STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 306104 St. Clair Circuit Court
JILL BASS DAY, Defendant-Appellant.	LC No. 11-000087-NC

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

PER CURIAM.

Defendant appeals as of right her jury trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve consecutive prison terms of 15 to 50 years for assault with intent to murder and two years for felony-firearm. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The victim, Steven Podschwit, was shot at six times in his driveway while trying to leave for work early one morning. Two bullets hit him in the chest and arm. He testified that he witnessed a dark-colored minivan slowly drive by after the shooting. Other witnesses also reported seeing a dark blue minivan in the driveway of a house next to the victim's home. The police determined that defendant drove a dark blue Honda Odyssey minivan and owned a .45 caliber handgun. However, the police could not locate the handgun and defendant could not provide an explanation as to where it could be. When the police searched defendant's house they found targets used for shooting practice; defendant had visited the shooting range a week before the incident. Moreover, the police found a torn photograph of the victim's house and driveway in defendant's house. The victim testified that he was receiving blocked phone calls from someone prior to the incident. These phone calls were traced to a phone number for a prepaid cell phone for which defendant had phone cards. The victim's ex-wife also testified that she received a phone call from a female inquiring about the victim's address and work location. The police were able to determine that this phone call came from the same prepaid cell phone. The jury convicted defendant of assault with intent to murder and felony-firearm.

Defendant moved for a new trial on the ground that the verdict was against the great weight of the evidence, but the trial court denied the motion. Defendant also filed a motion to

remand with this Court seeking an evidentiary hearing regarding her claim of ineffective assistance of counsel. This Court denied the motion.

II. GREAT WEIGHT OF THE EVIDENCE

First, defendant argues that the verdict was against the great weight of the evidence. We disagree.

We review a trial court's "denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence" for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). An abuse of discretion standard recognizes that there is more than one principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.*

> A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact [*People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008) (citations omitted).]

The evidence presented does not preponderate so heavily against the verdict that it would be an injustice to allow the verdict to stand. This case was based on circumstantial evidence, but "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Looking at the evidence as a whole, there was enough circumstantial evidence to support the jury's verdict. The victim was shot six times with a .45 caliber handgun, and he witnessed a dark-colored minivan leaving the scene. Witnesses also indentified a dark blue minivan in the driveway of a house next to the victim's house. Defendant drove a dark blue Honda Odyssey minivan and owned a .45 caliber handgun. The police could not locate that handgun and defendant could not provide an explanation as to its location. When police searched defendant's house they found targets used for shooting practice, and evidence showed that defendant had visited that shooting range a week before the incident. Moreover, police found a torn photograph of the victim's house and driveway in defendant's house. The victim testified that he was receiving blocked phone calls from someone prior to the incident. These phone calls were traced to a phone number for a prepaid cell phone for which defendant had phone cards.

Alternatively, defendant argues that there was insufficient evidence to support a conviction beyond a reasonable doubt. We disagree.

We review a claim of insufficient evidence de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of fact could conclude beyond a reasonable doubt that the essential elements of the crime were proven, *People v Wolfe*, 440 Mich 508, 515-514; 489 NW2d 748, amended 441 Mich 1201 (1992). The

evidence must be viewed in a light most favorable to the prosecution. *People v Railer*, 288 Mich App 213, 216; 792 NW2d 776 (2010). We defer to the factfinder's weighing of the evidence and assessment of the credibility of the witnesses. *Wolfe*, 440 Mich at 514.

"The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (quotation marks and citations omitted).

The victim was shot at six times with a .45 caliber handgun, and a dark blue minivan was seen near the scene. Defendant owned a .45 caliber handgun and she drove a blue minivan. Police found targets used for shooting practice at defendant's house, and defendant had visited that shooting range a week before the incident. The victim testified that he received blocked phone calls from someone prior to the incident, which police discovered were from a prepaid cell phone for which defendant had phone cards. Lastly, an intent to kill can be inferred from the use of a dangerous weapon. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). There was sufficient evidence from which a rational trier of fact could determine beyond a reasonable doubt that defendant committed assault with intent to murder.

III. IRRELEVANT EVIDENCE

Next, defendant argues that she was denied her due process right to a fair trial when the prosecutor was permitted to admit irrelevant and highly prejudicial evidence. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

To be admissible, evidence must be relevant. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "A fact that is 'of consequence' to the action is a material fact." *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995). A material fact "need not be an element of a crime or cause of action or defense, but it must, at least, be in issue in the sense that it is within the range of litigated matters in controversy." *Id.* at 68 (internal quotation marks and citation omitted).

Defendant argues that there were 14 different instances where the prosecutor admitted irrelevant evidence. However, upon examining this evidence, we find that all the evidence had some tendency to make the existence of a material fact more or less probable. Thus, the trial court did not abuse its discretion in admitting the evidence.

Defendant also argues that the prosecutor elicited improper opinion testimony from police officers throughout the trial regarding the value of objects they collected. However, defendant fails to identify specific references to the record. "A party may not leave it to this Court to search for the factual basis to sustain or reject its position, but must support its position with specific references to the record." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009).

IV. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor engaged in outcome-determinative misconduct by admitting irrelevant evidence and eliciting improper opinion testimony. We disagree.

Defendant failed to preserve this issue; therefore, our review is for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted or "if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,'" regardless of defendant's innocence. *Id.* at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

Defendant argues that the prosecutor acted in bad faith by admitting the irrelevant evidence. However, as discussed above, the evidence that defendant challenges was not irrelevant. Thus, there is nothing in the record to suggest that the prosecutor acted in bad faith. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) ("[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence.").

Defendant also argues that the cumulative impact of the claimed errors denied her a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not. However, in order to reverse on the basis of cumulative error, 'the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.'" *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), quoting *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). Having identified no errors, defendant has failed to establish her argument regarding cumulative effect.

V. DEFENDANT IN RESTRAINTS

Next, defendant argues that she was denied his right to an impartial jury because the jury was allowed to view her in restraints. We disagree.

Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Embodied in a defendant's right to a fair and impartial trial is the right to be free of restraints in the courtroom, unless they are necessary to prevent escape or injury to other persons. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). If a defendant is required to wear restraints in the courtroom, then the defendant must demonstrate prejudice as a result. *Id.* However, "the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom." *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008). "Further, when jurors inadvertently see a defendant in shackles, there still must be some showing that the defendant was prejudiced." *Id.*

The only time defendant's restraints were mentioned in the record was by defense counsel during voir dire:

> Now, when my one [sic] client came in the court today, she came in here in the company of deputies. Some of you in the hallway probably saw that she was handcuffed and shackled. She's charged with assault with intent to kill. It's a capital offense. Does anybody think she'd be out on bond on her merry way? Anybody at all? There's very, very high bonds in cases like this because they are very, very serious. That means you are not walking around on the street. And, typically, you are not suppose to see my client in handcuffs but I realize some of you did and that's why I'm bringing it up now.
>
> Anybody sitting on this panel, does anybody believe that they are going to prejudiced one way or another knowing that she is in jail right now on this charge? Anybody at all?
>
> Does anybody think she's guilty because she can't make bond in this case? Anybody at all?

The members of the jury panel did not answer defense counsel or say anything.

The above record evidence does not demonstrate that the potential jurors ever saw defendant in restraints. Defense counsel stated that because defendant came to court in handcuffs and shackles the potential jurors "probably" saw that, but nothing indicated that they actually did. Defendant did not seek a curative instruction or seek a mistrial. In fact, the issue was never formally raised to the trial court.

Even if the potential jurors saw defendant in handcuffs and shackles, the sighting would have occurred while defendant was being transported to court. As noted, "the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom." *Horn*, 279 Mich App at 37.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that defense counsel was ineffective for failing to object to (1) the repeated admission of irrelevant evidence, (2) the prosecutor's misconduct, and (3) the jury having saw defendant in shackles. We disagree.

This Court denied defendant's request for a remand for an evidentiary hearing. Because an evidentiary hearing was not held, our "review is limited to errors apparent on the record." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

To prove defendant received ineffective assistance of counsel, she must show: (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness," and (2) that there is a reasonable probability the outcome of the trial would

have been different but for counsel's performance. *Jordan*, 275 Mich App at 667. Counsel is presumed to have rendered effective assistance, and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). An appellate court should neither "substitute [its] judgment for that of counsel on matters of trial strategy, nor . . . use the benefit of hindsight when assessing counsel's competence." *Unger*, 278 Mich App at 242-243. Further, there is a strong presumption that counsel's performance was reasonable trial strategy and defense counsel is given broad discretion when it comes to trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); *Jordan*, 275 Mich App at 667-668. "Declining to raise objections can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 253.

First, defendant argues that defense counsel was ineffective for failing to object to the admission of irrelevant evidence and the instances of prosecutorial misconduct. However, there was no basis for defense counsel to object because, as stated above, the evidence was relevant and there was no prosecutorial misconduct. Thus, defense counsel cannot be deemed ineffective for failing to make a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Further, the mere failure to make an objection does not render defense counsel's performance deficient. It is possible defense counsel refrained from objecting in order to avoid drawing attention to every piece of evidence that might not have carried as much value. This would have been a reasonable choice to make.

Second, defendant argues that defense counsel was ineffective for allowing potential jurors to see defendant in shackles. However, as discussed above, there is no record evidence that the potential jurors even saw defendant in shackles. Even if the potential jurors did see defendant come to court in shackles, "the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom." *Horn*, 279 Mich App at 37. Thus, it would be a reasonable choice for defense counsel to raise the issue during voir dire, as he did.

Defendant also argues that the cumulative effect of defense counsel's errors warrants relief. However, "only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). There were no errors based on defense counsel's representation; therefore, there is no cumulative effect that would warrant relief.

VII. OFFENSE VARIABLES 5 AND 12

Lastly, defendant argues that the trial court incorrectly scored Offense Variable (OV) 5 and OV 12. We disagree.

We review de novo a trial court's scoring of offense variables using the statutory sentencing guidelines. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). We also review de novo issues of statutory interpretation. *People v Breidenbach*, 489 Mich 1, 6; 798 NW2d 738 (2011).

The trial court has discretion to score offense variables as long as the evidence on the record adequately supports the score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d

321 (2009). Therefore, "this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *Id.* "Scoring decisions 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). "When the defendant's sentence is based on an *error in scoring* or *based on inaccurate information*, a remand for resentencing is required." *People v Jackson*, 487 Mich 783, 792; 790 NW2d 783 (2010) (emphasis in original).

The trial court is to score defendant for OV 5 if the crime committed was assault with intent to commit murder. MCL 777.22(1). Fifteen points for OV 5 may be assessed if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1). The statute also states, "Score 15 points if the serious psychological injury to the victim's family *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.35(2) (emphasis added).

There was record evidence that the victim's daughter suffered serious psychological injury as a result of the attack on the victim. The victim testified that his daughter's grades dropped and she became more angry and short-tempered. He also stated that she had difficulty expressing herself. The victim also stated that the blood on the door affected his daughter, and that she was traumatized by the incident. Lastly, he indicated that she was very concerned about being home alone and was overly cautious entering and exiting the residence. Thus, the trial court did not err by scoring OV 5 at 15 points. *Waclawski*, 286 Mich App at 680.

The trial court may score defendant 25 points for OV 12 if "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(c). MCL 777.42(2)(a) provides:

> A felonious criminal act is contemporaneous if both of the following circumstances exist:
>
> (*i*) The act occurred within 24 hours of the sentencing offense.
>
> (*ii*) The act has not and will not result in a separate conviction.

"[T]he Legislature did not intend for contemporaneous felonious criminal acts to be the same acts that established the sentencing offense." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010). "Therefore, when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *Id.*

The trial court determined that "[e]ach and every one of the six shots that were aimed at the victim was, in fact, separate assault with intent to murder and each should be scored." We cannot conclude that the trial court erred in scoring OV 12. The evidence indicates that the victim was shot at six times. Each time defendant pulled the trigger was a separate act, and only one was needed to convict her. Thus, the other five acts of pulling the trigger would be contemporaneous felonious criminal act, because defendant's actions would not result in separate convictions and the acts occurred within 24 hours of the sentencing offense. See *People v Wakeford*, 418 Mich 95, 111-112; 341 NW2d 68 (1983) (indicating that here defendant's action

would only support one conviction of assault with intent to murder because only one person was assaulted).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray