

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 14, 2011

v

JACKSON TAYLOR, JR.,

Defendant-Appellant.

No. 296758
Saginaw Circuit Court
LC No. 09-032231-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with a dangerous weapon, MCL 750.82, five counts of possession of a firearm while committing a felony (felony-firearm), MCL 750.227b, two counts of assault with intent to murder, MCL 750.83, one count of felon in possession, MCL 750.224f, one count of carrying a concealed weapon (CCW), MCL 750.227, and one count of carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve a prison sentence of 2 years for the felony firearm convictions, which were to be served concurrently to each other but consecutive to and preceding the remaining sentences of 2 to 5 years on the CCW conviction and 70 to 111 years on the remaining counts, which were to be served concurrently to each other. Defendant appeals as of right. We affirm.

Defendant's convictions arose as a result of two incidents that occurred during the evening hours of Friday, September 26, 2008, and into the early morning hours of Saturday, September 27, 2008. Defendant, along with several other people, had gathered for a party. At some point, defendant's niece was involved in a physical altercation with another woman at the party, Charricka Moten, who bit defendant's niece's finger. Defendant observed the dispute and later threatened Charricka Moten and her mother, Tara Moten, while holding a handgun and pointing it in their direction.

Tara Moten reported the incident to her cousin, Ernest Moten, who then traveled to her home along with another cousin, Dion Kelley, to check on his relatives. Almost immediately after Ernest arrived, defendant was heard yelling at Ernest, who attempted to placate him. Shortly thereafter, several gunshots were discharged toward Ernest and Dion, who were standing outside in front of the Moten home. Ernest was hit in the leg by one bullet, resulting in severe and near fatal injuries. Charricka, who was inside the home at the time, was also injured by a

bullet that grazed the left side of her abdomen. Defendant's vehicle was observed speeding away a few minutes after the shooting.

On appeal, defendant first argues he was denied a fair trial as a result of two instances of prosecutorial misconduct.

Claims of prosecutorial misconduct are generally reviewed de novo to determine whether defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because defendant failed to properly preserve these claims of prosecutorial misconduct, he must demonstrate plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation omitted). Nevertheless, a prosecutor may not engage in conduct or make an argument that rises to the level of denying defendant a fair and impartial trial. *Dobek*, 274 Mich App at 63.

Defendant first argues that the prosecutor engaged in misconduct by inviting the jury to convict defendant using the prior inconsistent statement of his fourteen-year-old niece concerning her observations of defendant during the altercation as substantive evidence. We disagree.

Defendant is correct that impeachment testimony generally cannot be used as substantive evidence of a defendant's guilt. See *People v Jenkins*, 450 Mich 249, 260-261; 537 NW2d 828 (1995). However, defendant has mischaracterized the nature of the prosecutor's statements, as well as their content. First, the summary of the witness' testimony did not include an improper reference to a prior inconsistent statement because none of her testimony at trial conflicted with her prior statements. Rather, the witness testified that she was unable to remember the events of the evening of the shooting and the prosecutor used her prior testimony from the preliminary exam to refresh her recollection. After reviewing the statements that had been made at the prior hearing, the witness repeatedly agreed that the prior testimony was accurate.

We also note that the remarks defendant complains of on appeal constituted a response to defense counsel's closing argument. A prosecutor may respond to defense counsel's closing argument, and his remarks will be considered in light of those of defense counsel. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). As noted by the *Watson* Court, "[i]t was not improper for the prosecutor to respond by emphasizing the truth of the big picture, despite defense counsel's attempts to find discrepancies between the testimony of various witnesses." *Id.* at 593. Because the prosecutor's remarks were a proper response to those made by defense counsel during closing argument, defendant's alternative claim that he was denied the effective assistance of counsel when trial counsel failed to object to the challenged statements

must fail. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

Defendant next argues he was denied a fair trial when the prosecution introduced the testimony of his parole officer. We disagree.

Defendant's status as a convicted felon was relevant to the charge of felon in possession, MCL 750.224f. When a defendant fails to stipulate to the fact that he has a prior felony conviction, he is precluded from later arguing that the admission of evidence beyond the mere fact of his conviction constituted error. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Here, there was no stipulation regarding defendant's status as a convicted felon. Thus, defendant's argument that the parole officer's testimony should have been limited to the fact that he had a prior felony conviction without providing further detail as to the nature of the prior conviction is not permitted. Moreover, the jury was specifically instructed that it could only use the evidence of defendant's status as a convicted felon in its consideration of the charge of felon in possession and was admonished that such evidence could not be used to find that defendant was a bad person likely to commit crimes. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant next argues he was denied the effective assistance of counsel on the ground that trial counsel improperly vouched for credibility of the investigating detective during closing argument when counsel discussed the detective's treatment of defendant's fourteen-year old niece when he took her statement after the shooting. Review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

We find defendant's claim that he was denied the effective assistance of counsel cannot succeed. We first note that defendant mischaracterizes defense counsel's statements concerning the officer's interview of the witness. Rather than insinuating that the eyewitness was a liar, trial counsel made clear in his closing argument that, while he did not believe that defendant's niece was actually threatened by police officers, counsel did believe that she had that perception during her interview.

In addition, defendant is not entitled to relief because he has failed to establish prejudice as a result of any alleged error. In reaching this conclusion, we reject defendant's assertion that the only evidence connecting him to the shooting that injured Ernest Moten and Charricka Moten was the prior inconsistent testimony of defendant's niece. Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Here, the testimony of Tara and Charricka Moten established that defendant was armed with a firearm the evening of the shooting, with which he threatened both women after observing

a prior altercation between Charricka and his niece. In addition, Tara Moten positively identified defendant, based on her familiarity with his voice, as the man yelling at Ernest Moten when he arrived in the neighborhood. Tara Moten further testified that the shots that were fired shortly after defendant's comments to Ernest came from the same location that she had heard defendant's voice. Tara Moten also testified that she saw a vehicle she recognized as defendant's speed away a few minutes after the shooting. A reasonable jury could infer from this testimony that defendant was the shooter. Thus, even if defendant's niece's testimony was to be completely discounted, there was sufficient evidence for a reasonable jury to conclude that the prosecution had met its burden to establish that defendant was the shooter on the night in question.

In light of the foregoing, defendant's concurrent assertion that there was insufficient evidence to support his convictions for two counts of assault with intent to murder and the attendant felony-firearm convictions also fails. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The essential elements that must be established beyond a reasonable doubt to sustain a conviction for 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) (quotations omitted). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence [of intent to kill] is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In addition, identity is an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Here, defendant challenges whether the prosecution presented sufficient evidence to support his convictions. However, given the above evidence presented at trial, we find that the prosecution presented sufficient evidence for a reasonable factfinder to conclude beyond a reasonable doubt that defendant was the shooter.

Defendant has also filed a supplemental standard 4 brief alleging he was denied the effective assistance of counsel when trial counsel attempted to introduce an alibi defense not supported by the record. We find this argument to be without merit because there is nothing in the record to support defendant's assertion that his counsel advocated an alibi defense at any point during the trial.

We decline to address defendant's claim that he was denied the effective assistance of counsel because trial counsel failed to move for a directed verdict. Defendant's discussion of the issue consists mainly of conclusory statements with little or no citation to authority. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelley*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

We further reject defendant's challenges to the trial court's scoring of the sentencing guidelines. Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range as determined by the OV and prior record variable (PRV) points assigned to the defendant. MCL 769.34(2); *People v McCuller*,

479 Mich 672, 684-685; 739 NW2d 563 (2007). “A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial.” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (2004). Scoring decisions for which there is any evidence in support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 1 pertains to aggravated use of a weapon and requires that 25 points be scored if a firearm was discharged at or toward a person. MCL 777.31(1)(a). The evidence presented at trial established that, not only was a firearm discharged at or toward a person, but that two people were struck with bullets. This was sufficient evidence to uphold the scoring decision.

Defendant also states that OV 3 should have been scored at 10 points. However, our review of the record demonstrates that OV 3 was appropriately scored at 25 points. OV 3 is scored for the degree of physical injury to a victim and calls for the assessment of 25 points when a life threatening injury occurred to the victim. MCL 777.33(1)(c). Here, Ernest Moten testified that the bullet that hit his leg struck a main artery. Moten also testified that he had to be rushed to surgery, subsequently lapsed into a coma lasting approximately two months, later underwent more than ten additional surgeries, and suffered a blood infection as a result of the shooting. Moten specifically stated that his life was in jeopardy because of this injury. In addition, the lead investigator testified that it was initially believed that Moten would not survive his injuries. Thus, there was ample support for the scoring decision.

Defendant argues that OV 13 was improperly scored at 25 points. We disagree. A court must assess 25 points under OV 13 if the offense was part of a continuing pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). In determining the number of points to assess, all crimes within a five-year period, including the sentencing offense, must be counted regardless of whether the offense resulted in a conviction. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). In this trial alone defendant was convicted of more than three crimes against a person, including assault with intent to murder as to Charricka Moten, assault with intent to murder as to Ernest Moten, felonious assault as to Tara Moten, and felonious assault as to Charricka Moten, all from conduct occurring within a half hour period. Thus, there was support for this scoring decision as well.

Because the offense variables were correctly scored, defendant’s claim that trial counsel was ineffective for failing to object to the scoring is without merit. Counsel is not required to advocate a meritless position. *Snider*, 239 Mich App at 425.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens