for

plain error affecting substantial rights, i.e., the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is not warranted unless defendant is "actually innocent or . . . the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Police officers have a duty to investigate violations of the law and seize evidence. *People v Johnson*, 137 Mich App 295, 301; 357 NW2d 675 (1984); *People v Stiles*, 99 Mich App 116, 120; 297 NW2d 631 (1980). However, the police are not under a duty to seek and find exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Similarly, a prosecutor is not required to perform a defendant's investigative work for him, *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), or negate every theory consistent with a defendant's innocence, *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003).

Here, the evidence regarding the crime was investigated by the police and turned over to defendant by the prosecution. The victim and two eyewitnesses to the crime were interviewed by police and provided written statements. The spent casing and the clothes with bullet holes, which were taken from the victim by the police, were entered into evidence. "Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *Coy*, 258 Mich App at 21. Defendant has made no showing, and there is no evidence on the record, that the prosecution or the police suppressed evidence, engaged in intentional misconduct, or acted in bad faith. Defendant has not even suggested what evidence could have been revealed had further investigation been made.

Finally, defendant's reliance on *People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970), is misplaced. In *Jordan*, this Court addressed whether laboratory testing of a handkerchief with stains of uncertain origin was required in order to establish a proper foundation for its admission into evidence in a sexual assault case. *Id.* at 385-389. Here, defendant does not challenge the foundation for any admitted evidence. Instead, he contends that the police and prosecutor failed in their duty to further investigate the case. As already discussed, no such duty exists. Thus, defendant has failed to demonstrate plain error that affected the outcome of the proceedings, *Carines*, 460 Mich at 763-764, because he failed to demonstrate that he was "actually innocent" or that "the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence[,]" *Knox*, 469 Mich at 508. We therefore hold that defendant was not denied his state and federal constitutional rights to due process of law and a fair trial.

III. SUFFICIENCY OF THE EVIDENCE

We turn next to defendant's argument that his convictions should be reversed because there was no competent evidence of his guilt, so therefore the evidence was insufficient to support his convictions. He is wrong.

This Court reviews de novo a challenge on appeal to the sufficiency of the evidence. *People v Eriksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Id*. at 196.

Defendant does not argue before this Court that any particular element of the crimes for which he was convicted had not been met. Instead, defendant's sole argument is that the victim's testimony that he was shot at, and that the bullet went through his pants and undershorts but did not break any skin, was not credible and to believe it "is to simply throw common sense out the window." While there is no doubt that it was incredibly fortunate that the victim's body was not struck by the bullet, the trial court found his testimony credible. A police officer also testified about how the bullet could have traveled – consistent with the holes found in the clothing – without hitting the victim. Because resolution of this disputed factual question turns on the credibility of witnesses, this Court must defer to the trial court which had a superior opportunity to evaluate these matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

In addition to the victim's and officer's testimony, there was other competent evidence introduced to prove that defendant shot at the victim. The victim and two eyewitnesses identified defendant as the perpetrator of the crime and testified consistently concerning the crime. The pants and undershorts worn by the victim, with the bullet holes clearly observable, were entered into evidence, as was the spent casing that was taken from a wall in the bedroom where the crimes occurred. Two police officers also testified concerning the statements taken from the victim and the witnesses and their observations of the scene. Based on the evidence, which we view in the light most favorable to the prosecution, the trial court permissibly found that defendant shot at the victim and that the essential elements of the offenses were proved beyond a reasonable doubt.

IV. SENTENCING ISSUE

The final issue for our resolution comes by way of the prosecutor's appeal of some of defendant's sentences.[1] Specifically, the prosecutor argues that the trial court trial court erred as a matter of law when it determined that defendant's conviction under the Holmes Youthful Trainee Act, or HYTA, MCL 762.11, should not be counted when scoring prior record variables (PRVs) and offense variables (OVs) for purposes of determining the sentencing guidelines range.

The interpretation and application of statutes and court rules are reviewed de novo, *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010), as are questions of law, *People v Lukity*, 460

[1] All sentences are being challenged by the prosecutor except for the two-year felony-firearm sentence, which is not subject to the guidelines. *People v Johnigan*, 265 Mich App 463, 472; 696 NW2d 724 (2005).

Mich 484, 488; 596 NW2d 607 (1999). This Court reviews scoring decisions under the sentencing guidelines for an abuse of discretion. *Steele*, 283 Mich App at 490. "Trial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited." *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Scoring decisions involving statutory interpretation present a question of law to be reviewed de novo. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

Upon de novo review we conclude, as did another recent panel, *People v Williams*, ___ Mich App ___, ___; ___ NW2d ___ (rel'd October 17, 2012), that the trial court erred as a matter of law when it determined that defendant's conviction under the HYTA should not be counted when scoring PRVs and OVs for purposes of determining the sentencing guidelines range. In *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007), the Court held:

> The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Ford Motor Co v* [*City of*] *Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). If the statute is unambiguous, this Court will apply its language as written *Id*. When a statute specifically defines a given term, that definition alone controls. *Tryc v Mich*[] *Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

MCL 777.50(4)(a)(*i*),[2] which addresses the scoring of PRV 1 through 5, specifically provides that a "conviction" under the HYTA should be counted under PRV 1 through 5:

> (4) As used in this part:
>
> (a) "Conviction" includes any of the following:
>
> (*i*) Assignment to youthful trainee status under sections 11 to 15 of chapter II.

Hence the statute[3] plainly provides that the scorer is instructed to count a "conviction" under the HYTA when scoring PRV 1 through 5. Furthermore, under MCL 762.14(4), a youthful offender trainee's conviction and all proceedings regarding the disposition of the criminal charge "shall be open" to the courts, the DOC, the family independence agency, law enforcement personnel and, "beginning January 1, 2005, prosecuting attorneys for use only in the performance of their duties."

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[2] 1927 PA 175, as amended by 1998 PA 317, MCL 777.50, effective December 15, 1998.

[3] The Michigan Sentencing Guidelines Manual (2012 ed), p 9, follows MCL 777.50(4)(a)(*i*) in this regard. Under definitions, the sentencing guidelines manual defines "conviction" as "an adjudication of guilt in a criminal matter. A conviction includes assignment to MCL 762.11 (Holmes Youthful Trainee Act) and convictions set aside under MCL 780.621-780.624 (expunged)."

The only published case touching this issue is *People v Garner*, 215 Mich App 218, 220; 544 NW2d 478 (1996), which held that an assignment to youthful trainee status was not to be construed as a conviction when scoring the judicial guidelines for PRV 1. Defendant relies on *Garner*, but as the *Williams* Court recognized, *Garner* was published before the legislative guidelines became effective. 1998 PA 317, MCL 777.50, effective December 15, 1998, specifically, clearly, and unambiguously provides that a conviction under the HYTA is to be used for scoring PRV 1 through 5. That definition controls. *Haynes*, 477 Mich at 35.[4]

The trial court erred as a matter of law in determining that defendant's convictions under the HYTA should not be counted in scoring the sentencing guidelines. PRV 1 should be scored at 25 points, as it was originally. In addition, the court changed several other variables' scores based on its belief that the conviction under the HYTA should not be counted, which resulted in reducing the guidelines minimum range from 108 to 180 months to 81 to 135 months. Because the scoring errors altered the appropriate guidelines range, resentencing is required. See *People v Bonilla-Machado*, 489 Mich 412, 416; 803 NW2d 217 (2011) (an error in the scoring of offense variables changed the defendant's sentencing guidelines ranges, and therefore the matter was remanded for resentencing).

Defendant's convictions are affirmed, but the sentences for carjacking, armed robbery, and felonious assault are vacated and this matter is remanded to the trial court for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

[4] The United States Court of Appeals for the Sixth Circuit has recognized that the plain language of MCL 777.50(4)(a) permits use of a HYTA adjudication to calculate an offender's prior record. *Adams v United States*, 622 F3d 608, 612 (CA 6, 2010).