STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2014
v	No. 316107 Genesee Circuit Court
DEWAYNE EDWARD KERPERIEN, Defendant-Appellant.	LC No. 12-031768-FC

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and unlawful imprisonment, MCL 750.349b.[1] The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 25 to 50 years in prison. We affirm defendant's convictions and sentence.

Defendant first claims that the trial court violated his due process rights by empaneling an "anonymous jury," in that the jurors were referred to by number rather than name, and by failing to give an appropriate cautionary instruction explaining the anonymity. We disagree. We review for an abuse of discretion a trial court's decision to refer to jurors by number rather than name. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000).

"An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *Id.* at 522. While "the use of an 'anonymous jury' may promote the safety of prospective jurors," it is at the "potential expense" of "the defendant's interest in being able to conduct a meaningful examination of the jury" and "the defendant's interest in maintaining the presumption of innocence." *Id.* at 522-523. A defendant's challenge to an "anonymous jury" will only succeed where the record reflects "that the parties have had information withheld from them, thus

[1] Defendant was acquitted of felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id*. at 523; see also *People v Hanks*, 276 Mich App 91, 93; 740 NW2d 530 (2007)

In the present case, as in *Hanks* and *Williams*, there was nothing to show that juror biographical information was withheld from defendant. MCR 2.510 requires the use of juror personal history questionnaires, which all parties to the action must have access to and which the attorneys must be given a reasonable opportunity to examine before being called on to challenge for cause. MCR 2.510(A) and (C). The trial court noted that defendant had access to the juror questionnaires in this case, and there is no reason for this Court to conclude otherwise.[2]

Further, defendant has not demonstrated that the use of numbers "prevented him from conducting a meaningful voir dire or that his presumption of innocence was compromised." *Hanks*, 276 Mich App at 94, citing *Williams*, 241 Mich App at 523. The record reflects that both attorneys conducted extensive voir dire, and in doing so, were able to emphasize legal principles applicable to their case. Additionally, no comments were made at trial to indicate to the prospective jurors that it was unusual to refer to the jurors by number rather than name, or that the numbers were of any significance. See *Hanks*, 276 Mich App at 93-94. As in *Hanks*, here, the jury "was anonymous only in a literal sense, so none of the dangers of an 'anonymous jury' was implicated." *Id.* at 94, citing *Williams*, 241 Mich App at 523.

Defendant suggests that a curative instruction should have been given, and indeed in *Hanks*, the panel "[s]trongly urge[d]" trial courts to advise the jury that any use of numbers was "simply for logistical purposes" and not to be considered negatively against the defendant. *Hanks*, 276 Mich App at 94. The *Williams* Court also stated that appropriate safeguards should be used to assure a fair trial and that courts should use juror numbers "only when jurors' safety or freedom from undue harassment is, in fact, an issue." *Williams*, 241 Mich App at 525. However, these precautions are recommendations, and as discussed, there was no indication to the jury that the use of numbers was of significance as to create the potential for prejudice. See *id.* Rather, the lack of significance placed on use of numbers makes it likely that the jurors drew no conclusions at all regarding their anonymity or that they concluded that their anonymity was "designed to protect them from media or public pressures." *Id.* at 524 (quotations marks and citation omitted). Accordingly, we conclude that the trial court did not abuse its discretion by empaneling an "anonymous jury" without providing a cautionary instruction.

Next, defendant claims that he was denied a fair trial when the prosecutor insinuated during rebuttal closing argument that defendant had committed prior armed robberies. We disagree. Because defendant did not contemporaneously object to the prosecutor's statement and immediately request a curative instruction, our review is for outcome-determinative, plain error. *People v Unger (On Remand)*, 278 Mich App 210, 235; 749 NW2d 272 (2008). " 'Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* (citation omitted).

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[2] Notably, defendant does not dispute this fact.

To place the statement in context, the defense's theory during closing argument was that the victim needed money and had arranged to sell the items that were allegedly stolen, and defendant was there to pick them up. Defense counsel argued that defendant's behavior and the location of the alleged incident were not indicative of an armed robbery. Defense counsel claimed that the victim fabricated her story to the police and at trial. In response, the prosecutor noted that while this was "an interesting theory," there was no evidence to support it. Rather, the prosecutor argued that the evidence supports a robbery. The prosecutor continued by providing a possible explanation as to why defendant chose the particular location, clearly in response to defense counsel's argument that the location was not indicative of an armed robbery. The prosecutor then continued to describe defendant's behavior, arguing that it was indicative of a robbery. In doing so, the prosecutor, referring to defendant following the victim in the parking lot of a store, stated, "You can see on the video how he hustles right up after her to catch her before she enters the doors. Why? *Maybe it's because he's experienced in doing it.* He's got a getaway driver. He's got a borrowed vehicle." Defendant argues that in making the highlighted statement, the prosecutor "improperly injected into the trial the unfounded and prejudicial innuendo that [defendant] previously committed robberies."

It is true that "[a] prosecutor may not inject unfounded and prejudicial innuendo into a trial," *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007), and the statement made by the prosecutor arguably suggests that defendant had committed prior robberies. However, when considered in context, as we are required to do, *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005), the statement was merely the prosecutor's reasonable explanation or interpretation of defendant's actions based on the evidence presented and made in response to defense counsel's argument that defendant's actions were not indicative of a robbery. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) ("[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument."); see also *People v Comella*, 296 Mich App 643, 654; 823 NW2d 138 (2012) (stating that a prosecutor may argue the evidence and reasonable inferences from the evidence); *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (stating that a prosecutor's remarks must be evaluated in light of defendant's arguments).

Ultimately, "the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Dobek*, 274 Mich App at 63. We conclude that defendant was not denied a fair and impartial trial. The statement was brief, isolated, and responsive to defendant's theory of the case. Further, the trial court instructed the jury that the attorneys' statements and arguments were not evidence, which was sufficient to eliminate any potential prejudice. *Thomas*, 260 Mich App at 454. It is presumed that the jury follows the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant further argues that reversal is required because defense counsel's failure to object to the prosecutor's statement constituted ineffective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed question of fact, which we review for clear error, and constitutional law, which we review de novo. *Unger*, 278 Mich App at 242.

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To prevail on a claim for ineffective assistance of counsel, a defendant must establish that: (1) defense counsel's

performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We determined that the challenged statement did not rise to the level of prosecutorial misconduct, as to deny defendant a fair and impartial trial. Thus, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *Thomas*, 260 Mich App at 458.

However, even if we were to assume that the challenged statement was prosecutorial misconduct, defense counsel's performance did not fall below an objective standard of reasonableness. As our Supreme Court has recognized, "Certainly there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court has also stated that "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Id.* at 242-243.

Further, the second prong of the *Strickland* test requires a showing of prejudice, and we have concluded that any potential prejudice was eliminated by the trial court's instruction to the jury that the attorneys' arguments were not evidence. *Thomas*, 260 Mich App at 456-457. Therefore, we conclude that defense counsel's failure to object to the challenged statement did not rise to the level of ineffective assistance of counsel under *Strickland*.

Finally, defendant argues that he is entitled to resentencing because the trial court erred in scoring the guidelines. We disagree. A sentencing court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the facts, as found, are adequate to satisfy a particular score is a question of statutory interpretation, reviewed de novo. *Id*.

First, defendant challenges the trial court's assessment of 15 points for Offense Variable (OV) 1. OV 1 addresses the aggravated use of weapon and directs the trial court to assess 15 points if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c).

The trial court did not clearly err by finding, by a preponderance of the evidence, that a firearm was pointed at the victim. As the trial court noted, the victim testified that defendant came up behind her, put a gun to her head, and ordered her back to her car. She testified that she turned and saw the gun. Defendant then shoved the gun into her side as they walked back to her car. He had her climb in the passenger seat and over the center console, and then he got in and sat in the passenger seat. Holding the gun, defendant talked to the victim for approximately 20 minutes and robbed her of her cell phone, wallet, keys, and video games. She testified that he kept shoving the gun into her side and nudging her with it. She testified that at one point, the

gun touched her leg, and she could tell it was real because she felt the cold steel. These facts are adequate to justify a score of 15 points for OV 1.

Second, defendant challenges the trial court's assessment of 5 points for OV 2. OV 2 authorizes the trial court to assess 5 points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). A pistol, rifle, or shotgun "includes a revolver, semi-automatic pistol . . . or other firearm manufactured in or after 1898 that fires fixed ammunition." MCL 777.32(3)(c). It does not include a fully automatic weapon or short-barreled shotgun or rifle. MCL 777.32(3)(c).

As discussed, the testimony of the victim establishes, by a preponderance of the evidence, that defendant used a gun. We also conclude that the trial court did not err by finding that the evidence established, by a preponderance of the evidence, that the gun was a pistol, rifle, or shotgun. The victim testified that the gun was black and indicated that it had a magazine clip, such as a semi-automatic. She testified that it did not have "the spinney thing on it" like a revolver would. She saw that it was black and estimated the barrel to be eight to ten inches long. These facts are adequate to justify a score of 5 points for OV 2.

Defendant also argues that the trial court erred by scoring OV 1 and OV 2 because they involved the use of a weapon and he was acquitted of the possession of a weapon charges. However, in sentencing, a trial court may consider charges of which a defendant is acquitted if the underlying conduct is proven by a preponderance of the evidence. *People v Ewing*, 435 Mich 443, 454-455, 479; 458 NW2d 880 (1990); see also *People v McCuller*, 479 Mich 672, 682; 739 NW2d 563 (2007).[3] Therefore, although the jury in this case acquitted defendant of the felon-in-possession and felony-firearm charges, as discussed, defendant's possession of a gun was proven by a preponderance of the evidence. Although the trial court based its decision solely on the testimony of the victim, it is clear the court found that testimony credible, which is a determination that this Court does not interfere with. See *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Accordingly, we conclude that the trial court did not err in scoring the guidelines.

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[3] We note that our Supreme Court has granted leave in *People v Lockridge*, 304 Mich App 278; 849 NW2d 388, lv gtd 496 Mich 852; 846 NW2d 925 (2014) to consider "whether a judge's determination of the appropriate sentencing guidelines range, MCL 777.1, et seq., establishes a 'mandatory minimum sentence,' such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact" pursuant to *Alleyne v United States*, ___ US ___; 133 S Ct 2151, 2163; 186 L Ed 2d 314 (2013). In *Alleyne*, the United States Supreme Court held that facts that increase a mandatory minimum sentence must be submitted to the jury and found beyond a reasonable doubt. *Id*. at 2158. In the present case, however, the trial court did not depart from the appropriate minimum sentencing range, and thus, *Alleyne* is not applicable.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell