

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY K. FOSTER,

Defendant-Appellant.

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UNPUBLISHED  
October 31, 1997

No. 197600  
Recorder's Court  
LC No. 96-001700

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553. Defendant was sentenced to ten to fifteen years' imprisonment for his conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied the effective assistance of counsel when his attorney failed to request that cautionary instructions on accomplice testimony be read to the jury,<sup>1</sup> and failed to challenge the court's scoring of offense variables three and four. We disagree.

Because defendant failed to move for a new trial or for an evidentiary hearing on this basis, our review is limited to whether the errors are apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing norms, and that the deficiency was prejudicial to the defendant so as to deprive him of a fair trial. *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996).

Because an error in guidelines scoring does not have the force of law and is not itself a claim of legal error, we conclude that, even assuming that defense counsel's failure to challenge the scoring of OV3 and OV4 fell below an objective standard of reasonableness, it did not prejudice defendant. See *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997); *Reed, supra* at 694-695. Further, because this case was not a closely drawn credibility contest between defendant and Robinson<sup>2</sup> (in that

other witnesses corroborated Robinson's testimony), we conclude that defense counsel's failure to request the cautionary instructions on accomplice testimony did not prejudice defendant, even assuming that defense counsel's failure to request the instructions fell below an objective standard. *Reed, supra* at 694-695.

## II

Next, defendant argues that the trial court erred in failing, sua sponte, to instruct the jury on accomplice testimony. We disagree.

The jury was made plainly aware of the potential credibility problems associated with Robinson's testimony, and this was not a closely drawn case between defendant's and Robinson's credibility. Consequently, we find no error in the trial court's failure to instruct the jury sua sponte. *Reed, supra* at 692-693.

## III

Finally, defendant argues that the court abused its discretion in sentencing defendant above the guidelines' range because the sentence violates the doctrine of proportionality. *People v Milbourn*, 435 Mich 630, 461 NW2d 1 (1990). Again, we disagree.

The key test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Therefore, sentencing judges are not required to adhere to the guidelines. *Id.* Here, the guidelines range for defendant was thirty-six to ninety-six months' imprisonment, and the court sentenced defendant to ten to fifteen years' imprisonment. In doing so, the court noted the particularly brutal nature of the crime, and defendant's disregard for human life. Given the facts of this case, we conclude that the court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ David H. Sawyer

/s/ Janet T. Neff

<sup>1</sup> See CJI2d 5.5 and CJI2d 5.6.

<sup>2</sup> Jason Robinson, the witness alleged to have been an accomplice.