S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v ERIC MONTANEZ, Defendant-Appellant.	No. 305358 Oakland Circuit Court LC No. 2010-234988-FC

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of assault with intent to commit murder, MCL 750.83, felonious assault, MCL 750.82, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 17 to 50 years for each assault with intent to commit murder conviction, and two to four years for the felonious assault conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I. BASIC FACTS

Defendant's convictions arise from two separate incidents involving the Cartagena brothers in November 2010 in the city of Pontiac. Previously, in March 2009, Michael Cartagena had hit defendant in the head with a crowbar and served one year in jail for the assault. At the trial in this case, Michael and Alex Cartagena both testified that on November 19, 2010, defendant held a gun out a car window as he rode past their home. Then, on November 21, 2010, while Alex was driving with Michael in the passenger seat, they encountered defendant at a traffic light. Alex and defendant exchanged looks, Alex followed defendant's car, defendant brandished the same gun, and Alex urged defendant to "shoot, shoot, shoot." After hearing a gunshot, the Cartagena brothers observed blood coming from the back of Alex's head, where he had been grazed with a bullet. The defense theory at trial was that defendant was not present and not involved in any of the crimes.

II. THE SCORING OF OFFENSE VARIABLE 3

Defendant argues that he is entitled to resentencing because the trial court erroneously scored 25 points for offense variable (OV) 3 of the sentencing guidelines. Defendant contends that the evidence did not support a 25-point score for a life-threatening injury, and that OV 3

should have been scored at only 10 points for bodily injury requiring medical treatment. We disagree.

A trial court's scoring of the sentencing guidelines is reviewed to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010). When challenged, a sentencing factor need only be proven by a preponderance of the evidence, *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010), and the trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable, *People v Haacke*, 217 Mich App 434, 436; 553 NW2d 15 (1996). A scoring decision for which there is "*any* evidence in support" will be upheld. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012) (emphasis in original; citation omitted).

Twenty-five points should be scored for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c); *People v Houston*, 473 Mich 399, 404; 702 NW2d 530 (2005). The statute does not require medical testimony to prove a life-threatening injury. See *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007). A score of 10 points is appropriate if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). However, the statute mandates assessment of "the highest number of points possible." *Houston,* 473 Mich at 402.

In this case, the evidence at trial showed that defendant discharged a loaded firearm toward Alex's vehicle, and a bullet grazed the left rear of Alex's skull. Alex testified that he felt something hot, saw blood on his hand after he touched his head, and was in pain. Michael observed "a lot of blood" and described Alex's injury as a "real big gash" on the back of the head. Alex's uncle observed a "gush of blood" coming from Alex's head and rushed Alex to the hospital while calling 911. Alex's uncle explained that Alex "was bleeding so much." Alex received stitches and was in the hospital for three hours before being released. At trial, the actual scar on the back of Alex's head, as well as photographs depicting Alex's blood-stained shirt and his blood drippings in the car were shown. The trial court reasonably inferred from the record evidence concerning the location of the wound and the amount of blood the wound produced that Alex suffered a life-threatening injury. Accordingly, the evidence and reasonable inferences arising from it adequately supported the trial court's 25-point score for OV 3.

III. THE PROSECUTOR'S REMARKS IN CLOSING AND REBUTTAL ARGUMENTS

Defendant next argues that he is entitled to a new trial because the prosecutor improperly asserted facts not supported by the evidence and vouched for the testimony of the Cartagena brothers. We disagree. Because defendant did not object to the challenged comments below, this issue is unpreserved and we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction upon request. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. THE REMARKS

Defendant argues that the prosecutor impermissibly made statements not supported by the evidence by arguing that Michael acted in self-defense when he struck defendant with a crowbar in March 2009. In rebuttal argument, the prosecutor stated:

> And if you think that he just was messing around, somehow, and minding his own business and Michael Cartagena cracked him on the head, that's really not what happened.
>
> We heard Alex testify a little bit about what happened on that occasion and it was basically a free for all and *Michael, rightfully or wrongfully, decides to protect himself and he cracks the—the defendant in the head*, that's the motive in this case . . .. [Emphasis added.]

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, prosecutors have great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case, and they need not state their inferences in the blandest possible language. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Further, an otherwise improper remark might not warrant reversal if the prosecutor is responding to the defense counsel's argument. *Dobek,* 274 Mich App at 64; *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Viewed in context, the prosecutor argued the evidence and reasonable inferences arising from it to respond to defense counsel's assertions during closing argument. In providing a narration of the March 2009 incident, defense counsel argued that because defendant "was not willing to engage in any verbal or negative conflict with the Cartagena[]s," suddenly and without any action from defendant, Michael "[s]lams him in the back of the head with a crowbar[.]" As plaintiff aptly notes, there was no record evidence to support defense counsel's assertions regarding defendant's conciliatory thoughts and actions during the March 2009 event. Nonetheless, when making the challenged remarks during rebuttal argument, the prosecutor noted Alex's testimony, which was that during the altercation, defendant stated that he was going to get a gun out of his car, and that Michael became nervous and hit defendant on the head with a hard tool. Contrary to defendant's claim, the prosecution did not use the term "self-defense" or indicate that defendant had attacked Michael. Rather, the prosecutor stated that Michael made the decision to strike defendant, "rightfully *or wrongfully*." Moreover, the record was clear that Michael was convicted of assault and served a year in jail for his actions, thereby indicating that he was not acting in self-defense. Given this record, defendant has failed to establish that the prosecutor's responsive remarks were plain error.

Defendant also argues that the prosecutor improperly vouched for the credibility of the Cartagena brothers' testimony by stating that "[t]here's no way that they could fabricate what happened." In closing argument, the prosecutor stated:

> The Cartagena brothers, you saw them, we talked about them in jury selection. You can see, from their testimony, they're not exactly—and I don't mean to offend anyone—but they're not exactly road [sic] scholars.
>
> *There's no way that they could fabricate what happened* and then immediately go to their uncles, then you heard the 911 call, *couldn't fabricate*, well, yeah, let me get a wound in the back of the head and it—and then I'll pin it on the guy or somebody else shot me but I'm going to pin it on [defendant] because they identify [defendant] right away. [Emphasis added.]

A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But a prosecutor is free to argue from the facts and testimony that a witness is credible or worthy of belief. *Dobek*, 274 Mich App 66.

Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that Michael and Alex were credible. The prosecutor's remarks that the Cartagena brothers could not have fabricated what transpired were part of a permissible argument regarding credibility that was focused on countering the defense implication and assertions during trial that their identification of defendant as the shooter was not credible, and providing reasons why the brothers should be believed. When making the challenged remarks, the prosecutor urged the jury to evaluate the Cartagena brothers' testimony and demeanor, discussed the reliability of their testimony, and argued that there were reasons from the evidence to conclude that defendant was guilty of the charged crimes. After noting that the March 2009 incident provided defendant with a motive, the prosecutor noted that it was unlikely that Michael and Alex, who immediately identified defendant and called the police, would have manufactured an injury to Alex's head and accused defendant of causing it. The prosecutor further noted that the brothers had identified defendant as being in two different vehicles during the two incidents—a green Honda and a silver Honda—and that it was later revealed that defendant's mother owned a green Honda and defendant's cousin/friend owned a silver Honda. The prosecutor also explained how defendant's failure to attend work on the day of the shooting further supported the brothers' identification of defendant as the shooter. The prosecutor's argument was responsive to the evidence and theories presented at trial and, viewed in context, was not clearly improper.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant alternatively argues that defense counsel was ineffective for failing to object to the prosecutor's comments. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is

reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Because the prosecutor's remarks were not improper, defense counsel's failure to object was not objectively unreasonable. Further, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the properly admitted evidence, and that the jury was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly

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M. J. KELLY, J. (*concurring in part and dissenting in part*).

I concur fully with the majority's analysis and decision to affirm defendant's convictions. However, I cannot join the majority's decision to affirm the trial court's application of the sentencing guidelines. The trial court clearly erred when it found that Alex Cartagena sustained a life threatening injury and, for that reason, erred as a matter of law when it scored offense variable (OV) 3 at 25 points. Further, because this error altered the applicable sentencing range, I conclude that it warrants resentencing. Because I would remand for resentencing, I must respectfully dissent in part.

This Court reviews de novo whether a trial court properly interpreted and applied the sentencing guidelines when scoring offense variables. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). Our Supreme Court has held that the factual findings underlying a scoring decision must be proved by a preponderance of the evidence and appellate courts must review the findings for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

On appeal and before the trial court, defendant's lawyer argued that OV 3 should have been scored at 10 points rather than 25, because Cartagena's injury was not life threatening. In reply, the prosecutor conceded that the injury was a "grazing" wound, but argued that because it was a grazing wound to Cartagena's head—as opposed to his ankle—it was life threatening. The trial court agreed and, without any additional evidence, found that the injury was life threatening for purposes of scoring OV 3.

The Legislature provided that a trial court must score OV 3 on the basis of physical injury to a victim. See MCL 777.33(1). The trial court had to find whether and to what extent any victim was injured and then score OV 3 by "determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points." *Id.*

Here, there is no reasonable dispute that a bodily injury "occurred" to Cartagena. As such, the trial court had to score the highest level of points attributable given the nature of the injury. *Id.*

The trial court had to score 25 points under OV 3 if a "life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). However, if the injury was not life threatening, but was still a "bodily injury requiring medical treatment", the trial court had to score OV 3 at 10 points. MCL 777.33(1)(d). There is no dispute that Cartagena did not suffer a "permanent incapacitating injury." The very narrow question is whether a "life threatening" injury "*occurred*." MCL 777.33(1)(c) (emphasis added). I do not believe that Cartagena's injury constituted a life threatening injury.

Neither party admitted Cartagena's medical records at trial or at sentencing. Instead, the only evidence concerning the nature and extent of his injuries involved his testimony and that of other witnesses. Noticeably absent was testimony from any medical care providers. All the testimony described Cartagena as having been "grazed" by a bullet, resulting in a "gash." Cartagena's uncle, who was present to see the injury at its worst, testified that he was unable to tell how bad the injury was, but saw a gush of blood. He also stated that, as he drove Cartagena to the hospital, Cartagena had the presence of mind to lean his head so that he would not get the car interior dirty. Cartagena himself testified that he first noticed the injury because he felt something hot on the back of his head. After he realized that he had some sort of injury, Cartagena drove to his uncle's home. He stated that he was "just, you know, kind of, in pain", but was "doing alright." Cartagena's brother testified that he checked the wound and saw a "real big gash."

As with most injuries to the head, the testimony suggested that Cartagena bled quite a bit. However, he never lost consciousness and was able to describe the incident to a police officer while he was being treated at the hospital. Although he did go to the emergency room, he was treated and released in about three hours. Accordingly, I conclude that this evidence does not support a finding by a preponderance of the evidence that the injury was life threatening. *Osantowski*, 481 Mich at 111.

I believe the trial court and the majority have conflated the life threatening *act* (firing a loaded gun at the victim) with a life threatening *injury* (a graze to the head). Firing a gun at a person is always a potentially life-threatening act and that is why defendant was charged and convicted of assault with intent to commit murder. See MCL 750.83. But our focus in this appeal is not on that act. Nor is it on the injury that *might* have "occurred"; it is on the injury that *did* occur. See MCL 777.33(1)(c) and (d). And, while that injury unquestionably required medical attention, the actual testimony and evidence shows that it was not life threatening.

I conclude that the trial court clearly erred when it found that Cartagena suffered a life threatening injury—solely on the basis of anecdotal evidence that a grazing wound to the head is somehow more life threatening than one to the ankle. Because the facts only supported a finding that Cartagena suffered an injury that required medical treatment, the trial court had to score OV 3 at 10 points rather than 25. MCL 777.33(1)(d). Because the change in score alters the recommended minimum sentence range, I would vacate defendant's sentence and remand for resentencing. See *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

For these reasons, I must respectfully dissent in part.

/s/ Michael J. Kelly