STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2007
v	No. 271902 Ingham Circuit Court
JAMES MAJOR, Defendant-Appellant.	LC No. 05-001472-FH

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of four to fifteen years for the felonious assault and CCW convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant's convictions arise from an assault of Jawon Randles on November 19, 2005. Randles is the son of defendant's former girlfriend, Cheryl Wilson. Wilson obtained a personal protection order against defendant in November 2005, after their relationship ended, but did not have an opportunity to have it served on defendant. Wilson was living at a second-floor apartment on South Butler Street, but would not stay there because defendant had a key to the apartment and she did not want any trouble from defendant.

On November 19, 2005, after defendant phoned Wilson from the South Butler Street apartment, Wilson contacted the Lansing Police Department to arrange a meeting at the apartment so that defendant could be served with the PPO. Defendant was gone when the police arrived, but a teddy bear with a note from defendant was left under the covers of Wilson's bed. Randles and his girlfriend met with Wilson at the apartment. Randles secured the apartment door from the inside and then exited through the balcony before they departed. About two or three hours later, defendant again phoned Wilson from the South Butler Street apartment. Wilson drove to the apartment complex after phoning both the police and Randles, but departed after she was approached by defendant. Defendant was in a car following Wilson when Randles and his girlfriend drove by. Defendant followed them to the apartment complex, where

Randles's friend, James Rembert, was awaiting their arrival. Defendant exited his car, cocked a gun, and screamed about Randles being in his "business." He pointed the gun at Randles before sticking it in a belt under his shirt and taking a swing at Randles. Randles and Rembert tackled defendant to the ground. The gun discharged while they struggled with defendant. Defendant told Randles, "the next one's coming after you." The police arrived and took defendant into custody and seized the gun.

The defense theory was that defendant was assaulted by Rembert and Randles, whom defendant testified possessed the gun, after he went to the apartment complex to retrieve some of his possessions. The defense challenged the credibility of the prosecution witnesses who claimed that defendant possessed the gun and initiated the fight.

II

Defendant first argues that he was denied a fair trial because the prosecutor elicited testimony that a PPO was issued against him. Defendant claims that the evidence of the PPO and related testimony by Wilson was inadmissible "other acts" evidence under MRE 404(b). Because defendant failed to cite the specific page references in the transcripts that support his argument, as required by MCR 7.212(C)(7), this issue is not properly before us. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

But even if we overlook this deficiency and consider defendant's claim, we would not reverse. Because defendant concedes that this evidentiary issue was not preserved for appeal, he has the burden of showing plain error affecting his substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If these requirements are established, an appellate court exercises discretion in deciding whether to reverse. *Id.* "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Essential to the admissibility of evidence is the purpose of the evidence. "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Under MRE 404(b)(1), evidence of "other crimes, wrongs, or acts" may be admitted if it is offered for a proper purpose, it is relevant to a fact of consequence at trial, and the probative value of the evidence is not substantially outweighed by the danger of undue or unfair prejudice pursuant to MRE 403. *People v Dobek*, 274 Mich App 58, 84; 732 NW2d 546 (2007). The evidence must be excluded if its only purpose is to show the defendant's character or propensity to commit a crime. *Id.* at 86.

Facts and circumstances surrounding the commission of a crime are properly admitted as part of the res gestae. *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981); *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). MRE 404(b) does not preclude the prosecutor from introducing evidence to give the jury an intelligible presentation of the full context in which a disputed event occurs. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

Here, Wilson's relationship with defendant was part of the res gestae of the assault against the victim. The breakup of Wilson and defendant's relationship was part of the circumstances that led to the events of November 19, 2005. Randles's familial relationship with Wilson and efforts to assist her supported an inference that the breakup led to defendant confronting Randles with a gun at the apartment complex. Wilson's action in obtaining a PPO was part of the breakup, and this conduct was directly linked to the events of November 19, 2005, by Wilson's testimony that she arranged to meet with the police at the apartment in a failed attempt to have it served on defendant.

And while the prosecutor elicited testimony from Wilson that she understood that the purpose of a PPO is to protect a person from someone the person believes might be physically and mentally harmful, detailed testimony regarding the statements made by Wilson to obtain the PPO were not elicited until Wilson was cross-examined by defense counsel. Defense counsel elicited from Wilson that certain statements were not completely true, but that defendant had threatened her and was physically abusive in the past. Defense counsel also elicited that defendant was never charged with any crime against Wilson, notwithstanding her claim that she was fearful of him. He suggested in questions posed to Wilson that a PPO does not keep a person safe because it depends on the other person abiding by the PPO. He also asserted in closing argument that the evidence regarding the PPO affected the credibility of Wilson's testimony and characterized this evidence as "a very important portion of the trial."

Considering that the PPO evidence and related testimony regarding Wilson and defendant's relationship was part of the res gestae, and that defense counsel considered the PPO evidence to be important to the defense, defendant has failed to demonstrate a plain evidentiary error affecting his substantial rights.

We also hold that defendant has not established any basis for relief based on the prosecutor's remarks in closing and rebuttal arguments regarding this evidence. Because defendant did not object to the remarks, this claim is also considered under the plain error doctrine in *Carines, supra* at 763. See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2000). The test of prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *Dobek, supra* at 63. "A prosecutor's remarks are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id.* at 64. Otherwise improper remarks might not require reversal if they are responsive to issues raised by the defense. *Schutte, supra* at 721.

Here, the prosecutor's challenged remarks were responsive to matters raised by defense counsel in his cross-examination of Wilson and subsequent closing argument regarding Wilson's lack of credibility. An examination of the remarks in context reveals that the prosecutor did not invite the jury to convict defendant on the basis of unspecified prior bad acts. Rather, the prosecutor asked the jury to find that prosecution witnesses, including Wilson, gave credible testimony regarding the events of November 19, 2005. The prosecutor was free to comment on the credibility of the witnesses based on the evidence. *Schutte, supra* at 722. Therefore, we find no plain error affecting defendant's substantial rights.

Finally, we note that defendant asserts in his statement of the question presented that defense counsel was ineffective for failing to object. Because defendant has not briefed the

merits of this issue, however, we consider it abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

III

Defendant next claims that the prosecutor engaged in multiple instances of misconduct at trial. He first argues that the prosecutor improperly asked defendant to give testimony concerning the credibility of prosecution witnesses during cross-examination. The prosecution concedes on appeal that the cross-examination was improper pursuant to *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Nonetheless, because defendant did not object to the prosecutor's questions, he has the burden of showing that the plain error affected his substantial rights, i.e., affected the outcome of the trial. *Schutte, supra* at 720. The prosecutor's questioning was brief and defendant's response, "I'm telling you how it is," indicates that defendant dealt well with the questions. Further, a timely objection and request for a curative instruction could have cured any prejudice. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721; see also *Buckey, supra* at 18; *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Indeed, the trial court later instructed the jury regarding its responsibility for determining the credibility of witnesses and appropriate factors to consider in making this determination. The jury was instructed that the lawyers' questions to witnesses, statements, and arguments are not evidence. The jury instructions were sufficient to dispel any prejudice. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors").

Defendant's additional argument, that the prosecutor capitalized on this evidence in closing argument, is not properly before us because defendant has failed to cited the specific page references in the trial transcript that support his argument. Therefore, we deem this issue abandoned and decline to address it. *Norman, supra* at 260.

We similarly hold that defendant has not properly presented his other claims of prosecutorial misconduct. *Id.* But we shall consider defendant's claims to the extent that they are identified and addressed by the prosecutor on appeal, although our review is limited to plain error because defendant did not object to the remarks at trial. *Schutte, supra* at 720.

Regarding the prosecutor's remarks concerning defendant's medical condition, defendant's testimony indicated that he was suffering from a number of health problems, on November 19, 2005, including a lung disease known as sacrodosis. He was taking medication for asthma or breathing difficulties and had been advised by his doctor not to engage in strenuous activities. Defendant conceded on cross-examination by the prosecutor that he did not have any problem yelling during the altercation with Randles and Rembert. Examined in the context of this evidence, the prosecutor's remark in closing argument that defendant was not suffering from any trouble breathing at the time of the altercation does not constitute plain error. Prosecutors "are free to argue the evidence the all reasonable inferences arising from it as they relate to the theory of the case." *Schutte, supra* at 721. Even if there was error, and it was plain, any prejudice was dispelled by the trial court's instruction to the jury that the lawyers' arguments are not evidence. *Id.* at 721-721; *Abraham, supra* at 279.

We also reject defendant's claim that the prosecutor improperly remarked that Randles could not have held the gun in the waistband of his sweatpants. We are unpersuaded that demonstrative evidence was necessary for the prosecutor to make the argument. *Schutte, supra* at 721.

Further, defendant has not established any plain error based on the prosecutor's use of differences in testimony or prior statements of prosecution witnesses to argue that there was no collusion between the witnesses. A prosecutor is free to argue the credibility of witnesses based on the evidence. *Id.* The prosecutor did not have a duty to argue that prosecution witnesses had time to coordinate trial testimony.

In light of the foregoing, defendant has not established any actual errors that singularly or in combination served to deprive him of a fair trial. See *People v Bahoda,* 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) (only actual errors are aggregated to determine the cumulative effect) and *Knapp, supra* at 387 (the test for cumulative error is whether a combination of errors denied the defendant a fair trial).

IV

Defendant next argues that he was deprived of his constitutional right to a unanimous verdict because the jury was not given a specific unanimity instruction to explain that there must be unanimity as to one specific act for both the felonious assault and CCW charges. Defendant waived his review of this instructional issue because defense counsel specifically informed the trial court that there were no objections before and after the instructions were given to the jury. See *People v Lueth,* 253 Mich App 670, 688; 660 NW2d 322 (2002); *People v Ortiz,* 249 Mich App 297, 311; 642 NW2d 417 (2002). Unlike the forfeiture of an issue, which arises from the failure to object, a waiver extinguishes any error. *People v Carter,* 462 Mich 206, 216; 612 NW2d 144 (2000).

Defendant's alternative claim of ineffective assistance of counsel is not properly before us because it is not set forth in the statement of the question presented. MCR 7.212(C)(5); *People v Brown,* 239 Mich App 735, 748; 610 NW2d 234 (2000). But even if we were to consider this issue, reversal is not warranted.

Because defendant did not move for a *Ginther*[1] hearing or new trial, our review is limited to mistakes apparent from the record. *People v Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Ortiz, supra* at 311. Defendant must show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different and that the attendant proceedings were fundamentally unfair or unreliable. *Rodgers, supra* at 714. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin,* 257 Mich App 425, 433; 668 NW2d 392 (2003).

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

Given defendant's failure to show any necessity for a special unanimity instruction, we are unable to conclude that defense counsel's performance was objectively unreasonable. A court examines jury instructions as a whole to determine if they adequately protect a defendant's rights. *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005). A general unanimity instruction is adequate unless "1) the alternative acts are materially distinct (whether the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of the defendant's guilt." *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).

Here, the jury was specifically instructed that the CCW offense could be committed in two different ways, namely, defendant's possession of the weapon in a vehicle or on his person. The jury was given a verdict form containing both alternatives and specifically returned a verdict on the charge that defendant carried a weapon on his person. Therefore, we find no merit to defendant's claim that the jury could have voted to convict him of CCW based on separate and distinct acts.

The jury was not given instructions with respect to any specific act underlying the felonious assault charge, except that the jury was required to find that Randles was the victim. It is true that the prosecutor remarked in closing argument that a felonious assault actually occurred three times during the altercation. The prosecutor argued that Randles was assaulted when defendant cocked the gun, pointed the gun, and again when defendant fired the gun and indicated that the next one was for Randles. But each act was claimed to be part of a continuous assault that defendant committed against Randles. Defendant defended against the charge by claiming that he was the victim, not the perpetrator, of any assault. Defense counsel disputed the credibility of each witness who claimed that he had a weapon.

Considering the evidence and defense theory, defendant has not demonstrated that defense counsel's failure to request an instruction that the jury must agree on a specific act for felonious assault was objectively unreasonable or so prejudicial as to deprive defendant of a fair trial. There is no reasonable probability that the result of the trial would have been different if a special unanimity instruction was given to the jury. The trial evidence concerning each act was not materially distinct. Further, there is no reason to believe that jurors might have been confused or disagreed about the factual basis of defendant's guilt. Therefore, ineffective assistance of counsel has not been shown.

V

Defendant next challenges his 48-month minimum sentence for the CCW conviction. In particular, defendant challenges the scoring of each offense variable (OV) scored by the trial court. The trial court's scoring placed defendant in offense level IV[2] of the sentencing

[2] Under the statutory sentencing guidelines applicable to CCW, a class E offense, an OV level IV requires 35 to 49 points. See MCL 777.16m and MCL 777.66. Defendant's total score was 35 points.

guidelines, resulting in a minimum sentence range of 14 to 58 months (Sentencing information report.)

> Under MCL 769.34(10), if a minimum sentence is within the appropriate guidelines sentence range, we must affirm the sentence and may not remand for resentencing absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). [*People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).]

The trial court scored 15 points for OV 1, MCL 771.31. Fifteen points are properly scored under MCL 777.31(1)(c) if a "firearm was pointed at or toward a victim . . . ." At the hearing on defendant's motion for resentencing, the trial court rejected defendant's claim that only five points should be scored for the "display" of a gun.

The basis for defendant's challenge to this scoring decision is unclear. Assuming that defendant is challenging the trial court's ruling that it could consider the entire continuum of events for purposes of scoring the offense variables, no error has been shown. Defendant's reliance on *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004), is misplaced because the instant case does not involve a multiple offender situation. See also *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007) (trial court misapplied a multiple offender instruction for offense variables). Where, as in this case, only a single defendant is involved and the crimes constitute "one continuum of conduct," the trial court may "consider the entirety of the defendant's conduct in calculating the sentencing guideline range with respect to each offense." *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003). The trial testimony that defendant pointed the gun at Randles was sufficient to support the trial court's scoring decision.

The trial court scored ten points for OV 4, MCL 771.34, disagreeing with defense counsel's argument that Randles did not suffer the necessary psychological injury to support a score of ten points for this variable. The trial court also scored ten points for OV 9, MCL 777.39, without objection. Pursuant to MCL 777.39(1)(c) and (2)(a), ten points should be scored for OV 9 if there are two to nine victims, i.e., persons placed in danger of injury of death. The sole basis for defendant's challenges to these scoring decisions is that it was improper for the trial court to consider conduct related to the commission of the felonious assault. Based on *Cook, supra* at 640-641, we find no error.

Although defendant does not raise any specific challenge to the trial court's use of the sentencing guidelines to sentence him to a concurrent minimum sentence of 48 months for the

felonious assault conviction, we note that the trial court used the same scores for OV 1, OV 4, and OV 9 in the sentencing information report for the CCW conviction to determine a minimum sentence range of 14 to 48 months for the felonious assault conviction.[3] Defendant's sole argument with respect to the felonious assault conviction is that he is entitled to have a jury determine facts used to score the offense variables that were neither admitted by defendant nor found by the jury beyond a reasonable doubt at trial, pursuant to *Blakey v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant asserts that this claim applies equally to his sentence for the CCW conviction.

But as defendant concedes, our Supreme Court rejected this argument in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). See also *People v McCuller (On Remand),* 479 Mich 672; ___ NW2d ___ (2007). Therefore, we reject this claim of error.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

[3] In addition to OV 1, OV 4, and OV 9, the trial court scored five points for defendant's possession of the weapon under OV 2, MCL 777.32, to determine the OV level for the felonious assault conviction. We express no opinion whether the trial court was required to complete a sentencing information report for the felonious assault conviction, but note that this Court held in *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005), that a sentencing information report is only required for the highest crime class felony.