STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW ERIN CECIL,

Defendant-Appellant.

UNPUBLISHED
April 29, 2021

No. 352718
Lenawee Circuit Court
LC No. 18-018981-FC

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84.[1] Defendant was sentenced to 57 to 120 months' imprisonment for his AWIGBH conviction. We affirm.

I. BACKGROUND

This case arises from a physical altercation between defendant and the victim, Christopher James Dickerson.[2] At the time of the incident, defendant and Tabitha Rose Whiteeagle were in the middle of a breakup. While they had discussed defendant moving out of Whiteeagle's apartment, defendant still had a key to the apartment.

In May 2018, Dickerson went to Whiteeagle's apartment. Dickerson testified at preliminary examination that he was invited by Whiteeagle; however, Whiteeagle testified that Dickerson showed up unexpectedly. While Dickerson was laying down, Whiteeagle went outside to smoke a cigarette. When she returned, Dickerson was smoking a pipe in her bedroom. Defendant entered the apartment while Whiteeagle was yelling at Dickerson. Defendant told

[1] Defendant was charged but not convicted of assault with intent to murder (AWIM), MCL 750.83; and, defendant's first-degree home invasion charge, MCL 750.110a(2), and amended charge of associate or member of a gang (gang membership), MCL 750.411u, were dismissed.

[2] Between the preliminary examination and trial Dickerson died from an unrelated incident.

Dickerson to leave. When Dickerson refused, the two began fighting. Dickerson testified that defendant's demeanor was "[l]ike he was tryin' to hurt me" and stated that defendant said he was going to kill him. Both defendant and Whiteeagle denied that defendant said he was going to kill Dickerson.

Defendant admitted that he used a four-inch pocket knife against Dickerson. It was defendant's testimony that he "just barely touch[ed] [Dickerson's] shoulder blade" with the knife to stop Dickerson from choking him. Once cut, Dickerson ran out of the apartment. Two neighbors called the police when they saw Dickerson run out of Whiteeagle's apartment covered in blood. The neighbors testified they were with Dickerson for about five minutes when Whiteeagle approached them with blood spatter on her face. Dickerson testified that Whiteeagle asked him to not tell the police that defendant cut him.[3] When the police arrived Dickerson stated he did not know who cut him. The day after the incident, Adrian Police Department Detectives Greg Langford and Lamar Rufner interviewed Dickerson, who was treated and released from the hospital on the day of the incident. In addition to claiming that the defendant had threatened to kill him during the fight, Dickerson told the detectives that he and defendant had a text conversation before the incident about fighting each other. Dickerson testified that he did not initially tell the police that defendant was involved because he was scared of defendant. After Dickerson told police that defendant had stabbed him, defendant was arrested.

Dickerson died prior to trial and Langford read his testimony from the preliminary examination into the record. At one point in the reading of the transcript, Langford misread inserting " he was trying to *kill* me," rather than the actual words of Dickerson which were that "he was trying to *hurt* me."

Defendant testified on his own behalf stating that he "just barely touch[ed] [Dickerson's] shoulder blade" with the knife in self-defense to stop the victim from choking him. During defendant's cross-examination, the prosecution asked "how long have you been a member of the Latin Counts?"[4] Defendant objected to the admission of the evidence concerning defendant's alleged gang affiliation, arguing the evidence was irrelevant and inadmissible. The prosecution argued the evidence was relevant to rebut defendant's self-defense claim. The trial court allowed the prosecution to continue cross-examining defendant about his involvement with the Latin Counts, stating:

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[3] Whiteeagle disputed whether she was in the apartment when the incident took place, however, the victim testified that Whiteeagle was present during the incident and tried to grab the knife out of defendant's hand before she ran out of the apartment. We also note that Whiteeagle was charged and pleaded guilty to lying to a police officer during a violent crime investigation, MCL 750.479c(2)(d), after the incident. At her plea hearing, Whiteeagle testified that she was present during the fight between Dickerson and defendant, and she failed to disclose information to the police related to the incident.

[4] The Latin Counts were originally a Hispanic street gang formed in Chicago. The gang has branched out and is largely a prison gang no longer limited by ethnicity.

> Okay, I've had a chance to review this situation, and I do find that this information is relevant regarding any potential gang affiliation. I do find that that information does have a tendency to prove, er, I'm sorry, to make the existence of a fact of consequence, specifically the [d]efendant's motive, more or less probable. I also find that it is not unduly prejudicial. Undo [sic] prejudice exists where there's a probability that marginally probative information will be given undue influence or preemptive weight. I don't think that this information is just marginally probative. Again, I think it goes directly to [d]efendant's motive, which Defendant put in issue when he testified that he acted in self-defense. I do find that [the prosecutor's] question assumed a fact not in evidence, specifically that he is a member of a gang, and so I will allow her to inquire into whether he is a member of that gang.

When defendant's cross-examination resumed, defendant denied being a member of the Latin Counts.

The prosecution called Rufner as a rebuttal witness and expert witness on the Latin Counts. Rufner testified that one of the ways Latin Counts identify themselves is with a tattoo of the word "Amor," which is Spanish for love. Defendant had that on his arm. Rufner testified that Dickerson was identified as a Latin Counts member and that defendant associated with other known Latin Counts members. Rufner further stated that the Latin Counts have rules called "One Through Tens" that require a member to accept punishment when he violates a rule, which is usually in the form of physical violence.

After Rufner's testimony, defendant moved for a mistrial. The trial court rejected defendant's motion and concluded a curative jury instruction would resolve the issue, stating:

> Defendant requested a mistrial, and a mistrial should be granted only when the error complained of is so egregious that . . . there is no other way of removing its prejudicial effect. I don't find that to be the case here. The claimed error is that the prosecution intended to introduce evidence related to gang affiliation as motive of the [d]efendant. Here the jury heard general information about the Latin Counts Gang and that Detective Rufner believed that both [d]efendant and [the victim] were members of that gang. Detective Rufner also testified that one of the rules of the Latin Counts Gang is that you must take your discipline. The defense's argument that original argument that one of the other rules of the Latin Counts Gang was that you don't mess with another gang member's girl was not a part of Detective Rufner's testimony. While this does create a potential issue of prejudice to the [d]efendant[,] . . . the information that was introduced ultimately did not bear on [d]efendant's motive. However, I do believe that this issue can be resolved with a curative instruction.

The trial court then gave the following jury instruction concerning the gang-affiliation evidence:

> You have heard evidence of alleged gang affiliation. There has been no evidence that the alleged affiliation is relevant to a fact that is at issue in this case.

> You shall disregard any evidence that you heard with respect to the gang affiliation on the part of the Defendant or any other person.

The jury found defendant guilty of AWIGBH and the trial court sentenced defendant as delineated above.

After his sentencing, defendant moved for an evidentiary hearing or new trial based on ineffective assistance of counsel for failing to pursue a speedy-trial claim and to correct the trial transcript. Additionally, he claimed that the admission of irrelevant testimony regarding his alleged gang affiliation warranted a new trial.

The trial court denied defendant's motion without an evidentiary hearing finding the record was sufficient to determine that trial counsel was effective. The court also ruled that any prejudice occasioned by admission of the evidence regarding gang-affiliation was remedied by the curative instruction.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues because of trial counsel's failure to reassert defendant's speedy-trial claim and to correct the record when Dickerson's testimony was misread at trial, defendant was denied the effective assistance of counsel. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Likewise, "whether defendant was denied his right to a speedy trial is reviewed de novo." *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

Further, the trial court's decision whether to hold a *Ginther*[5] hearing is reviewed for an abuse of discretion, which "occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). Although the trial court rejected his motion, defendant preserved his claim of ineffective assistance of counsel by moving for a *Ginther* hearing or new trial in the trial court below. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). "Nonetheless, because no *Ginther* hearing was held, our review is limited to mistakes apparent on the record." *Id.*

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

"Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial." *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009); US Const, Am VI; Const 1963, art 1, § 20. "In order to determine whether a defendant has been denied his right to a speedy trial, this Court must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant." *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). "Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury." *Williams*, 475 Mich at 262 (quotation marks and citation omitted). "When the delay is less than 18 months, the defendant must prove that he or she suffered prejudice." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013). A speedy-trial violation requires dismissal of the charges with prejudice. *Waclawski*, 286 Mich App at 664-665.

However, "[i]n assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution." *Waclawski*, 286 Mich App at 666. Delays resulting from a request for an adjournment by a defendant are attributable to the defendant. *People v Cain*, 238 Mich App 95, 113; 605 NW2d 28 (1999). Unexplained delays or otherwise unattributed trial court delays are charged to the prosecution. *People v Lown*, 488 Mich 242, 262; 794 NW2d 9 (2011). Docket congestion only "minimally weighs against the prosecution." *Cain*, 238 Mich App at 113

Defendant argues trial counsel failed to reassert defendant's speedy-trial claim when the lapse in time became presumptively prejudicial. Nineteen months passed between the defendant's May 2018 arrest and his December 2019 trial. Defendant's original trial date was adjourned from September 2018 to November 2018 because defendant acquired new counsel. Subsequently, defendant stipulated to a two-month adjournment of the November 2018 trial date to January 2019. In January 2019, Dickerson died, resulting in the police investigating whether defendant was tied to Dickerson's death. In June 2019, defendant requested and was granted an additional adjournment from June 2019 to August 2019. As a result of the ongoing investigation into Dickerson's death, defendant was charged with the gang member felony in July 2019, which was later dismissed. The trial commenced in December 2019.

The first three-month adjournment of the trial date was occasioned by the defendant's change of counsel. The second adjournment of two months was done with defendant's stipulation. Thus, only 13 months of delay is attributable to the prosecution, leaving the defendant with the burden of establishing prejudice.

Defendant argues the delay personally prejudiced him with a lengthy incarceration and prejudiced his defense because Dickerson's death before trial restricted Dickerson's testimony to the preliminary examination. Prejudice can flow "to the person" or "to the defense." *Wickham*, 200 Mich App at 112. "In considering the prejudice to the defendant, the most serious inquiry is

whether the delay has impaired the defendant's defense." *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). A defendant who has not described how witness testimony "would have aided in his defense" has not shown prejudice. *Id.*

Defendant argues that he suffered prejudice in two ways: the inability to query Dickerson regarding the gang affiliation issue and the defendant's lengthy pre-trial incarceration. We cannot find that his defense was prejudiced due to the 13 month delay attributable to the prosecution's investigation of Dickerson's death. The defense had possession of the preliminary examination transcript and had participated in the examination. We agree that the gang association issue was not a subject of broached at the that preliminary examination. However, it is a matter of speculation as to what testimony Dickerson would have given regarding the Latin Counts. Dickerson's death occurred right after the two adjournments either attributable to the defendant or stipulated to by the defendant. It was Dickerson's death that led to investigation of the Latin Counts association. As a result, any prejudice resulting from the victim's death was not caused by the subsequent delays by the prosecution. Regardless, even to the extent that defendant's lengthy incarceration constituted prejudice to his person, if defendant does not also suffer prejudice to his defense, he may be incarcerated for longer than 19 months and not suffer prejudice to his person. *Williams*, 475 Mich at 264. Because defendant's speedy-trial claim has no merit, trial counsel was not ineffective for failing to reassert a speedy-trial violation. *People v Knapp*, 244 Mich App 361, 286; 624 NW2d 227 (2001).

Defendant also argues trial counsel failed to correct the record when Dickerson's testimony was misread at trial. To support this argument, defendant maintains that Langford's reading of Dickerson's preliminary examination statement "[l]ike he was tryin' to *kill* me (sic)—hurt me. (misread)[,]" instead of the actual statement "[l]ike he was tryin' to *hurt* me[,]" expressed intent that formed the jury's basis for conviction. As a result, defendant argues an evidentiary hearing was necessary to determine why trial counsel failed to attempt to correct the record. However, a *Ginther* hearing is required only if a defendant's claim is dependent on facts not apparent in the record. *Ginther*, 390 Mich at 442-443. Defendant's ineffective assistance claim pertains to trial counsel's inaction while Langford read Dickerson's preliminary hearing testimony at trial. As a result, this Court is able to review defendant's claim from the trial record.

On this basis, we opine that trial counsel's trial strategy is apparent from the record. Langford did mis-read the transcript, however Dickerson stated that defendant threatened to kill him in other portions of his testimony:

> *Trial Counsel*: Did [defendant] ever say anything to you during this incident?
>
> *Dickerson*: Yeah, he said he was gonna kill me.
>
> *Trial Counsel*: When did he say that?
>
> *Dickerson*: While he was on the bed while I was holdin' his arm down.
>
> * * *

Trial Counsel: I had asked you earlier and you said the only thing you ever heard him say that day was that he was gonna kill you, is that right?

Dickerson: Yeah.

Raising an objection would have likely drawn the jury's attention to Dickerson's other testimony regarding threats. This Court will not substitute its judgment for that of trial counsel on matters of trial strategy, and defendant has not overcome the strong presumption that trial counsel's performance was strategic. *Unger*, 278 Mich App at 242-243. Moreover, it is apparent from the trial record that Langford immediately corrected himself, making a subsequent objection by trial counsel meritless. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Further, given the overwhelming evidence in this case, it is not likely that, but for counsel's failure to object, a different outcome would have resulted. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Therefore, trial counsel was not ineffective for failing to correct the record when the victim's testimony was misread at trial.

B. EVIDENCE OF GANG AFFILIATION

Defendant argues the trial court erred in allowing evidence of defendant's alleged gang affiliation at trial and denying his motion for a mistrial. We disagree.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014). Likewise, the trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). "[W]hether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo." *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). "The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony." *Waclawski*, 286 Mich App at 670.

"[E]vidence which is not relevant is not admissible."[6] MRE 402. "As a result, an expert witness may not testify about matters that are irrelevant." *People v Bynum*, 496 Mich 610, 645; 852 NW2d 570 (2014). Under MRE 404(a), evidence of a person's character or a trait of character is generally not admissible except in limited circumstances, including:

> (1) *Character of Accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under

[6] "Relevant evidence means 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.

> subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution[.] [MRE 404(a)(1); *Bynum*, 496 Mich at 624-625.]

"When considering whether to admit expert testimony, MRE 702 requires the trial court to determine that the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." *Bynum*, 496 Mich at 624 (quotation marks and citation omitted). Applying MRE 402 and MRE 702 requires:

> [A] trial court to act as a gatekeeper of gang-related expert testimony and determine whether that testimony is relevant and will assist the trier of fact to understand the evidence. The introduction of evidence regarding a defendant's gang membership is relevant and can assist the trier of fact to understand the evidence when there is fact evidence that the crime at issue is gang-related." [*Bynum*, 496 Mich at 625-626 (quotation marks and citation omitted).]

Because the connection between the crime and gang activity is sometimes not common knowledge, "the relevance of gang-related expert testimony may be satisfied by fact evidence that, at first glance, may not indicate gang motivations, but when coupled with expert testimony, provides the gang-crime connection." *Id*. at 626 (quotation marks and citation omitted). However, "an expert may not testify that, on a particular occasion, a gang member acted in conformity with character traits commonly associated with gang members." *Id*. at 627.

Defendant argues evidence of his alleged gang membership was inadmissible because the charged crime was not gang related. Plaintiff argues that Rufner's testimony was proper evidence of defendant's motive and necessary to disprove defendant's argument that he acted in self-defense. As such, evidence of defendant's gang affiliation showed that defendant was seeking retribution against Dickerson for getting involved with defendant's girlfriend in violation of the Latin Counts rules. "Although an expert may be necessary to explain characteristics of gang culture, the expert may not offer an opinion that a particular gang member acted in conformity with character traits commonly associated with gang members and may not offer an opinion on the defendant's intent when he acted." *People v McFarlane*, 325 Mich App 507, 522; 926 NW2d 339 (2018). Rufner's testimony discussed the culture and customs of the Latin Counts. Rufner did state that Dickerson and other individuals that associated with defendant were identified as Latin Counts members and that the gang punishes members for violation of gang rules with physical violence; however, he did not offer an opinion that defendant conformed with any of the traits of Latin Counts members. Thus, this testimony did not run afoul of MRE 404(a).

However, Rufner's testimony was not relevant evidence under MRE 402. The defendant denied any gang affiliation and other than Rufner, no other witness tied the defendant or Dickerson to a gang. As previously noted, the gang-related charge was dismissed before the trial commenced. The trial court recognized the inadmissibility of the gang-affiliation evidence as irrelevant, concluding a curative jury instruction would resolve the issue. Therefore, the issue turns on whether the trial court properly denied defendant's motion for a mistrial.

"The trial court should only grant a mistrial for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial and when prejudicial effect of the error cannot be removed in any other way." *Lane*, 308 Mich App at 60 (quotation marks and

citation omitted). The trial court may consider, among other things, whether the prosecutor intentionally presented the information to the jury or emphasized the information." *Id.*

Defendant argues the inadmissible evidence of gang affiliation provided to the jury was outcome-determinative, concocted a motive for the incident, and entitled defendant to a mistrial. The better course, where the prosecution had dismissed the gang charge, would have been to avoid the entire line of questioning. However, the testimony was brief and the prosecution did not allude to it during closing argument. The trial court concluded that the error was not so prejudicial that a jury instruction could not cure it and instructed the jury to "disregard any evidence that [they] heard with respect to the gang affiliation[.]" Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the record contains overwhelming evidence of defendant's guilt, which included witness testimony, DNA evidence, and defendant's own admission to cutting Dickerson. We do not find that the trial court's decision to deny defendant's motion and give a curative jury instruction fell outside the range of principled outcomes.

C. OV 4 AND OV 9

Defendant argues the trial court erred in finding there was sufficient evidence to support the assessment of 10 points each for offense variable (OV) 4 and OV 9. We disagree.

"A trial court's factual determinations at sentencing are reviewed for clear error and need only be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to warrant the assessment of points under the pertinent OVs and [prior record variables] PRVs is a question of statutory interpretation, which this Court reviews de novo." *People v Carter*, 503 Mich 221, 226; 931 NW2d 566 (2019). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

OV 4 addresses psychological injury to the victim. MCL 777.34(1); *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). Ten points must be assessed "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) However, there must be some evidence of psychological injury on the record to justify the assessment of the points. *Lockett*, 295 Mich App at 183. A victim's expression of fearfulness or anger can constitute sufficient evidence of psychological injury. *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

The trial court properly assessed 10 points for OV 4. Defendant argues the trial court erred in assessing of 10 points for OV 4 because Dickerson's statement, that he was in fear after the incident and scared when talking to the police, did not rise to level of serious psychological injury. However, Dickerson told "police that he feared for the safety of his family after this incident" and, as a result, he left the area to remain safe. Dickerson also testified that he did not initially tell the police that defendant had stabbed him because he was afraid. The trial court relied on the PSIR and Dickerson's testimony, stating:

> [B]ased on those two things, I am going to find that assessing 10 points for the serious psychological injury is appropriate, and I will leave that at 10.

"A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Brown*, 326 Mich App 185, 198; 926 NW2d 879 (2018).[7] Defendant was given the opportunity to review his PSIR before he was sentenced. Because defendant did not object to Dickerson's impact statement contained in the PSIR, it was permissible for the trial court to rely on and use the information at sentencing. *Id*. at 198. Further, the fact that Dickerson did not seek psychological treatment is not conclusive that he did not suffer significant psychological injury from the incident. MCL 777.34(2). Because the trial court was permitted to rely on Dickerson's impact statement and testimony to conclude that he did suffer psychological impact after the incident, the trial court's assessment of 10 points for OV 4 was not clear error.

OV 9 addresses the number of victims. MCL 777.39(1); *People v Fawaz*, 299 Mich App 55, 62; 829 NW2d 259 (2012). Under OV 9, 10 points may be assessed where "there were two to nine victims who were placed in danger of physical injury or death, or four to nineteen victims who were placed in danger of property loss." MCL 777.39(1). Zero points should be assessed where "[t]here were fewer than 2 victims who were placed in danger of physical injury or death, or fewer than 4 victims who were placed in danger of property loss." MCL 777.39(1)(d). "[E]ach person who was placed in danger of physical injury or loss of life or property must be counted as a victim." *Waclawski*, 286 Mich App at 682, citing MCL 777.39(2)(a) (quotation marks omitted). A victim must be a direct victim, rather than a member of the community indirectly affected by a crime, *People v Carrigan*, 297 Mich App 513, 515-516; 824 NW2d 283 (2012), but a victim could be a first responder, *Fawaz*, 299 Mich App at 63. A victim does not have to actually suffer harm because close proximity to a physically threatening situation may suffice. *People v Gratsch*, 299 Mich App 604, 624; 831 NW2d 462 (2013). Only conduct related to the sentencing offense may be considered. *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008). "[I]t is improper for a trial court to consider conduct after an offense has been completed." *Gratsch*, 299 Mich App at 623.

The trial court properly assessed 10 points for OV 9. Defendant argues the trial court erred in assessing 10 points for OV 9 because there was no evidence of actual or threatened danger of physical injury or death to anyone other than Dickerson. In scoring OV 9, the trial court counted Whiteeagle as a victim involved in the incident between defendant and Dickerson, stating:

> I'm going to refer back to the testimony of [Dickerson] that was part of the record at the trial and also from the preliminary examination. During his testimony, he did testify that at one point Ms. WhiteEagle became a part of the fight when she tried to take the knife from [defendant]; And based on that,·I do believe that she was also placed in danger as being a part of the fight. And so[,] I'm going to leave OV 9 scored at 10 points.

[7] The opinion was amended to reflect an issuance date of June 18, 2019. *People v Brown*, unpublished order of the Court of Appeals, entered June 18, 2019 (Docket No. 339318).

Whiteeagle was properly counted as a victim because she was placed in danger of physical injury or death because of her close proximity to the fight between Dickerson and defendant that involved a knife. *Gratsch*, 299 Mich App at 624. Additionally, Dickerson testified that Whiteeagle was present during the incident and attempted to grab the knife away from defendant. Finally, a neighbor observed blood spatter on Whiteeagle's face while waiting for an ambulance to arrive but did not notice Dickerson's wound spraying blood, suggesting Whiteeagle was in close proximity to Dickerson when he was cut with the knife. On this basis, the trial court's inclusion of Whiteeagle as a victim for purposes of assessing 10 points for OV 9 was not clear error.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra