

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ANDREW SCHAEFER,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 182777

Washtenaw Circuit Court

LC No. 94-002372-FH

Before: Jansen, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645. Subsequently, defendant pleaded guilty as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant was sentenced to serve eight to twenty years' imprisonment as a fourth habitual offender. Defendant appeals as of right and we affirm.

Defendant first argues that he was denied his right to effective assistance of counsel because defense counsel failed to present an intoxication defense. In order to establish a claim for ineffective assistance of counsel, the defendant must show that, under an objective standard of reasonableness, counsel's performance was deficient and that the performance was prejudicial to defendant's case. The defendant must overcome the presumption that the challenged action could be considered sound trial strategy. *People v Lavearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Here, trial counsel elected to challenge the circumstantial nature of the prosecution's case, rather than to assert an intoxication defense. Because the record supported trial counsel's decision, we find that the challenged action could be considered sound trial strategy. *Id.*, p 216.

Defendant also argues that the prosecutor's remarks during closing and rebuttal closing arguments denied defendant a fair and impartial trial. Because defendant failed to object at trial, appellate review is precluded unless a curative instruction could not have eliminated any prejudice or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446

* Circuit judge, sitting on the Court of Appeals by assignment.

Mich 643, 687; 521 NW2d 557 (1994). After a review of the record, we are satisfied that the prosecutor did not engage in any improper argument. Even if error is assumed, we find that a cautionary instruction could have cured any perceived prejudice. *Id.*

Defendant next argues that the trial court erred in scoring offense variables (OV) 8, 14, and 17. We find that defendant is not entitled to a remand or any other relief because he was sentenced as an habitual offender. Sentencing guidelines do not apply to habitual offender sentences. *People v Chandler*, 211 Mich App 604, 615; 536 NW2d 799 (1995). Moreover, appellate review of habitual offender sentences using the sentencing guidelines is inappropriate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Therefore, we find that a remand is unnecessary because the sentencing guidelines do not apply to defendant's fourth habitual offender sentence and there is no indication that the trial court relied on the sentencing guidelines when fashioning defendant's sentence. *People v Dixon*, 217 Mich App 400, 411; 552 NW2d 663 (1996); see also *People v Edgett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 180885, issued December 27, 1996) ("given the fact that the guidelines are irrelevant in reviewing the proportionality of habitual-offender sentences, logic dictates that a defendant sentenced as an habitual offender may not challenge on appeal the trial court's calculation of the guidelines for the underlying offense"). Further, we would find that defendant's sentence of eight to twenty years as a fourth habitual offender, where he has a total of eight felony convictions and parole violations, does not violate the principle of proportionality and does not constitute an abuse of the trial court's discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick