

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ DESHAWN MOSES,

Defendant-Appellant.

UNPUBLISHED

July 2, 2013

No. 310705

Wayne Circuit Court

LC No. 11-006768-FC

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carjacking, MCL 750.529a, four counts of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, three counts of felonious assault, MCL 750.82, receiving or concealing a stolen motor vehicle, MCL 750.535(7), and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant to concurrent prison terms of 204 to 360 months for the carjacking, armed robbery, and assault with intent to rob convictions, 6 to 10 years for the assault with intent to do great bodily harm convictions, three to five years for the receiving or concealing conviction, and two to four years for the felonious assault convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

Defendant's convictions arise from incidents that occurred at two different venues in Detroit on June 26, 2011, one near the intersection of Commonwealth and Merrick, and one near the intersection of Tireman and Colfax. In the initial incident, defendant and at least one confederate carjacked and robbed a group of young men as they were leaving a local bar. Defendant was later found in possession of the stolen vehicle and drove away when a police officer tried to stop him. The officer tried to open the car door from the inside and his arm became caught inside the vehicle when defendant drove away. The officer was dragged alongside the vehicle before it eventually stopped. Defendant gave a statement to the police in which he admitted his participation in the offenses, although he minimized his involvement. At trial, defendant denied involvement in the offense and denied giving a statement to the police.

Defendant first argues that the prosecutor engaged in misconduct when she questioned him about, and later commented on, his claim that the trial court lacked jurisdiction over him.

We disagree. This issue has not been preserved for appeal because defendant did not object to the prosecutor's questions or comments at trial. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003).

It is the duty of the prosecutor to safeguard defendant's receipt of a fair trial and to protect the interests of the people, who are as concerned with protecting the innocent as with convicting the guilty. *People v Wilson*, 163 Mich App 63, 65; 414 NW2d 150 (1987). The prosecutor is entitled to prove her case "by whatever admissible evidence [s]he chooses," *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002), but may not knowingly offer inadmissible evidence. *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). The prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, she may not inject "unfounded or prejudicial innuendo into the proceedings." *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983). Furthermore, it is improper for the prosecutor to "argue facts not in evidence or mischaracterize the evidence presented[.]" *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

When defendant was called to testify, he initially refused to give his name, saying, "I can't do that. That's entering into jurisdiction. They ain't got no jurisdiction over me to be holding these proceedings." During cross-examination, the prosecutor questioned defendant about this claim, and defendant again stated that the trial court did not have any authority or jurisdiction over him. Because the matter was first raised by defendant, the prosecutor properly cross-examined defendant on the subject. *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988), aff'd after remand 181 Mich App 194 (1989); *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Once the defendant has the opportunity to explain his version of the events, he opens the door to full, not selective, development of the incident by the prosecutor. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Further, because the matter was in evidence, the prosecutor could comment on it during her closing argument. The prosecutor did not mock defendant for his belief as defendant contends on appeal, but rather invited the jury to infer from defendant's refusal to recognize the trial court's jurisdiction that he refused to acknowledge other things equally as obvious such as a citizen's obligation to obey the law. Thus, there was no error, plain or otherwise. Because the prosecutor did not engage in misconduct, the contention that defendant was deprived of the effective assistance of counsel is without merit. "Defense counsel is not required to make a meritless motion or a futile objection." *Goodin*, 257 Mich App at 433.

Defendant next argues that the trial court erred in scoring 15 points for OV 8. We disagree. "This Court . . . reviews a trial court's scoring of a sentencing variable for an abuse of discretion." *People v Carrigan*, 297 Mich App 513, 514; 824 NW2d 283 (2012) (citation and quotation omitted). The trial court's scoring decision will be upheld if there is any evidence to support it. *Id.* The general rule is that the relevant factors for scoring the offense variables must relate to the offense being scored. *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008). Issues of statutory construction present questions of law subject to review de novo. *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005). With regard to the legislative sentencing guidelines, effect must be given to the Legislature's intent as expressed in the plain, unambiguous language of the statutes. *Id.* at 403, 405. The words used in the statute should be

interpreted on the basis of their ordinary meaning and the context used in the statute. *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012). When a term is not defined in a statute, the appellate court may consult dictionary definitions. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005).

OV 8 takes into account “victim asportation or captivity.” MCL 777.38(1). A score of 15 points is warranted if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38(1)(a). Absent such evidence, OV 8 is to be scored at zero points. MCL 777.38(1)(b). Although the general rule is that the offense variable scoring must relate to the offense being scored, OV 8 addresses conduct beyond the time necessary to commit the offense; therefore, the Legislature explicitly allowed consideration of conduct not related to the offense being scored for purposes of this variable. *Sargent*, 481 Mich at 349-350. The trial court relied on the evidence that a police officer was dragged while trying to stop the stolen vehicle to justify a 15-point score for OV 8.

Movement of the victim that is “incidental to” the commission of the offense does not constitute asportation for purposes of OV 8. *People v James Thompson*, 488 Mich 888; 788 NW2d 677 (2010).¹ Instead, the victim must be asported to another place or situation “of greater danger.” A 15-point score is warranted, for example, where the victim is moved to an isolated area where the crime is less likely to be witnessed by others. *People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009); *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003); *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002), aff’d 469 Mich 390 (2003). Unlike the above cited cases, defendant did not transport the officer to a location of greater danger to limit public scrutiny. However, defendant assaulted the officer by dragging him alongside his vehicle, and in this context, defendant placed the officer in a situation of greater danger. See MCL 777.38(1)(a); *Houston*, 473 Mich at 405. Specifically, defendant drove the vehicle slowly out of the gas station parking area and proceeded to drive on a public street. Despite the officer’s demand that he stop, defendant continued to drive on the street and accelerated his speed as he drove the vehicle. It was estimated that he reached a speed of twenty-five miles per hour. Initially, the officer was able to run alongside the vehicle, but eventually could not keep up with the vehicle and found himself dragged alongside the car, suffering injury. This conduct was not incidental to the commission of the offense and placed the officer in a situation of greater danger. Therefore, the evidence supported a 15-point score for OV 8.

Affirmed.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

¹ Although this ruling was rendered in an order, not an opinion, an order of the Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).