

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

v

MARKESE EDWARD DICKERSON,
Defendant-Appellant.

No. 307233
Saginaw Circuit Court
LC No. 10-035076-FJ

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of one count of assault with intent to murder, MCL 750.83, two counts of possession of a firearm with intent to commit a felony (felony-firearm), MCL 750.227b, one count of carrying a dangerous weapon with unlawful intent, MCL 750.226, and one count of carrying a concealed weapon, MCL 750.227. We affirm defendant's convictions and sentences, but remand for a correction of defendant's judgment of sentence.

I. FACTS

According to trial testimony, on September 30, 2010, Franko Ortiz was at his home with his wife, his three nephews, and his nephew's girlfriend. Ortiz observed a fight going on down the street, and he and his nephews went to investigate. They saw their relative, Henry Martinez, in a fist-fight with defendant. Ortiz and his nephews broke up the fight, and took Martinez back to Ortiz's house. Shortly thereafter, defendant arrived at the house with his brother and god-brother, and an argument broke out between the three of them and Ortiz. Defendant walked away from the argument and obtained a handgun from an onlooker, and shot at the Ortiz home nine times, with one bullet striking Ortiz's nephew, Joseph in the chest. The following day, police apprehended defendant, who admitted to firing the gun at the house, but denied any intent to harm the occupants.

Defendant first challenges the sufficiency of the evidence of assault with intent to commit murder, claiming that the prosecution failed to present any evidence that he intended to kill anyone when he shot at the home. We review challenges to the sufficiency of the evidence de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We review the interpretation and application of statutory sentencing guidelines de novo. *People v Morson*, 471 Mich 248, 255 (2004). We review unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999).

The deprivation of effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

The elements of an assault with intent to commit murder are (1) an assault; (2) with the specific intent to commit murder; (3) which, if successful, would make the killing murder. *People v Beard*, 171 Mich App 538, 541; 431 NW2d (1988). Evidence is sufficient to sustain a conviction if it is sufficient to justify a reasonable person in concluding that defendant is guilty beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 365; 285 NW2d 284 (1979).

Here, defendant alleges that there was insufficient evidence presented at trial to justify the conclusion of a reasonable person that defendant acted with the specific intent to commit murder. At trial, the prosecution did not produce any direct evidence of a specific intent to kill on the part of defendant, and defendant himself testified that his intent was only to scare the inhabitants of the house. Despite this lack of direct evidence, however, there was sufficient circumstantial evidence presented at trial of defendant's intent at the time of the shooting. The prosecution showed that defendant had been in a fight with Henry Martinez earlier in the day and that defendant and his brothers had followed Martinez to Franko Ortiz's house, where defendant retrieved a gun from a nearby friend and fired nine shots at and into the occupied house. Defendant did not fire the shots into the air, or into the ground, but rather fired them directly into the home, where one of the bullets struck Joseph Ortiz in the chest.

While defendant correctly asserts that a willful and malicious disregard for the natural tendency of an action to cause death is insufficient to establish assault with intent to commit murder, the circumstances here were sufficient to justify the conclusion that defendant was not acting with mere willful and malicious disregard for the consequences of his actions, but rather was acting with a premeditated intent to exact revenge in the form of murder. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish the element of intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Defendant's testimony that he only meant to scare the inhabitants of the house was an attempt to counter that inference. However, the jury, as finder of fact, was free to find defendant's evidence non-credible in light of the circumstantial evidence presented. Therefore, the circumstantial evidence was sufficient to establish that a reasonable jury could conclude that defendant acted with the intent to kill when he went to Franko Ortiz's house and fired nine shots into and around the house.

Second, defendant asserts that that his sentence for concealed carrying of a weapon should be served concurrently with his sentences for assault with intent to murder and carrying a dangerous weapon with unlawful intent. In the absence of statutory authority, the imposition of consecutive sentences is forbidden. *People v Chambers*, 430 Mich 217, 222; 421 NW2d 903 (1988). Under the felony firearm statute, the sentences for defendant's felony firearm convictions must run consecutive to all of his other sentences, with the exception of his sentence for CCW. MCL 750.227b(1) and (2). However, while defendant's felony-firearm sentences must be served consecutively to the remaining offenses, and concurrently to the CCW conviction, this does not mean that the CCW sentence can be served consecutively to the sentences for assault or for carrying with dangerous intent. These latter sentences begin to run

after the felony-firearm sentence is served, even if time is left on a minimum sentence for CCW. Here, the problem is technically academic, because the CCW minimum sentence is 24 months. However, we remand for ministerial correction of the judgment of sentence.

Third, defendant asserts that his right to a fair and impartial trial was violated by numerous and cumulative acts of prosecutorial misconduct. We disagree.

First, defendant alleges that the prosecution erred by telling the jury during jury selection that defendant confessed to the crime. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Nor, in stating the inferences, is he required to use the “blandest possible terms.” *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). The evidence presented at trial reflected that defendant did, in fact, confess to shooting at and inside Frank Ortiz’s house, but never confessed to intending to kill anyone. As such, defendant effectively confessed to some of the charged offenses, but not to the charged offense of assault with intent to murder. While this renders the prosecution’s statement during jury selection somewhat misleading, it does not rise to the level of reversible error. The statement was made before the presentation of the evidence, closing statements, and jury instructions. This Court will not reverse a conviction simply because the prosecutor makes unsubstantiated statements in his opening statement. The prosecutor must also have acted in bad faith or his statements must have prejudiced the defendant. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997), quoting *People v Davis*, 343 Mich 348, 357; 72 NW2d 269 (1955). Given the evidence that defendant had confessed to shooting at the home, and given the prosecution’s theory that defendant had the intent to kill, the statement was not made in bad faith. In addition, there was ample opportunity to refute the notion that defendant confessed to assault with intent to commit murder, and trial counsel for defendant based his entire defense around the notion that defendant had no such intent when he fired into the house. As such, the prosecution’s statements do not merit reversal.

Second, defendant alleges that the prosecution misled the jury by saying that defendant’s intent could be inferred from his actions, just like a customer could infer from a department store’s decision to put fifty televisions on display that they intended to sell those televisions, even if no salesman was present. While the analogy may be somewhat clumsy, it is by no means improper, as it is a fair example of inferring intent from circumstantial evidence. As such, the prosecution’s statements do not merit reversal.

Third, defendant argues that the prosecution made an improper “civic duty” argument by stating that the victim and his family wanted justice and the ability to be in their home in peace. Appeals to a jury’s civic duty are improper because they encourage jurors to suspend their powers of judgment with regard to the defendant’s actual guilt or innocence. *People v Wright*, 99 Mich App 801, 809; 298 NW2d 857 (1980). Here, however, nothing in the prosecutor’s statement could be interpreted as an effort to draw the jury’s attention away from defendant’s actual guilt or innocence. Moreover, the jury was appropriately instructed with regard to the burden of proof and elements of the relevant offenses. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). As such, the prosecution’s statements do not merit reversal.

Fourth, defendant argues that the prosecution misstated the law by telling the jury that they needed to exercise their common sense when evaluating the evidence. Specifically, the prosecution said the following

Mr. Best: . . . If you hear a story from somebody on the street and you do not know them, you will decide do I believe this person or not. If you see something happen as a citizen, you're going to say I know what the intention was by the way it was done, by what was said. You don't need any fancy reasoning to do this. You do this everyday as citizens, and that's what we're asking you to do here.

Taken in context, the prosecution appears to be referencing evaluating the credibility of witnesses and inferring intent from words and actions. In that light, the prosecution's statements are not faulty or misleading, as assessments of credibility and inferences from circumstantial evidence are made from common sense. Moreover, the jury was appropriately instructed with regard to the burden of proof, and jurors are presumed to follow their instructions. *Id.* As such, the prosecution's statements do not merit reversal.

Finally, defendant argues that the prosecution argued facts not in evidence when saying that defendant admitted to starting the fight with Henry Martinez, and that there was transferred intent from Henry to Joseph Ortiz when Ortiz was shot by defendant. Based on the evidence at trial, the matter of who started the fight between defendant and Martinez was unclear and open to interpretation. As such, the prosecution's statement was not demonstrably false. Moreover, the jury was appropriately instructed with regard to the burden of proof and elements of the relevant offenses. Jurors are presumed to follow their instructions. *Id.* With regard to transferred intent, defendant's argument is misplaced. On appeal, defendant asserts that it is improper to transfer the intent from a fight to a shooting. The transferred intent in this case, however, is from shooting with intent to kill Martinez, and instead hitting Joseph Ortiz. This Court has held that the requisite intent for assault with intent to commit murder may be transferred. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). As such, the prosecution's statements do not merit reversal.

Therefore, because all of the misconduct alleged by defendant is either harmless or not misconduct, defendant's right to a fair and impartial trial was not violated.

Fourth, defendant asserts that his sentencing variables were improperly scored, and that he is entitled to resentencing. We disagree.

First, defendant asserts that the prosecution has the burden of establishing any facts used in the scoring of an offense variable beyond a reasonable doubt and before a jury. This position, however, was explicitly rejected by our Supreme Court in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). While defendant is free to argue that *Drohan* was incorrectly decided, it remains binding authority on this Court.

Defendant also asserts that, even if there is no need to establish the facts used in the scoring of an offense variable beyond a reasonable doubt and before a jury, the trial court still erred in scoring several of the offense variables. Defendant argues that the trial court erred by scoring 10 points under OV 4 for inflicting a serious psychological injury on the victim requiring

professional treatment. MCL 777.34(1)(a). Testimony at trial established that Franko Ortiz and his family no longer felt comfortable in their home, that the people in the house at the time of the shooting experienced shock. While no evidence was presented that any of the victims of the shooting were seeking professional help, the language of MCL 777.34(1)(a) does not require any such proof. See also MCL 777.34(2) (“In making this determination, the fact that treatment has not been sought is not conclusive.”) As such, this variable was not improperly scored.

Next, defendant argues that the trial court erred by scoring 50 points under OV 6 for having a premeditated intent to kill. MCL 777.36(1)(a). As noted above, the evidence at trial established that after his fight with Martinez, defendant gathered his brothers, followed Martinez to the Ortiz household, acquired a gun, and shot nine times into a house he knew to be occupied. Given this circumstantial evidence, it was not error to infer that defendant had a premeditated intent to kill at the time he fired on Franko Ortiz’s home. As such, this variable was not improperly scored.

Further, defendant argues that the trial court erred by scoring 10 points under OV 9 for putting two to nine victims in danger of physical injury or death. MCL 77.39(1)(c). The evidence at trial showed that there were six people inside the home when defendant opened fire on the house. All six of those people were clearly placed in danger of physical injury or death. As such, this variable was not improperly scored.

Finally, defendant argues that the trial court erred by scoring 25 points under OV 12 for committing three or more contemporaneous felonious criminal acts involving a crime against a person. MCL 777.42(1)(a). Defendant was convicted of assault with intent to murder for the shooting of Joseph Ortiz. Defendant was not charged with the same crime against the other five individuals who were inside the home at the time of the shooting, but he clearly could have been charged and convicted under the same evidence that supporting his conviction for assault with intent to murder. As such, this variable was not improperly scored.

Therefore, because none of the offense variables were improperly scored, defendant is not entitled to resentencing.

Finally, defendant asserts that he was denied the effective assistance of counsel due to his trial counsel’s failure to object to the prosecution’s alleged misconduct at trial and to the trial court’s allegedly erroneous scoring of the offense variables. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so objectively deficient that counsel was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302–303; 521 NW2d 797 (1994). Defendant must also show that he was prejudiced thereby. *Id.* at 312. To establish prejudice, defendant must show that there is a reasonable probability that the alleged error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, 446 Mich at 312.

As noted above, none of the instances or prosecutorial misconduct alleged by defendant were actually misconduct. Further, none of the alleged errors in the trial court’s scoring of the offense variables were erroneous. As such, any objection by defendant’s trial counsel would

have been meritless. Counsel, however, is not required to raise meritless objections. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Defendant's convictions and sentences are affirmed, but we remand for the ministerial task of correction of the judgment of sentence in accordance with this opinion.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens